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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

BY

NORMAN L. FREEMAN,
REPORTER.

VOLUME LXXIV.

CONTAINING ADDITIONAL CASES SUBMITTED AT THE SEPTEMBER TERM, 1874.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

Hon. PINKNEY H. WALKER, Chief Justice.

Hon. SIDNEY BREESE,
Hon. WILLIAM K. McALLISTER,
Hon. JOHN M. SCOTT,
Hon. BENJAMIN R. SHELDON,
Hon. JOHN SCHOLFIELD,
Hon. ALFRED M. CRAIG,
} Justices.

ATTORNEY-GENERAL,
JAMES K. EDSALL, Esq.

REPORTER,
NORMAN L. FREEMAN.

CLERK IN THE SOUTHERN GRAND DIVISION,
R. A. D. WILBANKS, Mt. Vernon.

CLERK IN THE CENTRAL GRAND DIVISION,
E. C. HAMBURGHER, Springfield.

CLERK IN THE NORTHERN GRAND DIVISION,
CAIRO D. TRIMBLE, Ottawa.

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CASES

IN THE

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, 1874.

LUCIUS A. LINCOLN

v.

HANNAH E. McLAUGHLIN.

1. PRACTICE — *leave to file additional pleas is discretionary with the court.* It is purely discretionary with the court, whether to allow a defendant to file an additional plea or not, after he has pleaded in bar to an action, unless it be a plea *puis darrein continuance*, and it is not only no error for a court to refuse such leave after a jury has been impaneled to try the cause, but it would be almost an abuse of discretion to grant it.

2. PLEADING — *de injuria sufficient replication to plea of justification in trespass.* In an action by a married woman for trespass to her separate property, against an officer who levied upon it as the property of her husband, and justifies under his writ, averring that the property belonged to the husband, a replication *de injuria* is sufficient.

3. PLEADING AND EVIDENCE — *abuse of authority cannot be shown under replication de injuria.* Where a plea of justification to an action of trespass sets up that the supposed trespass was committed under and by virtue of an execution against one who owned an interest in the goods taken, if the defendant in execution had in fact no interest in the goods, a replication *de*

injuria is sufficient, but if he had some interest and the plaintiff desires to rely upon an abuse of authority in making the levy, he should reply specially setting up such abuse.

4. Where a defendant, in an action of trespass for levying on goods, justifies under an execution against the husband of plaintiff, alleging that he owned the goods or an interest in them, if the plaintiff replies *de injuria*, she takes the hazard of proving title to the goods wholly in her self, and if she does so she must recover.

5. MARRIED WOMAN. A husband out of debt, or when it does not injure existing creditors, may settle property on his wife, either by having it conveyed directly to her, or to another in trust for her, and subsequent creditors cannot reach it, and money realized from the sale of such property will be hers.

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

Messrs. KILGOUR & MANAHAN, for the appellant.

Messrs. SACKETT & BENNETT, and Mr. C. L. SHELDON, for the appellee.

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

The first objection urged is, that the court erred in refusing appellant leave to file an additional plea after the jury were impaneled to try the cause. It has always been regarded as purely discretionary with the judge, after a defendant has pleaded in bar to an action, to file additional pleas, unless it be a plea *puis darrein continuance*. As a general rule a defendant has ample time to prepare his pleadings before the commencement of the term. But in this case not only so, but there had been a trial, the verdict set aside, and leave given to defendant to file additional pleas, which he had done. Thus it is seen he had the entire vacation to prepare such pleas. When a trial had been had developing all the facts of the case — thus having several months to prepare pleas that attorneys usually require but a few hours to do — it

would almost have been an abuse of discretion for the court at that stage of the proceedings to have delayed the case, the business of the court, occasioning expense in that and other causes, and inconvenience to other parties, witnesses and jurors, when the plea would only have presented a defense already made, and when we can see that no right would have been protected.

It is next urged that when appellant pleaded a justification and appellee replied *de injuria*, to be able to show an abuse of authority appellee should have new assigned and relied upon the abuse of authority as constituting a trespass *ab initio*.

Chitty, in his work on Pleadings, p. 671, lays down the rule thus: "There are some pleas which rather partake of the nature of new assignments than are properly and strictly so. As, where the defendant abused authority or license which the law gives him, by which he became a trespasser *ab initio*. In an action brought for a trespass thus committed, when the defendant pleads the license as authority, the plaintiff may reply the abuse. Such a replication, it will be observed, differs from a new assignment, because it does not operate in any manner as a waiver or abandonment of the trespass attempted to be justified, but states matter in confession and avoidance of the justification." And there is the further difference that the pleadings all relate to one and the same trespass.

There is nothing in this case which requires such a replication. The question presented was, whether appellant wrongfully, and as a trespasser, levied on appellee's property to pay the debt of her husband. If the property was hers, then he became a trespasser, and liable for all damage she sustained thereby. If it was her separate property, and the jury, we think, have rightfully so found, the officer had no more right to seize it than he had that of any other stranger to the execution. We also find that there is, in our opinion, no evidence tending to prove that the husband and wife were joint owners of the property, to justify a levy, upon which to predicate an

abuse of authority by selling the wife's interest, as well as that of the husband. Had there been such evidence, then it may probably be true that the abuse of the authority should have been specially replied. The party, by failing to so reply, took the hazard of proving title in appellee, and has rightfully succeeded, and hence such a replication is wholly unnecessary to sustain the verdict.

In this case there was no claim or pretense that there was not means of appellee appropriated to the purchase and improvement of the lot, and that a large portion thereof was derived from other persons than her husband. It appears that the amount thus furnished was more than equal to the value of the property in controversy. If witnesses are to be believed, and they, so far as we can see, stand unimpeached, she received money from her father and brothers, that was applied to the purchase of the lot and materials, and that they did much the greater part of the work on the building. A small portion only of the labor was paid for by the husband. And even if he did perform labor on the house, and paid some small bills for labor, and even if a portion of the earnings of the wife, to which the husband was entitled, were thus appropriated, still this was done, so far as we can see, when the husband owed nothing, and before he owed the execution creditors any thing.

In the case of *McLaurie* v. *Partlow*, 53 Ill. 340, it was held, that where a wife's money purchased property which was conveyed to the husband, who afterward conveyed it, his wife joining in the deed, to a third person, in trust for the wife, it was held the wife could hold the property. And this, too, although a portion of the money was so received from his father's estate before, and part after the passage of the act of 1861, enabling married women to hold separate property. It was there held, that in such a case she would be protected under the act of 1861, so far as concerned that received after the adoption of the act by force of its provisions, and as to all previous to that time, it would, under such circumstances, be tried upon the broad principles of equity and justice. It was

again held in *Haines* v. *Haines*, 54 Ill. 74, that where a husband purchased land with his own money, and without fraud procured it to be conveyed to his wife, it thereby became as much her separate property as if it had been purchased with money belonging to her before marriage; that on its sale the purchase money received by her therefor will be regarded as her separate property. Nor would she lose the legal right to it or its avails, by placing it in the hands of her husband for the purpose of building her a house.

But it is said that was a divorce case, and only involved rights as between the husband and wife. The doctrine has been long recognized and is undisputed, that a husband out of debt, or when it does not injure existing creditors, may settle property on his wife, either by having it conveyed directly to her, or to another to hold in trust for her, and subsequent creditors cannot reach it. So in this case, if the husband was not in debt, and even by his labor purchased the lot and had it conveyed to his wife, the lot became hers, and all the improvements made upon it, with his and her means, also vested in her. And property or money received on its being sold, would be hers. Then nothing appearing to show the husband was indebted when the lot was purchased and improved, no reason is perceived why appellee did not hold the lot by an absolute title as her separate property, and when sold, why the consideration paid for the lot was not hers.

But it is said the description in the deed is so defective that the conveyance was void. This, we think, is a clear misapprehension. It is said that the survey will not close on the last call. It calls for a line of a certain course to the place of beginning. This court has held so often, that we can hardly expect to be called on to repeat it, that both course and distance must yield to monuments placed, or natural objects when adopted as corners. And it is so plain that we need but state the proposition, that to close the survey it is only necessary to run from the last preceding corner to the place of beginning to close the call. That is the object to which the surveyor is

required to run, without reference to the course or distance, unless a deflected line is called for and coincides with a line to that corner. We do not see the semblance of an objection to the validity of the deed.

But even if the deed was defective, we fail to see that it could matter, as appellee, at any rate, had an equitable title, and when that was given for the property in controversy it manifestly formed a sufficient consideration given by her for this property, to vest the title in appellee, as her sole and separate property. So that, in any view the case can be presented, the evidence clearly shows this was appellee's separate property. And it is so manifest that we are not willing to disturb the verdict, although there may be slight inaccuracies in one or two of the instructions. Justice has been manifestly done by the finding of the jury, and the judgment of the court below must be affirmed.

Judgment affirmed.

CHRISTIAN KASSING *et al.*

v.

INTERNATIONAL BANK.

1. PLEADING AND EVIDENCE. Evidence tending to prove payment may be introduced under the general issue.

2. SURETY — *his right under deed of trust given to indemnify him.* Where a surety on a note deposits with the holder a deed of trust executed by the principal to indemnify him against his liability as surety, and afterward, upon proceedings in bankruptcy against him, compromises with the holder by giving other notes for a less amount, with personal security, or is discharged from his liability on the original note, he will be entitled to have the proceeds of a sale under the deed of trust applied to the payment of the notes so given in discharge of the original note.

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

Mr. GEORGE W. PARKES, for the appellants.

Messrs. ROSENTHAL & PENCE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, brought to the Superior Court of Cook county, by the International Bank against Christian Kassing and John H. Kassing, on three promissory notes executed by the defendants to the plaintiff. The general issue and a release were pleaded, and the cause submitted to the court for trial, who found for the plaintiff and assessed the damages at eleven hundred and twenty-three dollars and fifty cents, for which judgment was rendered.

The defendants bring the record here on appeal, and assign for error that the finding is against the law and the evidence.

The facts are briefly these: One August Walbaum was indebted to the International Bank in the sum of three thousand five hundred dollars, for which, on March 1, 1871, he executed his note, with Christian Kassing, one of the appellants, security, without any consideration received by him, purely as an act of friendship. To indemnify him, however, for this act, a trust deed was executed by Walbaum on ten acres of land, which he valued at one thousand dollars per acre. This trust deed Christian Kassing deposited with the bank as collateral to this note. After the great fire of October, 1871, proceedings in bankruptcy were instituted against Christian Kassing, and he compromised with his creditors, among whom was this bank holding this note. The bank, with other credi tors, signed an agreement, to accept of him forty per cent and release him. It was a part of the agreement, for this satisfaction and discharge, that Christian Kassing should execute his notes at seven per cent, payable in nine, fifteen and eighteen months, to bear date of June 1, 1872, each for one-third part of this forty per cent, and be signed by John H. Kassing, a brother of Christian, as joint maker thereof. It was agreed and promised that, on the receipt of the notes, a full acquit-

tance and discharge of Christian's indebtedness should be given to him by the creditors, this bank among them, and the proceedings in bankruptcy be set aside.

These notes are the three notes, the subject of this controversy, and measure the forty per cent due from Christian Kassing on his guaranty of the note for thirty-five hundred dollars executed by Walbaum on the compromise. This was all the indebtedness of Kassing to the bank. These notes in suit represent the sum total of that indebtedness, and there was paid on them by Kassing, before the commencement of this suit, three hundred and thirty dollars and ninety cents, and since its commencement the further sum of four hundred and ninety-nine dollars.

The land conveyed by the trust deed so deposited by Kassing with the bank was sold by the trustees at the instance of the bank, and purchased by the president of the bank, as he testifies, on his private account, for the sum of twenty-six hundred and fifty-five dollars. After deducting the expenses of the sale, the net proceeds amounted to twenty-five hundred and eighty-three dollars, which the president of the bank testifies was applied as a credit on Walbaum's note, of which Christian Kassing was a joint maker, as before stated.

Appellants contend such was an improper application of those proceeds. They insist they should be applied first to the extinguishment and satisfaction of the notes in suit, and the balance applied on Walbaum's debt. And this is the only important question in the case, as it appears to us, though not fully presented by appellants in their brief.

It is in proof this deed of trust was designed and executed as an indemnity to Christian Kassing, to secure him for signing the note with Walbaum of thirty-five hundred dollars. By the compromise and sealed agreement of the bank, the payee of this note, and Kassing, he was released from all but forty per cent of the note, which, leaving out the interest, amounted to fourteen hundred dollars and no more. This was the total

indebtedness of Kassing to the bank at the time of the compromise.

It was known to the bank Kassing was a mere security — that he signed the note for the accommodation of Walbaum, without any valuable consideration moving to him. If this trust deed was executed for the benefit of Kassing, and that is fully established by the testimony, then, clearly, Kassing was entitled to the benefit of the proceeds of the sale under it. The proceeds should, therefore, be applied to his indemnity, the deed of trust being executed for that very purpose. If so applied the notes in suit were largely overpaid. Payment of a note can be given in evidence under the general issue. This was the doctrine of the common law prior to the rules adopted at Hilary term in the fourth year of the reign of William IV. 1 Ch. Pl. (9th Am. ed. 477 and 516) note f; 1 Lord Raym. 219; *Baylies et al.* v. *Fettyplace*, 7 Mass. 325. This court said in *Crews* v. *Bleakley*, 16 Ill. 21, that evidence tending to prove payment might be given in evidence under the general issue. The only objection to this doctrine is that plaintiff might be taken by surprise, but that could rarely be, as he is presumed to know all the facts of his case. It appears to us from the proofs, these notes have been fully paid by the sale of the land which was specially conveyed in trust for the benefit of Kassing, although it appears to have been made to secure the payment of a note by Walbaum, payable to himself for the same sum of thirty-five hundred dollars, which was merely collateral to the first note of that amount. Why the transaction assumes that form we are not advised, but the fact is incontestible that the deed of trust was for the benefit of Kassing.

The plea of release interposed was not a proper plea in the case, for the notes in suit were the consideration of a release from sixty per cent of the original indebtedness. They are the offspring of the compromise and have been fully paid. The finding of the court, therefore, was erroneous, and the judgment must be reversed.

Judgment reversed.

THE PEOPLE *ex rel.* Michael Manyx
v.
GEORGE T. WHITSON.

1. HABEAS CORPUS — *prisoner not discharged for mere error in order of commitment.* If the judgment upon which a prisoner is held in custody is merely erroneous and subject to be reversed on writ of error, he will not be discharged upon *habeas corpus.* But if the court had no power or jurisdiction to render such judgment, the prisoner should be discharged on *habeas corpus.*

2. AMENDMENTS — *of record at a subsequent term of court.* Courts have no power or jurisdiction to amend their record of a judgment in a criminal case, at a subsequent term of court.

3. Where a defendant in a criminal case has suffered punishment according to a legal sentence, a second judgment in the same case, even if rendered at the same term of court, is void.

4. CRIMINAL LAW — *verdict of guilty as to part is an acquittal as to balance of the counts in the indictment.* A verdict of guilty as to a part of the counts in the indictment is an acquittal as to the other counts, and in such case it is necessary that the verdict should specify upon which of the counts the defendant is guilty.

5. It would be error to sentence a prisoner upon counts other than those upon which he is found guilty.

THIS was an application to this court for a writ of *habeas corpus.*

Mr. EDGAR ANDERSON, and Mr. JOHN C. BAGBY, for the relator.

Mr. EDWARD P. VAIL, for the defendant.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

The questions for decision in this case arise upon *habeas corpus*, awarded at a former day of this term upon the petition of Michael Manyx, alleging that he was unlawfully imprisoned by the sheriff of Schuyler county, by virtue of a supposed final

judgment or sentence of the county court of that county. In support of which allegation various matters were set forth, and certified copies of the record of said court, so far as material to the questions raised, were attached to the petition and made a part thereof. By the return of the sheriff, which merely sets forth a copy of the judgment as the cause of the caption and detention of relator, and a stipulation between his counsel and the State's attorney, the record of proceedings in the county court is before us, with the same effect as if it had been sent up in return to a writ of *certiorari* accompanying that of *habeas corpus.*

The case before us is this: At the March term, 1874, of the county court of Schuyler county, the State's attorney, upon affidavits filed, and by leave of the court, filed an information against Manyx for alleged violations of the act approved January 13, 1872, entitled "An act to provide against the evils resulting from the sale of intoxicating liquors," etc., the information containing more than one hundred counts. The case was tried upon a plea of not guilty, and a verdict returned of guilty, as charged in the complaint, upon forty counts. Whereupon, at that same term, as appears by the record, the court sentenced the prisoner to ten days' imprisonment upon each count. On this judgment relator was, on the 26th day of March, 1874, committed to the county jail of that county, and there confined until the 26th day of June, when he was discharged upon a writ of *habeas corpus*, issued upon the prisoner's petition, by Chief Justice WALKER, at chambers, on the ground that, by the terms of the sentence entered of record, the prisoner had undergone the punishment to which he was sentenced, all of the terms having commenced and ended simultaneously.

It is conceded by the State's attorney that there was no judgment entered for any fine or costs, and he does not question the propriety of the ruling of the chief justice in discharging the prisoner for the reason stated. And we may add, that, although neither the county court nor this court have any right

to review that decision, yet in our opinion, it was, upon well-settled legal principles, entirely correct.

That decision did not involve the question whether it was competent for the court to have entered consecutive judgments, of so many days' imprisonment on each count, when no particular counts of the one hundred and five contained in the information were specified as comprising the forty on which he was found guilty, or whether consecutive judgments can be entered without a statute authorizing it. It was sufficient that, so far as appeared by the record, there was no attempt to enter consecutive judgments. The judgment was entire. The several sentences of imprisonment, if they could be called several, were concurrent in point of time, and when one had run, they had all expired. 1 Bishop's Cr. Proc., § 1129; *Miller, Warden, etc.*, v. *Allen*, 11 Ind. 389; *James* v. *Ward*, 2 Metc. (Ky.) 271; *Buck* v. *The State*, 1 Ohio St. 61.

After the prisoner was so discharged upon *habeas corpus*, and at the August term, 1874, of the county court, at the March term whereof he had been convicted and sentenced, as above stated, said court, upon the petition of the State's attorney, and ten days' notice to the prisoner, entered an order amending the judgment of the March term, and directing the same to be entered *nunc pro tunc*, to the effect that defendant, Michael Manyx, be imprisoned in the county jail for the term of ten days, and fined in the sum of $20, on each of the forty offenses or counts, of which the jury in their verdict found him guilty. The term of imprisonment on each subsequent count after the first to begin on the termination of the term of imprisonment on the one next preceding, and that he be imprisoned until such fine and costs of prosecution herein are paid And therefore it is considered and ordered by the court that the People of the State of Illinois recover of the said defendant, Michael Manyx, the sum of $20 fine for each of the several forty counts of the information of which the jury found him guilty, being in the aggregate the sum of $800, and also their costs herein, and may have execution therefor.

Upon a certified copy of this last-mentioned order of judgment, Manyx was re-arrested by the sheriff, and committed to the county jail of Schuyler county, and which the sheriff, in his return to the writ of *habeas corpus* issued by this court, has set up as the cause of the prisoner's caption and detention.

If the entry at the August term of the order amending the judgment of the March term was a mere error, which would subject it to reversal upon writ of error, then we have no authority to discharge upon *habeas corpus*. But if, on the other hand, the county court had no power or jurisdiction to make it, then it is absolutely void, and we not only have authority, but it is our duty, to discharge the prisoner from that unjust, because unlawful, imprisonment.

Amendments in criminal cases are entirely excepted out of the operation of the statute of amendments and jeofails, and the question of the power of the court to alter or amend its judgments at a subsequent term is therefore to be determined by the common law.

The rule, as laid down by Starkie, in his work on Criminal Pleading, is, that during the term, assizes or session, in which judgment is given, it remains in the breast of the court, and he states that the fine imposed, or any other discretionary punishment, may be varied, but he adds, that after the term it becomes matter of record and admits of no alteration. 1 Stark. Cr. Pl. 262.

Chitty says: "In case of misdemeanors, it is clear the court may vacate the judgment passed, before it becomes matter of record, and may mitigate or pass another, even when the latter is more severe. And the justices at sessions have the same power during the sessions, because it is regarded as only one day; but they cannot do it at any subsequent period, unless an adjournment be entered on the roll, and no court can make any alteration when once the judgment is solemnly entered on the record." 1 Chit. Cr. Law, 721.

So Archbold says: "A judgment pronounced by a court of oyer and terminer, or jail delivery, may be altered or amended

by the judge at any time during the same assizes; a judgment by a court of quarter sessions may be altered at any time during the same sessions, and a judgment of the court of Queen's Bench, at any time during the same term; provided the sentence be not actually entered of record." 1 Arch. Cr. Pr. & Pl. (Am. ed.) 186.

In *The State* v. *Harrison*, 10 Yerg. (Tenn.) 542, the court observed, that the judge, during the term, is a living record; and, therefore, during that period of time, he may alter and supply, from his own memory, any order, judgment and decree which has been pronounced, and this, because having made them himself, he is presumed to retain them in his recollection. But at common law, after the term had elapsed, the judge had no such power, because it was supposed that there would be a period at which a judge would cease to retain in his memory the things which had been ordered and adjudged; and that period, it was well conceived, might be the end of term, as he would be apt to dismiss from his thoughts the things which had been previously passing in them. It is, however, a very delicate power and might be subject to much abuse, especially in criminal cases, if the extent to which it might be carried was not well defined, and prop erly checked, by law.

By analogy to this principle, it has been held that in criminal cases before a justice of the peace, the power of that magistrate is completely exhausted when the record of conviction has been made and signed, and final commitment made. *The People* v. *Duffy*, 5 Barb. 205; *The People* v. *Brown*, 23 Wend. 47.

In the recent and very interesting case, *Ex parte Lange*, 18 Wall. 163, the power of the court, in criminal cases, to alter its judgment, after the prisoner has suffered part of the punishment under it, received a very exhaustive discussion in the Supreme Court of the United States. Lange had been indicted in the United States circuit court, under the act of congress, for stealing, etc., certain mail bags belonging to the post-office

department. Upon trial he was found guilty, and the value of the bags appropriated was found to have been less than $25. In that case the punishment provided by the act is imprisonment for not more than one year *or* a fine of not less than ten nor more than two hundred dollars. The court sentenced the prisoner upon that verdict to one year's imprisonment *and* to pay a fine of $200; on which he was committed to jail in execution of the sentence. The next day after his commitment he paid the fine to the clerk, who turned it over to the United States treasurer. Some five days afterward, the prisoner was brought before the court, at the same term, and an order was entered vacating the former judgment and the prisoner was again sentenced to imprisonment for one year from that date. Having been committed on this latter sentence, he applied to the Supreme Court for the writ of *habeas corpus* and *certiorari*, and return having been made of the proceedings in the circuit court, it was held that the second sentence was a nullity, on the ground that, while the first sentence was irregular in that it included both imprisonment and fine, while the law affixed but one, still it was not void, and the prisoner having suffered part of the imprisonment and paid the fine, which had gone into the treasury, and that being one of the punishments prescribed for the offense of which he was found guilty, the second sentence was, in effect, to punish the prisoner twice for the same offense, and prohibited by both the common law and bill of rights; that the second sentence was therefore void, and the prisoner entitled to be discharged.

That case is not so clear as the case at bar. There, the court, in the first sentence of Lange, added to his punishment more than the law permitted. Fine and imprisonment were both imposed when the statute required that it might be one or the other, but did not authorize both. In the case in hand the statute required both fine and imprisonment, and the court imposed only the latter. The people could not have sued out a writ of error for the omission to add the fine, and the error being in the prisoner's favor he could not have taken advan-

tage of it. So that, if the first sentence was not void in Lange's case, it certainly was not in the case at bar. The sentence being legal and the prisoner having suffered the punishment according to the legal effect of that sentence, the second judgment was void according to the ruling of Lange's case, without reference to the question of the want of power to enter it at a subsequent term.

The State's attorney takes a very singular position. He says the clerk did not enter the sentence which the court pronounced, and therefore there was no judgment at the March term, and it was entirely competent for that reason to enter one at the subsequent August term, *nunc pro tunc*; that this is not the amendment of a judgment but the entry of one where there had been none before.

This attempt to argue about a matter which admits of no argument necessarily runs into absurdity. The record of the proceedings in the cause shows that there was a verdict rendered upon an information containing one hundred and five separate counts, of guilty upon forty counts, without any specification of which counts they were. This was necessarily a verdict of acquittal upon sixty-five counts, but which ones they were nobody can tell. It is a rule founded in good sense, that where there are numerous counts in an indictment, and the jury find the defendant guilty of some of the charges, and not guilty of others, it is necessary that they should point out with certainty upon what charges they find guilty and of what they acquit, and it would be error to sentence the prisoner upon counts other than those upon which he is found guilty. *Woodford* v. *The State*, 1 Ohio St. 427.

Here, the prisoner was tried on an information containing one hundred and five distinct charges or counts. The jury return a verdict of guilty upon forty counts, without pointing out in any manner which they were, and the court and State's attorney fail to have the verdict corrected and made more specific. In that form it becomes a part of the record. Now what judgment can the court pronounce? Upon what counts

of the information will he give judgment? If he declared consecutive judgments, as the State's attorney says he did, where would he begin? Upon the first count? How did the court know but the prisoner was acquitted upon that? So it will readily be seen that the judgment which was entered of record by the clerk, was the only safe and proper one which could have been entered upon that verdict. But however that may be, a judgment was in fact entered that the prisoner be imprisoned ten days upon each count, the legal effect of which was that the time began concurrently upon each. When the term elapsed, that entry became conclusive evidence of what the judgment was, and to say that the supposed judgment, entered at the subsequent term, which comprised forty consecutive sentences, is not an alteration of that former judgment, is sheer nonsense. If valid, it would be a serious alteration. But the court had no power or jurisdiction at a subsequent term to make it. Hence it is void, and the prisoner must be discharged from imprisonment under it.

Relator discharged.

Springfield & Illinois Southeastern Railway Co.

v.

The County Clerk of Wayne County *et al.*

1. Mandamus — *will not be awarded in doubtful cases.* The writ of mandamus is one of the extraordinary remedies provided by law, and should never be awarded unless the party applying for it shows a clear right to have the thing sought by it done and by the person or body sought to be coerced. In doubtful cases it should not be granted.

2. The petitioner in an application for a mandamus, like a plaintiff in an ordinary case, is bound to state a case *prima facie* good.

3. Taxation *to pay donation to railroad — certificate of election — by whom.* When the law requires the trustees of a township to certify the result of an election on the question of a donation to a railroad company, to the county clerk, a petition for a mandamus to compel the county clerk to

extend a tax to pay such donation, which alleges that a majority of the votes cast were in favor of such donation, and that that fact was certified by the town clerk to the county clerk, and that the town clerk was the proper officer to so certify, is bad on demurrer.

4. Election *in respect to donation — identity of proposition voted upon.* And where the petition shows that two propositions were submitted to the people of a town upon the question of a donation to a railroad company, one for the levying of a tax, and the other for issuing bonds to pay such donation if made, and that a majority of the votes cast were in favor of "said proposition," a mandamus to compel the county clerk to extend the tax mentioned in the first proposition will not be awarded.

This was a petition presented in this court for a mandamus.

Mr. Thomas W. Ewart, and Mr. H. Tompkins, for the petitioner.

Mr. James McCartney, for the respondents.

Mr. Justice Scott delivered the opinion of the Court:

This is an original proceeding in this court, commenced by the Springfield and Illinois Southeastern Railway Co., for a mandamus to compel the county clerk of Wayne county to extend a tax on all the taxable property in Barnhill township in that county, to raise a sum sufficient in the aggregate to pay the amount of a donation alleged to have been made by a vote of the inhabitants, on the 10th day of November, 1868, to the "Illinois Southeastern Railway Company." The petitioners bring this suit for the use of Cutler, Dodge & Co.

By the act of the general assembly, approved February 25, 1867, certain persons therein named were created an incorporation by the name of "The Illinois Southeastern Railway Company," and authorized to construct a railroad from some suitable point on the Chicago branch of the Illinois Central Railroad, running thence by the way of Fairfield, in Wayne county, to the Ohio river.

It was further provided that any town in any county, under township organization, was authorized to make a donation to

said company, not to exceed in amount the sum of $30,000, if a majority of all the votes cast by the legal voters of such township at an election called for that purpose be in favor of the proposition.

In pursuance of the provisions of the act of incorporation, the directors of the company submitted to the legal voters of Barnhill township, Wayne county, a county under township organization, a proposition to be voted upon at an election to be held on the 10th day of November, 1868, in substance as follows:

First. That the town of Barnhill donate to the Illinois Southeastern Railway Company the sum of $20,000, to be paid in three equal installments, by a tax levied upon all the taxable property in the township, respectively in the years 1869, 1870 and 1871, but not to be paid over to the railway company until it had complied with certain conditions therein specified, and in case the company never complied with the conditions, the funds so raised were to be paid over to the proper authorities of the town of Barnhill, to be disposed of as other township funds.

Second. That if the necessary legislation could be obtained from the State legislature at the next session, authorizing and empowering the town of Barnhill to issue township bonds payable in five years, or at any time thereafter, not exceeding twenty years, at the option of the town, bearing interest at the rate of ten per cent per annum, the company would receive such bonds in lieu of the amount to be raised by taxation, as provided in the first clause of this proposition, and in that event the tax was not to be levied.

The proposition was published in a newspaper published in the county of Wayne, as required by law, and the town clerk of the town of Barnhill gave the requisite notice of the election. It is averred a majority of all the votes cast at the election was in favor of accepting the proposition, and that the result of such election was certified to the county clerk by the town clerk of Barnhill township.

It is further represented, the legislature at its next session after the election passed an amendatory act to the company's original charter, approved February 24, 1869, in and by which, among other things, the donation voted by the inhabitants of the town of Barnhill was declared legalized, and the town was authorized to issue bonds for the amount of the donation corresponding in sums, time of payment and interest with the proposition submitted at the election, without submitting the question of paying the donation in bonds to a vote at an election to be called for that purpose. But it is alleged, the question of paying the donation in bonds was subsequently submitted to the inhabitants of the town, and that the vote was against the proposition, and thereby the donation became payable in money, as specified in the first clause of the proposition originally submitted, the whole line of the road having been completed and the cars running thereon through the town of Barnhill, and within the corporate limits of the town of Fairfield on the 1st day of June, 1870.

It is further represented, that by virtue of the powers vested in the corporations by their respective charters and the general railroad law of 1849, the "Illinois Southeastern Railway Company," and the "Northwestern Railroad Company," both at the time in process of construction, in the month of February, 1870, by their mutual agreement, consolidated, making one continuous line of railroad from Shawneetown, through Barnhill township and within the limits of the incorporated town of Fairfield, to Edgewood, on the Chicago branch of the Illinois Central Railroad, and thence in a northwesterly direction, through the city of Springfield, to Beardstown, on the Illinois river, adopting as the name of the consolidated company "The Springfield and Illinois Southeastern Railway Company," and by the agreement of consolidation and the laws of the State authorizing the same, all the franchises, rights, property, real, personal and mixed, choses in action and claims of whatever nature belonging to the constituent companies, became and were vested in the consolidated company.

It is also represented the several installments of the donation have long since become due, according to the terms of the proposition submitted, yet the county clerk of Wayne county, although requested by petitioner, through its officers, has refused to extend the tax upon the property of Barnhill township, to raise a sum sufficient to pay the amount of the alleged donation.

These constitute the substance of the material allegations of the petition, to which the respondents have filed a demurrer, upon which the cause has been submitted for decision.

The writ of mandamus is one of the extraordinary remedies provided by law, and should never be awarded unless the party applying for it shall show a clear right to have the thing sought by it done, and by the person or body sought to be coerced. In doubtful cases it should not be granted. *The People* v. *Hatch*, 33 Ill. 9; *The People* v. *The Mayor of Chicago*, 51 id. 17.

The petitioner is bound, like a plaintiff in an ordinary case, to state a case *prima facie* good, and the question is, has it been done in this case? We think some of the objections taken by the demurrants must be sustained.

It was certainly not the duty of the county clerk to extend the tax on the property in Barnhill township, until there was legitimate evidence on file in his office that a vote had been taken in the town, authorizing the tax to be levied for the purposes demanded. The law under which the vote was taken provided the result of the election upon the proposition to make the donation should be certified by the "trustees of said town," to the county clerk in the county in which the town is situated, before he is authorized to extend the tax to pay the donation. The certificate required by law to be made by the "trustees of said town," has not and cannot be made, for the reasons there are no such officers in towns organized under the general township organization law. The allegation is, the result of the election in this case was certified by the town clerk of the town of Barnhill, who, it is alleged, was the proper officer to make such certificate

The answer is, the town clerk was not authorized, by the law under which the vote was taken, to certify the result, nor was it his duty by any general law to make any such certification. Being without authority of law, the certificate of the result of the election made by him was an absolute nullity. Hence it cannot be said there was any legitimate evidence in the county clerk's office that an election had been held in Barnhill township on the 10th day of November, 1868, or at any other time, for the purpose of voting on a proposition to make a donation to the railway company. How could the county clerk know that a majority of the votes cast at that election was in favor of the proposition submitted. The certificate of the town clerk was no evidence of that fact, and it is not claimed there was any other evidence on file when petitioner made the demand on the county clerk to extend the tax. This view of the law is not answered by the suggestion, the demurrer admits the allegation in the petition, that a majority of the votes cast at the election was in favor of the proposition submitted? That fact was not known to the county clerk officially, when the demand was made upon him to extend the tax. Hence he was not authorized to act. The right to do the act sought to be coerced must exist at the time the party is called upon to perform it. The writ, if awarded, could confer no new authority. *The People* v. *Hatch*, *supra*.

There is, however, an ambiguity in the statement of petitioner's cause which would constitute a technical ground for sustaining the demurrer. The proposition submitted to the voters of Barnhill township, at the election called to be held on the 10th day of November, 1868, was twofold: first, to donate $20,000 in money to be paid in three equal installments, by taxes to be levied and collected respectively, in the years 1869, 1870 and 1871; and second, to pay the amount of the donation by the issuing of township bonds, and in that event the tax was not to be levied.

It is alleged a majority of the votes cast at the election was "for said proposition." What proposition did the people ac-

cept? There were two propositions submitted. If the latter was accepted, the tax which petitioner now seeks to have levied was not to be levied at all. It is not distinctly alleged, nor does it clearly appear, the inhabitants of the town of Barnhill ever consented by any vote that any tax should be levied upon the property of the township to pay a donation to the railway company, and without such consent none could be levied.

The petitioner has not shown that clear right, nor indeed any right at all to the relief sought, and hence the demurrer must be sustained. Judgment will be rendered for the respondents.

Judgment affirmed.

PETER L. YOE

v.

ANDREW MCCORD.

1. WILL — *what proof necessary to admit to probate.* The statute requires a party producing a will for admission to probate in the county court to prove nothing but its formal execution and that the testator was of sound mind and memory at the time of its execution.

2. The statute does not require that a will should be *signed* in the presence of two or more credible witnesses. It is sufficient if two attesting witnesses heard the testator acknowledge that he signed it.

3. An instruction that signing and acknowledging a will is not sufficient to entitle it to probate, but that it must further appear that it was the actual deed of the testator, requires more than the statute, and is for that reason wrong.

4. SAME — *testimony of subscribing witness need not be in words of the statute.* It is not necessary that a subscribing witness to a will should state on oath in so many words that he believed the testator to be of sound mind and memory. It is sufficient if he so declares in legal effect.

5. SAME — *meaning of sound mind and memory.* If the testator's mind is sound, although his memory may be impaired, he is of sound mind and memory in the sense in which the phrase is used in law, and, in order to destroy the capacity of a person to make a will on account of failure of

memory, the failure must be total or extend to his immediate family and property.

6. If the mind and memory of a testator are sufficiently sound to enable him to know and understand the business in which he is engaged at the time of executing his will, then he is of sound mind and memory within the meaning of the law.

7. On the trial of the question as to whether a will shall be admitted to probate, an instruction that if the jury believe, from the testimony of the subscribing witnesses, that the testator was of unsound mind *or* memory, they should find against the will, makes an unwarrantable distinction between "sound mind" and "sound memory," calculated to mislead the jury, and should not be given.

8. SAME — *what facts will invalidate a will is a question of law, and not to be left to a jury.* What acts of fraud or improper conduct in procuring the execution of a will, will invalidate it, is a question of law, and a jury should not by an instruction be left at liberty to invalidate a will for what according to their own notions may be improper conduct sufficient for that purpose.

9. SAME — *question of capacity to make a will left to a jury most be general.* The question as to the capacity of a testator, when submitted to a jury, should be, had he the capacity to make *a* will, not had he the capacity to make *the will* produced.

10. SAME — *undue influence over testator implies something wrongful.* It is not unlawful for one by honest advice or persuasion to induce a testator to make a will or influence the disposition of his property by will. To vitiate a will on account of *undue* influence it must appear that there was something wrongful, a species of fraud perpetrated.

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

Messrs. AYER & KALES, for the appellant.

Mr. MELVILLE W. FULLER, and Messrs. HOLDEN & MOORE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a proceeding, commenced in the county court of Cook county, on the 6th of March, 1873, by Peter L. Yoe, the appellant, as executor, for the probate of the will of John McCord, deceased. The will was admitted to probate by the

county court. Andrew McCord, one of the heirs, took an appeal from this order of the county court to the circuit court of Cook county, where, upon trial had, the verdict of the jury was against the will, and judgment was entered accordingly. From which judgment the executor has taken this appeal.

At the trial below, the probate of the will was resisted on two grounds: *First*, that the testator was not of sound mind and memory at the time of signing or acknowledging the will; and, *second*, that its execution was procured by undue influence. Some of the attendant circumstances it may be proper to consider, as bearing upon the legal points to be discussed.

John McCord died on the 1st of March, 1873, at the age of sixty-nine. The will was executed on the 6th of August, 1872. At the time of his death the decedent resided at the village of Blue Island, in Cook county, where he had lived since about April 1, 1871, having at that time removed thither from a farm upon which he had ever before lived, he being a farmer by occupation.

On the 28th of November, 1870, his brother, Jason McCord, a resident of Chicago, died intestate, leaving an estate, consisting principally of improved real property, situated in the business portion of Chicago, said to have been worth upwards of seven hundred thousand dollars. John McCord was the only heir of his brother Jason, and succeeded to the ownership of this estate by inheritance. Peter L. Yoe, the appellant, had been for many years the intimate friend and confidant of Jason McCord, and employed to some extent in the management of his business affairs, and John McCord united with him in taking out letters of administration upon his brother's estate. Yoe became in fact the acting administrator, transacting pretty much all the business. On the 23d of December, 1870, soon after his appointment as administrator, John McCord gave him a power of attorney to manage all his real estate in Cook county, Mr. McCord at that time residing on his farm at Homer, in Will county. In October, 1871, by the disastrous fire of that month, every building belonging to the Jason McCord

estate in the city of Chicago was totally consumed, there being among them six large and costly stores.

On the 27th of November, after the fire, Mr. McCord gave to Yoe another power of attorney for the management of his real estate in Chicago, with authority to build upon and improve the same. At the time of the making of the will only two of the stores had been rebuilt.

Some time in June, 1872, when Mr. McCord was in Chicago, he called upon his attorney, Mr. Hosmer, and consulted him professionally about making a will, and explained to him fully how he wished to make his will, which agreed substantially with the one afterward drawn and now in question. About the last of July Mr. McCord sent for Mr. Yoe, with the view of making some disposition of his property. Mr. Yoe called upon Mr. Hosmer, and took the latter with him down to Mr. McCord's. Mr. McCord told Yoe he had sent for him for the purpose of dividing and deeding his property to his children, but on their consultation together, it was decided to make a will. Mr. Hosmer took down from Mr. McCord, on paper, his directions for the making of the will. The former returned to Chicago, and drew the will. On the 6th of August, 1872, he, with Mr. Yoe, went down to Blue Island, taking with them the draft of the will, and on that day Mr. McCord executed it.

The will, after giving to the widow the homestead and an annuity of $1,000 a year, divided the property equally among the children, share and share alike, placing it in the hands of Mr. Yoe, the executor, as trustee, to manage and pay over the income, until the youngest child should attain the age of twenty-one, which will be on the 9th of November, 1883. The value of the property devised is supposed to be from seven to eight hundred thousand dollars; the personal property being worth not far from $200,000. The testator's children at the time the will was made were eight in number, three of whom were minors.

The statute of this State in relation to the execution and proof of wills, provides as follows:

"All wills, testaments and codicils by which any lands, tenements, hereditaments, annuities, rents, or goods and chattels are devised, shall be reduced to writing, and signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom declaring on oath or affirmation before the county court of the proper county, that they were present and saw the testator or testatrix sign said will, testament or codicil in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will, testament or codicil, to admit the same to record: *Provided*, that no proof of fraud, compulsion, or other improper conduct be exhibited, which, in the opinion of said county court, shall be deemed sufficient to invalidate or destroy the same."

By the first clause of contestant's first instruction given to the jury, they were instructed: "That in all cases the party propounding a will is bound to prove that the paper in question does declare the will of the deceased."

It is to be borne in mind what the nature of this proceeding is, that it is the exhibition of a will for probate, not a case of contesting the validity of the will under section seven of the statute of wills. The probate of the will is not conclusive, but such section of the present statute provides, that within three years thereafter (the former one five years), any person interested, may, by bill in chancery, contest the validity of the will, when an issue at law shall be made up and tried by a jury whether the writing produced be the will of the testator or not. The statute contemplates the proceeding for admission to probate as summary, requires no notice to be given, and declares it, in express terms, the duty of the county court to receive probate of the will without delay.

The statute defines what shall be sufficient proof to admit a will to probate.

It requires the party propounding a will to prove nothing but its formal execution, and that the testator was of sound mind and memory at the time; and does not require him to go further, as the instruction implies, and make proof in addition, "that the paper in question does declare the will of the deceased."

The second instruction was, in part, as follows, that the jury must be satisfied "that said John McCord signed it (the instrument propounded), and that he attested it in the presence of two or more credible witnesses; and it is also necessary that said two witnesses, if the jury find from the evidence there were but two, must have declared on oath, on this trial, that they were present and saw the said John McCord sign said will in their presence or acknowledge the same to be his act and deed, and also that they believed the said McCord to be of sound mind and memory at the time of signing or acknowledging the same; and it is also necessary that no proof of fraud, compulsion or other improper conduct shall have been exhibited on this trial which the jury shall deem sufficient to invalidate or destroy the said instrument as the will of said John McCord, deceased."

The first clause of this instruction requires that the instrument should be *signed in the presence* of two or more credible witnesses.

This the statute does not require. If it is acknowledged in the presence of the witnesses it is sufficient, although they did not see the testator sign it, or though it was not signed in their presence. Neither of the attesting witnesses in this case remembers to have seen the deceased sign the will, but they both heard him acknowledge it.

By the second clause of this instruction, the jury would naturally be led to infer that it was essential to the admission of the will to probate, that the two attesting witnesses should have declared, on oath, in so many words, and according to this particular formula, "That they believed the said McCord to be of sound mind and memory at the time of signing or acknowledging

the same." In obedience to such an instruction, the jury could not well have found a verdict for the proponent. One of the subscribing witnesses, Roche, after testifying that "Mr. McCord's mind was all right as regards sanity," said, he did not think he had a sound memory; "that is, I don't think he had a good memory."

Now, here the witness could not declare, on oath, in so many words, that he believed the testator to be of sound mind and memory, and yet he did declare so in legal effect, which was sufficient. He testified that he thought the testator knew what property he owned, believed he knew the number of his children, that he understood about his property, and the natural objects of his bounty.

If the testator was of sound mind, but of poor or impaired memory, he was of sound mind and memory, as the phrase is known in the law. The failure of memory is not sufficient to create the incapacity, unless it be quite total, or extend to his immediate family and property. *Turner* v. *Cheesman*, 15 N. J. Eq. R. 243. It was evidently the witness' mistaken idea that a sound mind was incompatible with a poor memory, and hence, in his testimony, could not come up to the requirement of the instruction, as the jury would naturally take it to be; and the tenth instruction is liable to a similar objection.

The last clause of the instruction which we are considering declared it to be necessary to the admission of the will to probate, that no proof of fraud, compulsion, or other improper conduct, shall have been exhibited, "which the jury shall deem sufficient to invalidate or destroy the said instrument." It is a question of law what is such improper conduct as will invalidate a will, and it is only to be avoided by such conduct as the law deems sufficient for that purpose, not a jury; and a jury should not, by an instruction, be left at liberty to invalidate a will for what, according to their own notions, may be improper conduct sufficient for that purpose.

The following further instructions were given for the contestant:

"4. The jury are instructed, as matter of law, that if the testimony of the two witnesses subscribing the alleged will of John McCord, deceased, taken together, satisfies the jury that said McCord, at the time of the making and execution of the alleged will, had not a *sound memory*, nor sufficient mind, nor a mind in a proper state for disposing of his estate with reason, or according to any fixed judgment or settled purpose of his own, then said will should not be admitted to probate, and the jury should find accordingly."

We regard such an instruction as improper, and calculated to mislead a jury.

If the testator's mind was sound, that was enough, without requiring it also to be in a suitable *state*. A man's mind, his temper, his disposition, his feelings, may be in an improper state, without impairing his legal capacity to make a deed or will.

The jury are also told that the testator's mind must be in a proper state for disposing of his property according to some fixed judgment and settled purpose of his own. This is not the language of the law; it does not go any way to the enlightenment of the jury, and its natural effect is to confuse and mislead a jury.

"9. The jury are instructed that if they find, from the evidence given by the two witnesses who subscribed the alleged will of John McCord, deceased, that said alleged will was made and executed by him at a time when said McCord was of unsound mind or memory, then the jury must find the instrument in question is not the will of said John McCord."

The expression used in the statute is, "sound mind and memory." By substituting the disjunctive conjunction "or" for the copulative "and," as is done in this instruction, an unwarrantable distinction, as we regard, is attempted to be marked between "sound mind" and "sound memory."

The expression "sound mind and memory," as used in the statute, we conceive means nothing more than the words "sound and disposing mind," frequently employed in reference

to this subject. Here, as elsewhere, the phrase has been treated by the court as equivalent to the term "sanity." *Dickie* v. *Carter*, 42 Ill. 377; *Andrews* v. *Black*, 43 id. 256.

Littleton makes the terms "of non-sane memory," "non compos mentis," and "not of sound memory," convertible terms. 2 Co. Litt., § 405. And Coke, in his note, defines one *non compos mentis* (aside from natural idiots, lunatics and drunken men), as one that "by sickness, grief, or other accident, wholly loseth his memory and understanding." Comyn in his digest, Bacon in his abridgement (title Idiots), employ the terms in the same way. The statute of wills, 34 and 35 Henry VIII, does the same by providing that no will of lands shall be valid if made by any idiot or by any person of "non-sane memory." So that, as known in the law, "sound memory" is something quite different from good or unimpaired memory, in which latter sense the subscribing witness, Roche, evidently understood it. Failure of memory does not constitute unsoundness of memory.

Much testimony in the case consisted of instances of defect of memory in the deceased, and in view of the evidence, the variation from the language of the statute, by the use of the language sound mind *or* memory, was highly calculated to mislead the jury, in bringing in undue prominence before them the mistaken notion of the subscribing witness as to what constituted sound memory, and leading them to think it had the sanction of the court.

"11. It is essential to the sound memory required by the statute, for the making of a valid will, that the testator should possess something more than mere *passive* memory. He must undoubtedly retain sufficient *active* memory to collect in his mind without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least their more obvious relation to each other, and be able to form some rational judgment in relation to them. And the elements of such a judgment include the number of his children, their deserts with reference to conduct

and capacity as well as need, and what he had before done for them relating to each other, and the amount and condition of his property.

"And if in this case the jury believe, from the evidence of the subscribing witnesses to the will in question, taken together, that John McCord, at the time the said will was made and executed, did not retain sufficient active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their more obvious relations to each other, and to form a rational judgment in relation to them, that he did not possess sufficient memory to realize the nature and extent of his property, or the number, conduct, and capacity of his children, then the jury would be justified in finding that the alleged will is not entitled to be admitted to probate."

"13. The jury are instructed that the mere fact of the signing and acknowledgment of the alleged will by the said John McCord does not entitle it to be treated or considered as his will, and that in addition thereto it must appear to the jury, from the evidence, that it is his actual deed, and if they should find, from the evidence, that he did not know each and all of its provisions, then it is not his will."

The first of the two last above instructions was condemned by this court in *Trish et al.* v. *Newell et al.* 62 Ill. 197, as requiring, or as calculated to impress a jury that there was required a greater amount of mental capacity and power of memory than is possessed by, perhaps, the generality of men.

In any thing that might have there been said with reference to the competency of mind to make the will which may be in question, we would not wish to have it inferred that we admit the idea that it is in general a proper question to submit to a jury, whether the testator had sufficient capacity to make the particular will produced.

One grossly ignorant, or of very limited mental capacity, if otherwise of sane mind, may make any instrument, however

complex it may be, and be bound thereby. Written instruments would be very precarious securities of men's rights, if they were subject to be thus invalidated, and have their validity depend upon the result of an inquiry before a jury whether, according to their belief, the maker had sufficient capacity to make the particular instrument which might be in question. We agree with the rule as held in *Delafield* v. *Parish*, 25 N. Y. 9, that the question is, had the testator, as *compos mentis*, capacity to make a will; not, had he capacity to make the will produced.

The last above instruction is erroneous in telling the jury that the signing and acknowledgment of the alleged will was not sufficient, but that in addition thereto it must appear that it was the actual deed of the testator. The statute requires no such thing. The instruction was further wrong in saying that if the testator "did not know each and all of its provisions," then the instrument was not his will.

Most written instruments probably would fail to stand the test of any such rule.

Writings are constantly passing from one to another in the every day transactions of business, where the makers are more or less ignorant of their entire contents, executed often without reading or hearing them read, in trust upon some other person for their being correct, where there may be, in fact, no actual knowledge of what they do contain. A written instrument is not to be defeated by evidence that the maker did not know each and all of its provisions. The idea is inadmissible. Where the testator is shown to have executed an instrument as his will, being in his right mind, and there is nothing of fraud or imposition, it will be presumed that he was aware of its contents.

The general rule is, that proof of the testator's signature to the will is *prima facie* evidence of his having understandingly executed the same. *Weigel* v. *Weigel*, 5 Watts, 486; *Beall* v. *Mann*, 5 Ga. 456.

"20. The jury are instructed, as matter of law, that although they may believe, from the evidence, that the deceased, John

McCord, was possessed, at the time of the making and execution of the alleged will in question, of a mind of sufficient sanity to general purposes, and of sufficient soundness and discretion to regulate his affairs in general; yet, if they further believe, from the evidence, that the proponent, P. L. Yoe, acquired such dominion and influence over said McCord in relation to his property as to prevent the exercise of a sound discretion on his part in relation thereto, and that said Yoe exerted such dominion and influence over said McCord, in reference to the making and execution of the alleged will in question, to such an extent as to substitute for the will said McCord designed and desired to make, and would have made, if he had been left in the exercise of mental free agency, a will according to the views of said Yoe, then such latter instrument would not be entitled to probate, and the jury should find accordingly."

We regard this instruction as erroneous, in that it does not embrace the element of fraud or wrong in the dominion and influence mentioned in the instruction. It is not unlawful for a man by honest advice, or persuasion, to induce a testator to make a will, or to influence the disposition of his property by will.

Such advice or persuasion will not vitiate a will made freely and from conviction of its propriety, though such will might never have been made but for such advice or persuasion. This does not amount to fraud, compulsion or other improper conduct. To avoid a will, the influence which is exercised must be *undue*, and this, in the legal sense, is something wrongful, a species of fraud. *Dickie et al.* v. *Carter*, 42 Ill. 376; *Roe* v. *Taylor*, 45 id. 485; 1 Redf. on Wills, 514. The instruction might have been refused, too, as inapplicable, there being no evidence to base it upon.

For the reasons indicated we regard the foregoing instructions as erroneous.

To define the exact degree of mental capacity requisite to the making of a valid will is confessedly a difficult task.

Where it is attempted, in a multiplicity of instructions to a jury, it is quite apt to bring error into a record. Observations made use of in judicial opinions, in illustration of views upon a point decided, are to be found, which may be well in reference to the case in hand, and as understood by the professional mind, but when extracted and embodied in instructions, as rules for the guidance of a jury in perhaps some entirely different case, they not infrequently may be inapposite, and from their vague generality, or metaphysical cast, be of no practical use to a jury in leading them to a right conclusion, but, on the contrary, tend to mislead them.

In *Horne* v. *Horne*, 9 Ired. 99, with reference to the amount of testamentary capacity necessary, it is said it is sufficient if the testator knew what he was doing, and to whom he was giving his property, and in the note to its citation, in 1 Redfield on Wills, 125–127, it is said, this is about as accurate and brief a definition as can be given. Other courts have declared it in a similar plain form, as, in 7 Serg. & Rawle, 90, as to making a will, it is said, "There is no standard by which the understanding is to be weighed, but one: has the party such a portion of understanding as would enable him to do any binding act?" In *Kinne* v. *Kinne*, 9 Conn. 104, "Had he an understanding of the nature of the business he was engaged in, a recollection of the property he meant to dispose of, and of the persons to whom he meant to convey it, and the manner he meant to distribute it between them? or, as was said by WASHINGTON, J., in *Stevens* v. *Vancleve*, 4 Wash. C. C. R. 267, "To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed his will?"

Such plain definitions may be of service to a jury in informing them as to the legal meaning of sound mind and memory.

In 1 Redfield on Wills, 123–124, the author states that "the result of the best considered cases upon the subject seems to put the quantum of understanding requisite to the valid

execution of a will upon the basis of knowing and comprehending the transaction, or in popular phrase, that the testator should, at the time of executing the will, know and understand what he was about." This last mode of expression of the doctrine is intelligible to a jury, and embodies about the whole rule upon the subject, so far as it can be profitably given to a jury. And whether the testator did thus know and understand, is a question of fact for the jury, for them to judge of and determine from all the evidence before them. When a court undertakes to inform them what amount of mental capacity a man must have to know and understand what he is about, it is futile, and tends rather to mislead than to afford any practical aid to a jury.

As to the evidence in the case, without entering upon the review of it in detail, we will remark that, from a full examination thereof, we see no sufficient reason why the will should have been refused admission to probate. As before intimated, we find no proof whatever of undue influence.

The will, in all its parts, was an eminently proper one to be made, under the circumstances of the testator's property and family. No doubt the testator's mind had become somewhat impaired by age, and many instances of defect of memory appear in evidence. But the deficiency of mind or memory disclosed falls quite short of amounting to unsoundness of mind and memory.

There was clearly testamentary capacity.

If wills are liable to be set aside upon such testimony as is exhibited in this record, the privilege of disposition of property by will is an uncertain one indeed.

The judgment of the court below must be reversed.

Judgment reversed.

HOLMES O. SLEIGHT *et al.*

v.

THE PEOPLE, etc., for use WELLER TOWNSHIP.

1. TAXATION — *by municipal corporations — constitutional limitations.* Under the constitution of 1848, as well as that of 1870, the legislature is prohibited from authorizing the corporate authorities of counties, townships, school districts, cities, towns and villages to assess and collect taxes for any other than corporate purposes; and it is indispensable to the validity of all taxes levied and collected for corporate purposes, that they shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

2. SAME — *what is a "corporate purpose."* A tax imposed for the payment of a debt not incurred by the authority imposing the tax, and for the payment of which it is in nowise responsible, is not for a corporate purpose.

3. CONSTITUTIONAL LAW — *devoting county taxes and township taxes to the payment of debt of a particular town.* A section in a railway charter provided that the taxes to be collected from the company for county and township purposes by the several counties and townships through which the railroad ran, should be set apart by the county treasurer as a sinking fund to redeem the principal of the bonds issued by any township or townships in such county. It was claimed that the county taxes and the township taxes levied upon the railroad by two townships, which had issued no bonds, should have been set apart to create a sinking fund for two townships which had issued railroad bonds, but the court *held* that this could not be constitutionally done, as its effect was to devote taxes levied for county and township purposes to the payment of the debt of the townships which had issued their bonds, and to that extent increased the taxes in the county and the other two townships to make up the deficiency thus caused in their revenue, and therefore the law was unconstitutional and void.

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

Mr. C. DUNHAM, and Mr. T. E. MILCHRIST, for the appellants

Mr. T. G. AYRES, and Mr. H. BIGELOW, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This is an action of debt against the treasurer of Henry county and his sureties, on his official bond, and the breach of duty charged is in refusing to set apart, as a sinking fund, and account to the town of Weller for certain taxes collected from the American Central Railway Company, for county and township purposes, in the years 1869, 1870, and 1871. The road of that company runs through the towns of Oxford, Clover, Weller, and a portion of Galva, in Henry county. Of these, Weller and Galva alone subscribed to the capital stock of the company, and issued their bonds in payment of the subscriptions. By the tenth section of an amendment to the company's charter, approved February 21st, 1859 (Laws of 1859, p. 529), it is enacted that "the taxes to be collected from said railroad company for county and township purposes, by the several counties and townships through which said railroad runs, shall be paid to and set apart by the county treasurer as a sinking fund, to redeem the principal of the bonds issued by any township or townships in such county."

The claim is made, and the court below held, that the entire tax collected from the railway company for county and township purposes, in the several towns through which the road runs, should be paid to and set apart by the county treasurer as a sinking fund, to be applied *pro rata* in redeeming the principal of the bonds issued by the towns of Weller and Galva.

By § 5, art. 9, Const. 1848, it is provided: "The corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law." And by § 2 of the same article, it is required "that all taxes shall

be levied by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." Corresponding provisions will be found in §§ 1, 9, and 10, in art. 9 of the present constitution.

These are limitations upon the legislative department, prohibiting the enacting of laws conferring upon the corporate authorities of counties, townships, school districts, cities, towns, and villages, power to assess and collect taxes for any other than corporate purposes, and requiring, as an indispensable condition to the validity of all taxes levied and collected for corporate purposes, that they shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same. *Harward* v. *St. Clair Drainage Co.*, 51 Ill. 130; *Primm* v. *City of Belleville*, 59 id. 142; *Trustees, etc.*, v. *The People*, 63 id. 300.

A tax cannot be levied for county or township purposes on property which is not subject to the jurisdiction of the authority levying the tax; and the property of the railway company in the county, and in each township, must be subject to the same taxation as other taxable property there situated, for county and township purposes; and no property can be held for the payment of a county or township tax which is not levied for a corporate purpose.

Without undertaking to define what is a corporate purpose, it is very certain that a tax imposed for the payment of a debt not incurred by the authority imposing the tax, and for the payment of which it is in nowise responsible, is not for a corporate purpose.

Neither Henry county, nor the towns of Oxford or Clover, made any subscription to the capital stock of this railway company, or incurred any indebtedness, by issuing bonds or otherwise, on account thereof. Nor are they either indebted to the towns of Weller and Galva.

Neither Henry county, nor the town of Oxford or Clover could, therefore, levy and collect a tax in excess of the amounts needed for their respective corporate purposes, and equal to

the amount claimed for this sinking fund, because such a tax would not be for a corporate purpose.

But the claim here made is for taxes actually levied and collected for county and township purposes, from the railway company, in the towns of Oxford and Clover. If this amount shall be taken, then there must necessarily be a deficiency, to that extent, in the county and township revenues, which will have to be supplied by additional taxation. The property liable to taxation in one municipality will thus be compelled to bear a burden of taxation imposed by the corporate authority of a different municipality, and this, too, without its consent, and in the absence of any presumptive corresponding benefits. The principle upon which alone this can be sustained is, that the legislature may, in its pleasure, impose debts upon counties and townships and require their payment, without regard to the wishes of the inhabitants and tax payers of such counties and townships; for it is evident that the practical result is precisely the same, whether it is said the taxes levied for county and township purposes on the property of the railway company, in the towns of Oxford and Clover, shall be set apart for the payment of the bonds issued by the towns of Weller and Galva, or that the county and these townships shall pay a sum equal to that amount, out of their revenues, for the same purpose. In either event, it is taking so much of the revenues of the county, and of the towns of Oxford and Clover, to pay the debts of the towns of Weller and Galva. But it has been repeatedly held by this court that the legislature is powerless to impose a debt upon a municipality without its consent; and those cases must be deemed conclusive on the question involved here. *The People, etc.*, v. *The Mayor, etc.*, 51 Ill. 18; *People* v. *Salomon*, id. 38; *People* v. *Chicago*, id. 58; *Madison Co.* v. *The People*, 58 id. 463; *Hessler* v. *The Drainage Com'rs*, 53 id. 105; *Lovingston* v. *Wider*, id. 302.

The judgment is reversed and the cause remanded.

Judgment reversed.

JOHN T. NOBLE *et al.*

v

JOHN CUNNINGHAM.

1. AGENT AND PRINCIPAL — *when principal liable for tort of agent.* If a tort is committed by an agent in the course of his employment while pursuing the business of his principal, and is not a willful departure from such employment and business, the principal is liable although done without his knowledge.

2. NEGLIGENCE — *putting car in motion without means of stopping it.* It is negligence for persons engaged in loading cars on a railroad track to put a car in motion without making any provision for stopping it, or examining to see whether the brakes are in order, or examining to see whether any person is on or about other cars on the same track with which the one put in motion will necessarily collide, and if injury results to one who is guilty of no negligence himself, the parties putting the car in motion will be liable.

APPEAL from the Superior Court of Cook county; the Hon. JOHN BURNS, Judge, presiding.

Mr. JOHN VAN ARMAN, for the appellants.

Messrs. HERVEY, ANTHONY & GALT, and Mr. JOHN C. RICHBERG, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action on the case, brought by John Cunningham, in the Superior Court of Cook county, against appellants, John T. Noble and Francis B. Little, to recover for an injury received, resulting in the loss of a hand, caused by the moving of a car on the side track of the Illinois Central Railroad Company, in the city of Chicago, by the servants of appellants.

A trial of the cause was had before a jury, which resulted in a verdict and judgment in favor of appellee for $3,000.

The appellants insist first, that the verdict is unsupported by the evidence.

We have carefully considered the testimony contained in the

record, and find it ample upon which to base the verdict of the jury.

At the time appellee was injured he was a laborer in the employ of the Illinois Central Railroad Company; two cars were standing together on a side track of the company; he went under one of them for the purpose of making some repairs; before doing this, however, he placed a man by the side of the car to keep watch and notify him should any other car or engine approach; several feet north of the car to be repaired, upon the same track, stood a number of cars, also three cars were standing some distance south.

Appellants, who kept a lumber yard in Chicago, on the morning of the accident sent three of their hired men with lumber to the railroad to be carred and shipped. The car to be loaded was one of the number standing on the track, north of where appellee was at work. The servants of appellants, in order to facilitate the loading of the car, undertook to move the cars between the one they desired to load and the car where appellee was at work, further south in the direction of appellee. They hitched a span of horses to the first car to be moved and started it, but when in motion they were unable to control it, and before appellee had any notice of the approach of the car, it struck the one adjoining the car appellee was repairing, which moved it forward and crushed appellee's hand.

The railroad company had, in its employ, a man, provided with an engine, whose duty and business it was to move all cars when necessary to accommodate its patrons.

It is claimed application was made to the agent to move the car, and the engine provided for that purpose was then in use, and the three servants of appellants were directed by the agent to move the cars themselves; this, however, was denied by the agent.

But independent of this fact, if the servants of appellants undertook to move the car, they were bound to exercise proper care and caution, and if they failed to observe this duty, and appellee was injured, when in the exercise of due care, through

the neglect and want of ordinary care on the part of the servants of appellants, the damages sustained by appellee must be visited upon appellants.

There is no pretense that appellee failed to observe due care and caution at the time of the accident. The controverted question is whether appellants' employees were guilty of negligence. They set in motion the car without making any provision whatever for stopping it; the brake upon it was out of order and could not be used. This they failed to examine. No blocks were permitted to be used in stopping the car; no examination was made to see if any person was under or about the cars the one moved was bound to come in collision with. In fact no precautions were taken to guard against danger. Under such circumstances the facts before the jury were sufficient to justify them in arriving at the conclusion that the negligence of appellants' servants was the cause of the injury.

It is, however, urged that appellants are not liable for the negligence of their servants in moving the car.

The general rule is, that the principal is liable for the torts of his agent, done in the course of his employment, although the principal did not authorize, or justify, or participate in, or even if he disapproved them. If the tort is committed by the agent in the course of his employment while pursuing the business of his principal, and is not a willful departure from such employment and business, the principal is liable, although done without his knowledge.

The three men who moved the car were in the employ of appellants. They were sent to the railroad to load a car with lumber; for the purpose of doing the act they were sent and directed to do, they undertook to move the car. The act of moving the car was a part and parcel of loading the other; it was not only no departure from the employment but will be regarded in the direct course of the employment.

It is insisted that it was error for the court to permit proof that an agent of the railroad company said to the servants of appellants, after the accident, that they should never load a car

in the yard again. Even if the evidence was improper, its admission had no tendency to prejudice the appellants. The same may be said in regard to the declaration of the witness Remsey, to which objection was made.

It is also urged by the counsel of appellants, in a very elaborate and ingenious argument, that the instructions given for appellee were improper, and that the court erred in refusing certain instructions asked by appellants.

While some of the instructions given may be liable to slight technical objections, yet we fail to perceive any substantial error in the law as given by the court to the jury.

The instructions placed the case fairly before the jury. They contained nothing calculated to mislead, and after a careful consideration of the whole record we are satisfied it contains no substantial error. The judgment will therefore be affirmed.

Judgment affirmed.

Henry F. Eames *et al.*

v.

The Germania Turn Verein.

1. Lien *of a money decree.* Where a decree finds a specific sum of money due from one party to another, and orders a sale of specific property, and in case not enough is realized from such sale to pay the amount that an execution issue, such decree is a money decree, within the meaning of the fourteenth section of the chapter entitled Chancery, of the Revised Statutes of 1845, and becomes a lien upon the real estate of the party against whom it is rendered, the same as a judgment at law.

2. The lien of a money decree, like that of a judgment at law, only continues for one year after it is rendered, unless an execution is issued within that time.

Appeal from the Circuit Court of Cook county; the Hon. John G. Rogers, Judge, presiding.

Messrs. Sleeper & Whiton, for the appellant.

Mr. Adolph Moses, for the appellees.

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

Appellees, being desirous of erecting a hall for the use of their society, and of purchasing a suitable site for the same, entered into negotiations with the agents of appellants for the purchase of certain real estate in the city of Chicago. A written agreement was entered into, by which appellees were to pay $33,000, in installments, the deferred payments to draw eight per cent interest. Five hundred dollars was paid when the writing was executed, and was to be part of a $9,000 payment in cash. The purchasers were to have ten days for the examination and approval of title, after being furnished with an abstract. If it proved not to be good, the $500 thus paid was to be refunded, but in case no valid objections were found, and the first payment not made, the sellers were to hold the deposit, as liquidated damages, and the contract to become null and void. Time was made of the essence of the contract. Appellees to receive a good and sufficient warranty deed, and to give notes and trust deed as security for the deferred payments. The contract was dated June the 8th, 1870, and the abstract of title was soon after furnished.

An attorney was consulted, and he pronounced the title good. Thereupon appellees paid at various times the aggregate sum of $2,500 on the purchase. The time for the first payment was extended. But a member of the organization not being satisfied with the title, had it examined by Rosenthal & Pence, who decided that the property was subject to the lien of a decree of over $51,000. The vendors were informed of the fact, and promised to have it removed, or to have it made right. Notice was given to Rosenthal & Pence by Eames, that, unless payments were made according to the terms of the agreement, he would resell, and in case of loss would hold the company

liable for the difference. He also stated that he was prepared to convey a perfect title in fee, on appellees complying with their contract. And appellees gave notice that they declared the contract ended on account of the lien of the decree.

An action was brought by the company to recover back the money paid on the purchase. A trial was had before the court, resulting in a judgment in favor of plaintiffs, from which defendants have appealed to this court.

The decree against Gage was rendered on the 17th day of June, 1868, when he was the owner of this property sold by Eames and wife to appellees. Eames and wife subsequently acquired Gage's title to the portion of the property which they sold to appellees. And to this portion of the property no other objection is interposed to the title, but the supposed lien of the decree against Gage. It finds that Gage and others were indebted to Lawrence in the sum of $51,288.99, and they were ordered to pay it in ten days, or in default thereof that the property involved in that suit should be sold by the master, and if it failed to produce a sum sufficient to pay the decree, that then an execution should issue for the balance. This was strictly in accordance with the act of 1865 (Sess. Laws, p. 36).

Was this decree a lien on the property of Eames and wife at the time of the sale? The fourteenth section of the chapter entitled "Chancery" R. S., 1845, declares that "a decree for money shall be a lien on the lands and tenements of the party against whom it is entered, to the same extent and under the same limitations as a judgment at law." That this was, either in whole or in part, a money decree, we think cannot be controverted. It finds a specific sum to be due, decrees its payment, orders specific property to be sold, and if the proceeds of the sale are not sufficient to pay the decree, it awards a general execution. Although the specific property is ordered to be sold, it is none the less a money decree. It is for the payment of money, and for the performance of no other act. The sale of the specific property is but a mode of having execution from property upon which there was a lien. And the de-

cree became a lien on the property of the defendants, precisely as it would had the decree been a judgment at law rendered by the same court. Under our attachment laws, when there is service or appearance the judgment is *in personam*, and a special execution first issues, and if the sale is insufficient to discharge the judgment, a general execution may issue for the balance. In such a case no one would doubt that the judgment would be a lien on real estate, as in other cases. This decree is in all essential features the same as such a judgment.

We are clearly of opinion that under this section this decree became a lien, and was such under the first section of the chapter entitled "Judgments and Executions," of the same revision. But it only continued to be a lien for one year after the decree became such, unless an execution was sued out within that time, under the decree. This record fails to show that such an execution was ever issued. It will be observed that the decree was rendered on the 17th day of June, 1868, and affirmed at the September term of this court, of the same year. So that more than one year had elapsed, as the execution could have issued at any time after the decree was affirmed, and more than a year before the contract was entered into by Eames for the sale of the land, which bears date on the 8th of June, 1870, and the refusal by appellees to proceed under the agreement was some time later.

The fourteenth section of the chancery code imposes the same restrictions on the lien of a money decree that are imposed on a judgment at law. The lien of a judgment only continues one year unless execution is sued out before the expiration of that time. Such a decree as this, by the terms of the statute, is under the same limitations.

We are referred to the act of 1865, in appellees' argument, but the title of the act, its date, or the page of the volume where found, is not given. We have turned to the laws of that session, and find the act of February 16, 1865, page 36, which, we presume, is the one to which reference is made. It

provides, that in foreclosing mortgages, the court may render a decree for the balance above what shall be paid by sale of the mortgaged property, conditionally at the rendition thereof, or absolutely after the sale of the property, and the balance is ascertained, and award execution for the collection of the same. This section undoubtedly authorized a money decree in the case, but it in nowise has any bearing on the lien such a decree should be on other property than the mortgaged premises.

As what is not shown is presumed not to exist, we must conclude that no execution was ever issued on the decree, and if not, then it was not a lien on this property of Eames and wife when sold. And that is the only objection urged against their title, and none is urged against Laflin's. It thus follows that appellees had no right to refuse to proceed with the fulfill ment of their agreement to purchase. And as appellants were not in default on their part, appellees had no right to rescind and recover back the purchase money they had paid. Having failed to show that this decree was a subsisting lien at the time of sale, on the portion of the property sold by Eames, appellees have failed to show a right to recover, and the judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

HENRY MULHOLLAND

v.

MOSES BARTLETT.

1. CONSIDERATION—*forbearance to sue.* To make forbearance to sue a good consideration for a promise to pay, there must be a well-founded claim in law or in equity forborne, or there must be a compromise of a doubtful right.

2. When a person in a strange city, on being threatened with suit upon the acceptance of a draft by a firm as a partner therein, when in fact he was not a partner, and had no connection with such firm, and so informed

the holder of the draft, to avoid suit and to gain time gave the holder his written promise to pay the draft, it was held that there was no valid consideration for the promise.

APPEAL from the Circuit Court of Winnebago county; the Hon. WILLIAM BROWN, Judge, presiding.

This was an action of assumpsit, brought by Henry Mulholland against Moses Bartlett, upon the written promise set out in the opinion. A trial was had, resulting in a verdict and judgment for the defendant.

Messrs. CRAWFORD & MARSHALL, for the appellant.

Mr. WILLIAM LATHROP, and Mr. C. M. BRAZEE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, in the Winnebago circuit court, resulting in a verdict and judgment for the defendant.

The question presented is, the liability of the defendant to the plaintiff, growing out of the following transaction, and which is the foundation of plaintiff's claim.

"MONTREAL, 10*th October*, 1857.

"£147.13.9, cy.

"Four months after date, please pay to our own order at the agency of the City Bank, Toronto, one hundred and forty-seven pounds 13-9, currency, for value received.

"BREWSTER, MULHOLLAND & Co.

"To Messrs. Pringle, Daniels & Co.,

"Uxbridge, C. W.

"Accepted, Pringle, Daniels & Co."

"MONTREAL, 20 *Jan.*, 1859.

"Messrs. Brewster, Mulholland & Co.:

"DEAR SIRS — The above is a copy of an acceptance of the late firm of Pringle, Daniels & Co., for one hundred and forty-

seven pounds 13-9 currency, which became due and payable on the 10th — 13th February, 1858, and is now in your hands unpaid. Without in any manner acknowledging, either directly or indirectly, to be in any way liable for the above debt, still to avoid the trouble and annoyance of defending myself at law, from being made liable as a partner in the said firm of Pringle, Daniels & Co., which allegation I now deny, I hereby bind myself and agree to pay to Brewster, Mulholland & Co., or their order, in twelve months from this date, the above sum of one hundred and forty-seven pounds 13-9, with interest at the rate of seven per cent per annum, from its maturity till actual payment be made, should they not collect it from the estate of Pringle, Daniels & Co., in the meantime.

"MOSES BARTLETT."

The plea was the general issue. This instrument was written by Mulholland under the circumstances detailed in the record. The plaintiff in the action sought to show that defendant was a member of the firm of the drawees and acceptors of this bill, Pringle, Daniels & Co., which, if so, established his legal liability, and was a sufficient consideration for his promise. On this question there is some conflict in the testimony, but the great preponderance, we think, is that defendant never was at any time a member of that firm, or under any obligations to answer for their contracts, or pay their debts. He was a member of the firm of "H. Daniels & Co.," a firm which had been doing business many years prior to this transaction, at a place called "Brookline," distant eighteen miles from "Uxbridge," the place of business of Pringle, Daniels & Co., the acceptors of the bill. This firm of H. Daniels & Co. was, as late as March 5, 1857, composed of Henry Daniels and George W. Coulston, in the proportion of two-thirds interest in Daniels and one-third in Coulston. In May following the defendant purchased of Daniels one-half of his interest in the firm, and thereby became a partner on an equal footing with Daniels and Coulston. The name of the firm was not changed. On the 8th of March,

1857, W. A. Pringle, H. Daniels and George W. Coulston formed a co-partnership under the name and style of Pringle, Daniels & Co., at Uxbridge. There was some talk of defendant's taking an interest in this firm, but, after examining into its condition, he declined. The business of the two firms was separate and distinct, Pringle managing the business of Pringle, Daniels & Co., and Coulston that of H. Daniels & Co.

In November, 1857, soon after the acceptance of the bill by the firm of Pringle, Daniels & Co., they made an assignment for the benefit of their creditors, which was signed by Pringle, Daniels and Coulston, and simultaneously with this H. Daniels individually made an assignment. The firm did not make an assignment, but ceased to do business, and defendant, still a member of the firm, was appointed agent to manage its affairs and wind up the business, which he did satisfactorily by paying the debts in full.

Brookline was the residence of the defendant, and the place of business of the firm of H. Daniels & Co. This place is distant from Montreal three hundred and fifty miles or more. When on a visit to that city for the purpose of getting an extension from the creditors of H. Daniels & Co., of whom the firm of Brewster, Mulholland & Co. represented here by the plaintiff, were one, the defendant was successful, and when he had accomplished this object, Mulholland presented to defendant this bill of exchange, and threatened immediate suit on it, against defendant, as a member of the firm of Pringle, Daniels & Co., the drawees and acceptors, unless he arranged it. This threat produced the writing on which this action was brought, and set out *supra*. These facts appear from the testimony in the record.

The defense is, there was no valid consideration for the instrument and none is expressed in it. If this be so, then the finding of the jury was right and the judgment should stand, and this is the important question in the case.

Forbearing to sue is admitted on all sides to be a good consideration, for which assumpsit will lie. 1 Ch. Pl. 101. Ap-

pellant's counsel has presented an able review of the British and American cases bearing upon this subject, by which it will be seen the earlier cases held the law to be, that the forbearance of a suit threatened upon an unfounded claim, was not a valid consideration for a contract, and the more modern cases to which we are referred do not seem to be entirely harmonious. Among the references to the latter is *McKinley* v. *Watkins*, 13 Ill. 140, where it was held, if a party threatens to sue, honestly supposing he has a good cause of action, it will uphold a contract fairly entered into in order to avoid the suit. And it was further said, the compromise of a doubtful right is a sufficient consideration for a promise, and that it is immaterial on whose side the right ultimately turns out to be, but in order to support the promise there must be such a claim as to lay a reasonable ground for the defendant making the promise, and then it is immaterial on which side the right may ultimately lie, referring to *Edwards* v. *Baugh*, 11 Mees. & Wels. 641, and *Perkins* v. *Yay*, 3 Serg. & Rawle, 331. *Knotts et al.* v. *Preble*, 50 Ill. 226, is also cited.

We understand appellant as insisting that the cases cited, those of this court included, hold that if a person, in good faith, believing he has a good cause of action against another, has made inquiries, heard of testimony by which he could sustain it, and is about to sue, and the other party does not desire a suit, that a written promise to pay the claim at a future day, given to avoid the suit and accepted by the threatening party who forbears his suit, has all the elements of a binding contract which can be enforced at law.

We do not think the cases from this court cited above go to that extent, and the only English case cited most approvingly (*Cook* v. *Wright*, Langdell's Sel. Cases on Contracts, 333), would seem to go that far. The case in 13 Ill. holds, in order to support the promise there must be such a claim as to lay a reasonable ground for the defendant making the promise. What reasonable ground for defendant's promise is shown in this case? He never saw or heard of the bill drawn on Pringle,

Daniels & Co., until this visit to Montreal in January, 1859, a long time after it had been accepted by that house. He had no interest in knowing any thing about it, as he never had been connected with that firm as a member, and he distinctly declared to the plaintiff, who drew the instrument, that he was not a partner in that firm, and denied all liability, directly or indirectly, on that bill.

The case from 50 Ill. does not sustain appellant, for there it was held, notwithstanding it was shown the maker of the note was impressed with the belief he was in some measure responsible for the loss of payee by the fire, that in fact the payee had no claim upon the maker of the note, and there was no consideration for the note.

In the elementary treatises on this subject, the doctrine will be found to be, that an agreement to forbear legal proceedings to enforce a well founded claim, is a valid consideration for a promise. 1 Pars. on Con. 365; Chitty on Con. 33. The last mentioned author further says, in order to render the agreement to forbear and the forbearance of a claim a sufficient consideration, it is essential such claim should be sustainable at law or in equity, and the consideration will fail if it appear the demand was utterly without foundation.

The result of the authorities, as we are inclined to think, is, to make forbearance a good consideration, there must be a well founded claim in law or equity forborne, or there must be a compromise of a doubtful right. A compromise implies the yielding of a part of a claim. There is nothing of that kind in this case. The claim was, that appellee was a partner of the acceptors of the bill, and a demand made for instant payment or a suit to enforce the collection. Appellee might well have been surprised at such a demand, it being for the first time made known to him such a paper existed. He knew and so told appellant he was not liable on the paper as a partner. What was he to do? He was at Montreal for the first time in his life, nearly four hundred miles from his home and his friends, the demandant in the midst of both, giving him a most decided

advantage in any law suit he might commence, and who would most probably hold the defendant by a capias and incarcerate him unless some satisfaction was given, dictated the writing which appellant drew up, and is now the subject of this controversy. It seems to us quite clear here was no compromise of a doubtful claim, but a wrongful assertion of a claim, which appellant, when the instrument was executed, had strong reasons for believing had no valid existence as against the appellee. Circumstances very much affect cases. Appellee was among strangers, threatened by a mercantile house of high standing, who, to relieve himself from the embarrassment of his position, executed this writing, there being at the time no ground whatever in law or equity to charge him with this debt. We cannot say, forbearing to prosecute an action to recover this demand, should, under the circumstances, be held as a valid consideration for this promise, and the court below took a correct view of the case. We cannot see how the jury could have found otherwise than they did. The instructions were as favorable to appellant as he could ask, and on a careful examination of the whole record, we are satisfied justice has been done, and we affirm the judgment.

Judgment affirmed.

HORACE A. HURLBUT *et al.*

v.

SEVILLE F. JOHNSON *et al.*

1. PARTNERSHIP *property must first be applied to payment of firm debts.* Where a merchant sells an interest in his stock of goods to another who becomes a partner in the business, debts contracted by the new firm must first be paid out of goods afterward purchased before any portion of them can be taken for debts of the former, and only his interest in such of the old stock as remains on hand until levied upon, can be appropriated to the payment of his prior debts.

2. On a bill to subject partnership funds to the payment of partnership debts, if it appears that any portion of the property on hand had belonged to one of the partners before the formation of the partnership, and was at that time put into the partnership business by him, his individual prior creditors will be entitled to have his interest in such property as is still on hand, and can be identified, appropriated to the payment of executions against him, which have been levied on the entire stock before the filing of the bill, but nothing more.

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

Mr. F. S. MURPHY, for the appellants.

Messrs. WILLIAMS, MCKENZIE & CALKINS, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This bill was to enjoin the sale of a stock of goods under executions and have the same appropriated to the payment of the several claims of the creditors of defendant Krone or Krone & Wineberg. The facts upon which relief is sought may be shortly stated: On the 20th of April, 1872, Krone purchased of Christopher Wineberg, who is also made a defendant to the bill, an interest in a stock of drugs and such other goods as are usually kept in a retail drug store, for which he conveyed to him eighty acres of land situated in Iowa, estimated to be worth about $5 per acre. The value of the stock on hand was estimated by the witnesses, from $200 to $600. On the 29th day of April, 1872, appellees Colburn, Burke & Co., and Simeon & Colburn, respectively, recovered judgments before justices of the peace, against Christopher Wineberg, and afterward executions were issued upon such judgments and placed in the hands of Constable Johnson, who levied the same on the goods in controversy as the property of Wineberg. Upon filing the bill the court granted a temporary injunction and appointed a receiver. Some of the goods being of a perishable character, the receiver, under the direction of the court,

sold the entire stock, and has now on hand the proceeds subject to the order of the court.

The execution creditors insist the sale of the stock of goods to Krone was not in good faith, but made with a purpose to hinder and delay the creditors of Wineberg in the collection of their just claims. On the contrary, appellants, who are the *bona fide* creditors of Krone for goods sold to him to replenish the stock, insist they are entitled to have their claims first paid, no matter what view may be taken of the relations subsisting between Krone and Wineberg. The circuit court, on the hearing, divided the funds in the hands of the receiver equally between the contesting claimants. Appellants bring the cause to this court, and seek a reversal of the decree on the ground they are entitled to be first paid out of the funds in the hands of the receiver.

There is some conflict in the testimony as to the relations which existed between Krone and Wineberg after the sale of the 20th of April, but when construed in connection with the written instrument executed by the parties at the time, we think there can be no doubt, Krone purchased an undivided one-half of the stock belonging to the firm of Wineberg & Bro. It is equally clear the purchase was in good faith, for a valuable consideration. The land conveyed to Wineberg was worth much more than one-half interest in the stock of drugs. There were then no judgments or executions against Wineberg & Bro., or either of them, and no reason is shown why Krone did not acquire by the purchase a clear title to one undivided half interest in the entire stock on hand in the store, the other half remaining in Christopher Wineberg.

There is no doubt an arrangement was made, the business thereafter should be conducted in the name of Krone, and that Wineberg, although interested in the store as a partner, was not to be known as such. It is immaterial, so far as the questions arising on this record are concerned, whether he was a silent or an active partner in the business thereafter to be conducted. Whatever debts might be contracted for goods to

replenish the stock would, in any event, take precedence over any mere private indebtedness previously contracted by Wineberg. The claims of appellants were for goods sold to Krone, and undoubtedly went into the store to increase the common stock. Whatever might be the interest of Wineberg in the goods in the store, the debts contracted for the purpose of conducting the business must be first paid, and all the individual creditors could rightfully subject to the payment of their claims would be the interest of Wineberg remaining after the firm debts had been fully paid. The credit was given to Krone on the faith of the stock of goods then in his possession, and as we have seen, it makes no difference whether he owned them in his own right, or whether they were the property of Krone & Wineberg.

The sale of the stock by Wineberg & Bro. to Krone and Wineberg, was in good faith. It was certainly made for an adequate consideration, and the evidence shows the land taken in payment was appropriated to the payment of the debts of Wineberg.

There can be no question the undivided one-half interest in the stock passed by the sale to Krone. All the previous creditors of Wineberg could in any event be entitled to recover, would be the interest Wineberg had in the stock of goods after the sale to Krone & Wineberg by Wineberg & Bro., prior to any new purchases. All the interest subsequently acquired by the firm by new purchases should first be appropriated to the payment of the creditors of Krone, or of Krone & Wineberg, if they shall be held to have been partners in the business, as well as all the interest of Krone in the goods.

The executions against the property of Wineberg under which appellees claim were issued on the 29th day of April, 1872, but no levies were made until the 29th day of June next following. Whether any portion of the original stock formerly owned by Wineberg & Bro. remained at that date is not shown by any thing in the record. The interest of Wineberg in the original stock that remained until the levies were made, if the

same can be ascertained, can alone be appropriated to the payment of the prior creditors of Wineberg, but the debts of Krone, or Krone & Wineberg, contracted for goods for the common business must first be satisfied out of the subsequently acquired goods.

The decree of the court below will be reversed and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

THE PEOPLE *ex rel.* Mathias Blumle

v.

STEWART NEILL *et al.*

1. CONTEMPT — *retaking property replevied.* A party from whose possession personal property has been taken by an officer by virtue of a writ of replevin, is guilty of a contempt of court if he forcibly retakes the possession thereof after the goods have been by the officer delivered to the plaintiff in replevin.

2. SAME — *appeal or writ of error will not lie from an order of discharge.* Proceedings for a contempt of court are on behalf of the people, and in the nature of a criminal proceeding, and an appeal or writ of error on the part of the people will not lie in such case.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. JOSEPH W. COCHRAN, Judge, presiding.

Mr. H. W. WELLS, for the plaintiff in error.

Messrs. MCCULLOCH, STEVENS & WILSON, for the defendants in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

Mathias Blumle, on October 1, 1873, sued out from the circuit court of Peoria county, a writ of replevin against Stewart Neill, for about two thousand pounds of hops. On the same day the sheriff served and executed the writ and returned the same,

with his indorsement of service, that he had executed the writ by replevying the property, and had placed the same in the possession of the plaintiff, and by reading the writ to the defendant as he was therein commanded, on the 1st day of October, 1873. On October 2, 1873, Blumle made his affidavit that defendant Neill and one Latham A. Wood, a few hours after the said service and replevy of said property, in the night-time of the same day, October 1, forcibly broke into the building where the hops were in his, Blumle's, possession, and retook the same and carried them away. Thereupon an attachment was issued against Neill and Wood for a contempt of court, who afterward, upon making their answers to the interrogatories filed, were discharged. From which order of discharge this writ of error is prosecuted.

The doing of the acts charged does not appear to be denied by the answers, and is attempted to be excused by averring that the property had been previously sold to Wood and belonged to him.

We fail to see why Neill, at least, should not have been adjudged guilty of a contempt, and have been so mulcted as to have made his law-defying act unprofitable, and have effect to deter from the repetition of a like offense.

It is due to the maintenance of the supremacy of the law, the respect which should be yielded to the authority of judicial mandates, and to the importance of upholding the process of courts in full vigor, that writs should not be suffered to be thus thwarted in their effect, with impunity.

But this is a prosecution in behalf of the people, and the proceeding for a contempt is in the nature of a criminal proceeding. *Stuart* v. *The People*, 3 Scam. 395. The people are not allowed an appeal or writ of error in a criminal case. Besides, it is the general rule, that the sole adjudication for contempt, and the punishment thereof, belong exclusively and without interference, to each respective court.

We are of opinion the acquittal of the defendants by the court below must be held to be conclusive. The judgment must be affirmed. *Judgment affirmed.*

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

v.

SILVANIAN RILEY.

EXCESSIVE DAMAGES — *expulsion of passenger from cars.* In trespass against a railway company for ejecting the plaintiff from a passenger coach near a station, where no extreme violence was used, and no maliciousness or wanton recklessness was manifested, and the plaintiff was not seriously and permanently injured, it was held that $2,500 damages were excessive and a new trial was awarded.

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

This was an action of trespass, by the appellee against the appellant, brought in the circuit court of Bureau county, and taken by change of venue to La Salle county. The material facts of the case are fully stated in the opinion of the court.

Mr. G. S. ELDRIDGE, and Mr. THOMAS F. WITHROW, for the appellant.

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

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This action was prosecuted to recover for injuries received by the plaintiff in consequence of being violently ejected from a passenger car on the defendant's road, by its servants, at or near a station called Mineral, in Bureau county.

The verdict of the jury was for the plaintiff, assessing his damages at $2,500, upon which the court gave judgment.

The plaintiff entered the car, which was one of a regular passenger train on the defendant's road, at Mineral, intending to go to Burlington Crossing, and thence by the C. B. & Q. R. R. to Princeton, where he had been subpœnaed to attend as a witness in a case to be tried on that day. He was accompanied

by several others, on a like errand, among whom was Kepler, who sat in the same seat in the car with him, on the side next the aisle which extends between the rows of seats. The fare charged by the defendant for passengers from Mineral to Burlington Crossing was fifty cents; but at 2½ cents per mile, which was claimed by Kepler and others of the party to be "legal fare," it would have been only thirty-five cents. Soon after the train started from Mineral, the conductor came to the seat in which were the plaintiff and Kepler, collecting fare. Kepler handed him thirty-five cents, after informing him where he was going. This the conductor returned to him, telling him he must either pay fifty cents or leave the car. Upon his refusing to comply, the train was checked, run back some distance toward the station and he was removed.

There is a conflict in the evidence as to what occurred between the plaintiff and conductor in regard to his fare. He says the conductor did not demand his fare, but, after having removed Kepler, ordered him to be seized and removed, although he notified him he was willing to pay the regular fare; while the conductor and several other witnesses say he expressly refused to pay more than what he called "legal fare," thirty-five cents. Inasmuch, however, as the case must go before another jury for error unconnected with this question, we deem it inexpedient to comment on the evidence in this respect.

A fair and dispassionate consideration of all the evidence, to our minds, relieves the conduct of the defendant's servants from the charge of that degree of wanton recklessness or maliciousness which is essential to justify so large a verdict, unless it has been proved, as the plaintiff claims it has, that he was seriously and permanently injured.

The injuries plaintiff claims to have received of this character, were, what the medical witnesses call "painful crepitation," on the right side near the lower angle of the right shoulder blade; and "hepatization" of the middle lobe of the right

lung, caused, as is argued, by being forced against the door, or the side of the door, as he was put out of the car.

The evidence of the medical witnesses, considered with reference to apparent intelligence, experience and skill in the profession, as well as to numbers, in our opinion, clearly and decidedly preponderates that a blow of sufficient violence to cause "hepatization" of the lungs would be immediately followed by prostration, chill, and fever; that the first effect upon the lungs would be inflammation, after which would follow the "hepatization;" that although "crepitation" of the muscles may be produced by a violent blow, it may also be the result of rheumatism, or of other causes.

The plaintiff says, after he was put out of the car he immediately returned, entering at the opposite end. He seems to have engaged with much warmth in a verbal altercation with the conductor, which was kept up until he left the train at the Burlington Crossing, and until that time he makes no complaint of having suffered physical pain in consequence of his expulsion; then, however, he says he "felt considerable sore from the effects of it." When he reached Princeton he did not feel under the necessity of calling upon a physician until after he had visited his attorney. He says: "It runs in my mind I went to Lawyer Taylor's office before I went to Latimer's. I am pretty sure I did. I think Taylor told me I ought to have something done for it."

When he consulted Latimer, he says Latimer gave him a liniment and advised him to put on a blister. He was at the hotel, but feeling pain, and thinking he would rest better in a private house, went home with a friend residing in Princeton, and staid all night with him. This friend says, when the plaintiff retired for the night he requested him to rub some of the liniment on his back. He examined his back, and discovered that "a little along the lower point of the right shoulder blade seemed to be a little red and swollen, and he rubbed the liniment on it," upon which plaintiff made complaint that the

pressure gave him pain. The next morning the plaintiff got up, ate his breakfast and departed.

In addition to being at his lawyer's office, the physician's office and the hotel, after he arrived at Princeton, he was at the court house; and, in the evening, he was sitting in company with others, who were talking, at the hotel, until about nine o'clock, when he went home with his friend, and after reaching his house he sat talking with him and family about matters at Mineral some little time before going to bed. From this it is apparent he exhibited none of that evidence of recent severe violence which the medical evidence shows would have been manifested had the blow or jam he received been sufficient to have produced the consequences which he seeks to attribute to it. The grating noise or "crepitation," he says, he first observed two or three months after he was put out of the car.

No witness sustains him, so far as we have been able to ascertain from the evidence, in the fact that he was violently pushed or pulled against the door or the side of the door, and he does not claim that he was otherwise seriously or permanently injured by the expulsion.

His evidence on this point, as found in the abstract, is this: "They both had hold of me, and rushed me right into the aisle, and got about to the door, with my back against the door like. The door, or the side of the door like, struck at my shoulder. I was ahead, my face partly turned round south; my feet were kind of sideways. The men were angry, I think. They went about as fast as they could do it, I thought. The big man had hold of my right arm. They jammed me, I think, against the door or the side of the door, I can't say which it was, but my shoulder struck against something, either the side of the door or the door, and with that I went right off the top step, about ten feet, I should judge, down the grade."

Wheeler, the conductor, Kintz, the baggage-master, Alexander, road-master on the eastern end of the road, Bernett, road-master on the western end of the road, and O'Brien, who was attending to waterworks on the road, all swear that he was put

out by Kintz, the baggage-master, alone, and that Kintz used no violence. Kintz positively denies that plaintiff struck against the door, and the others say they were in a position if he had struck the door to have observed it, but they saw nothing of the kind, and they all describe him as going out face-foremost.

Buswell, who was a passenger on the train, and lived in the same county, at no very great distance from Mineral, says, he can't say that Wheeler, the conductor, took hold of plaintiff; he thinks Kintz is the man who put him off. He uses this language: "I don't think Riley (the plaintiff) resisted particularly; I am certain he didn't as far as I could see; there was quite a little movement there; I didn't see him jammed at all; if there had been a tussle between them I could not have failed to have seen it, but I saw him go out just as you might take any man out that offered no resistance."

McCulloch, a witness for plaintiff, who is a farmer residing at Albion, in Henry county, was a passenger on the train, and says, he saw the plaintiff put off. He says, in cross-examination: "The man took hold of Riley (the plaintiff) by the collar; Riley made no resistance; he walked right along; he was turned round at the door; I might be mistaken as to this; I did not see any violence—no harsh means, but to take him along, turn him around, and put him out."

Thompson, another witness for plaintiff, in his cross-examination, says he saw Wheeler have hold of plaintiff. "Don't know whether Kintz or Wheeler took hold first; there was not much difference; plaintiff was facing north-east; he was on the south side of the car; Wheeler went in behind plaintiff; Kintz took hold of him by the arm in front; I am not mistaken that Wheeler had hold of him; Kintz took hold of him by the arms and led him out; he did not jerk him out very viciously; * * * I can't swear Riley (plaintiff) was jammed against the door; he went off, face foremost."

Williams, also a witness for the plaintiff, who claims to have been an eye-witness to the entire scene, says, he does not think

there was any thing very violent about the manner of getting the plaintiff out of the slip, and that he did not notice that plaintiff came in contact with any thing at the door.

That plaintiff was complaining of being unwell with cold and rheumatism in the morning before getting on the train is not contested. That was given as a reason why he did not propose to go with the others, getting on at Mineral, at that time on "legal fare."

Brainerd, who professes to be an intimate friend of his, and who was one of his witnesses, furnished the exact change at his store, so they all could pay on the train. He says, he asked plaintiff if he was going on "legal fare?" He said, no, he was unwell; "I remember he had been complaining for a week before."

Other witnesses on behalf of the plaintiff also testify to his being unwell, and complaining of having rheumatism. Witnesses, introduced on behalf of defendant, testify to hearing him complain of ill health, and especially of rheumatism, for a considerable period before this occurrence. The plaintiff himself also admits to having been slightly troubled wilh rheumatism since his return from California, which we infer to have been a few years previous to his receipt of the injury in question. He says: "When I had a bad cold I would feel bad; it makes me feel unwell, and stiffens me up; I couldn't tell how many attacks I had had before this occasion; it may be more than one; that morning I felt stiff in the joints, not more in the shoulder than in the legs; I did not feel well for some days before; did not consult a physician," etc.

We have endeavored to give a careful consideration to all the evidence, and we feel convinced injustice is done the defendant, though no doubt unintentionally, by this verdict. It is thereby made responsible for disease and suffering, resulting from causes with which, unless we have unwittingly overlooked important countervailing evidence, its servants have had no connection.

For the reason that, in our opinion, the damages assessed by the verdict are excessive, the judgment is reversed and the cause remanded.

Judgment reversed.

JOHN H. CLELAND

v.

SAMUEL R. PORTER.

ELECTION — *closing polls before time does not of itself render votes cast invalid.* If an election has been in other respects fairly and properly conducted, the votes cast will not be rejected simply because the judges closed the polls an hour before the time prescribed by law, when it does not appear that any voter offered to vote after the polls were closed and before the lawful time for closing them, or was prevented from voting by reason thereof.

WRIT OF ERROR to the County Court of Rock Island county; the Hon. SAMUEL S. GUYER, Judge, presiding.

Mr. WILLIAM H. GEST, and Messrs. CONNELLY & MCNEAL, for the plaintiff in error.

Mr. CHARLES M. OSBORN, and Messrs. KENWORTHY & BEARDSLEY, for the defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

At the general election held on the fourth day of November, 1873, the defendant in error was declared elected to the office of treasurer of Rock Island county.

The plaintiff in error, who was the opposing candidate for the office, on the third day of December, 1873, filed a petition in the county court of Rock Island county to contest the election.

It is averred in the petition that no votes were cast in the

county for any person for the office of treasurer except petitioner and the defendant in error; that in the entire county the defendant in error received fifteen hundred and ninety-two votes, and that the petitioner received fifteen hundred and seventy-nine votes, making a majority of thirteen votes in favor of defendant in error.

That in Buffe Prairie township there were registered and entitled to vote two hundred and fifty persons; that the entire vote cast in that township was only one hundred and thirteen, seventy-nine of which were for defendant in error, and thirty-four for petitioner; that the judges of election in that township did neglect and fail to continue open the polls until seven o'clock in the afternoon of the day on which the election was held, but did knowingly and willfully close the same before the hour of six o'clock in the afternoon, and, for the purpose of giving their illegal proceedings the semblance of regularity, did knowingly and willfully run forward the hands of the clock used to indicate the time of closing the polls.

On account of this irregularity of the judges, the petitioner asks that the entire vote of the township may be rejected and not counted.

To this petition a general demurrer was filed, which the court sustained, and it was dismissed.

The petitioner brings the record here, and assigns as error the decision of the court in sustaining the demurrer and dismissing the petition.

Section forty-eight, Revised Laws of 1874, page 458, which was in force at the time the election was held, declares the polls shall be opened at the hour of eight o'clock in the morning, and continued open until seven o'clock in the afternoon of the same day, at which time the polls shall be closed.

Section eighty-six of the same act declares if any judge of any election shall willfully neglect to perform any of the duties required of him by the act, he shall, on conviction thereof, be fined in a sum not exceeding $1,000, or imprisoned in the county jail one year, or both, at the discretion of the court

It was clearly the duty of the judges of election to keep the polls open until seven o'clock on the day the election was held, and the legislature, by the act cited *supra*, has imposed a severe penalty upon the judges of the election for a willful disregard of duty.

But the question presented by this record is, what effect shall a duty imposed upon the officers, disregarded, have upon the result of the election, when it does not appear that a single legal voter was deprived of the elective franchise?

The substance of the complaint made by the petitioner is this, that the law required the judges of election to keep open the polls until seven o'clock, and they closed at six o'clock.

It is nowhere alleged that a single voter appeared at the polls, after adjournment, for the purpose of voting, or that any voter was deprived of the right to vote for the reason the polls were closed one hour earlier than required by law.

No fraud is shown on the part of the officers in conducting the election. There seems to have been a fair expression of the will of the voters of the township at the polls; it is not pretended that the defendant in error, or any candidate for any office, had any knowledge of the act of the judges, or were in any manner connected therewith or advised the closing of the polls at an earlier hour than the law required.

Under these circumstances we are not prepared to hold that the voters of the township who appeared and cast their votes shall be disfranchised by a rejection of the entire poll; in the absence of fraud, and where it does not appear that a single voter was deprived of the right of suffrage, we think justice requires that those who honestly expressed their will at the ballot-box should be protected, and if the officers of the election have violated the law, let the penalty attached be imposed upon them. This view seems to be just, and it is in harmony with the former decisions of this court when similar questions have arisen. In *Piatt* v. *The People*, 29 Ill. 54, this court held: "The rules prescribed by the law for conducting an election

are chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain, with certainty, the result. Such rules are directory, merely, not jurisdictional or imperative. If an irregularity, of which complaint is made, is shown to have deprived no legal voter of his right, or admitted a disqualified person to vote, if it casts no uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it, it may well be overlooked in a case of this kind, when the only question is, which vote was the greatest?"

A question, not unlike the one involved in this case, arose in case of *The People ex rel. Welland Scott* v. *The Board of Supervisors of Du Page County*, 65 Ill. 360. The question there was, whether the entire poll of one township should be rejected because the judges of election closed the polls for one hour at noon, when it did not appear that there had been any fraud, or that any voter had been prevented from voting. On the authority of *Piatt* v. *The People*, *supra*, it was held that the circuit court erred in rejecting the entire poll.

In that case the question was, whether the entire vote of the township should be rejected, for the reason alone that the polls were, in violation of the statute, closed for one hour in the middle of the day; here, the question is, shall the entire vote of a township be disregarded, for the reason alone that the judges of election closed the polls one hour, from six o'clock until seven; there can be no difference in principle between the questions involved in the two cases. Had this petition contained an averment that voters appeared at the polls for the purpose of voting after the polls were closed and before seven o'clock, and were deprived of the right, that would have presented a question not raised by this record, and upon which we decline to express an opinion.

The averments in the petition being insufficient, the demurrer was properly sustained. The judgment of the court below will be affirmed.

Judgment affirmed.

JAMES STINSON

v.

JOHN S. GOULD *et al.*

1. SET-OFF — *of claim against factor in suit for goods bought of him.* Where a factor or agent has the property of another in his possession, and a person not having notice or chargeable with notice purchases the property, supposing it to belong to the factor, the purchaser may set off a claim he has against the agent.

2. But where the property sold is not in the possession of the agent when sold, or if the purchaser has notice or is chargeable with notice that the person selling is not the owner of the property, then he cannot set off any claim he may have against the agent.

3. SAME — *of joint claim against factor and others in suit for goods sold by factor.* Although a purchaser of property in the hands of a factor, supposed by the purchaser to be the owner, may set off any claim he may have against such factor, in a suit by the owner of the goods for the purchase money, yet he cannot set off any claim he may have against such factor and other parties jointly.

APPEAL from the Superior Court of Cook county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Mr. B. WALSH, for the appellant.

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

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

Appellees brought this suit in the Superior Court of Cook county, against appellant, to recover the value of eight iron lamp posts and fixtures. On the trial, in the court below, a jury was waived by consent of parties and a trial was had by the judge, who found the issues for the plaintiffs, and rendered judgment in their favor for $494 and costs, from which this appeal is prosecuted.

The controversy in the case turns upon the question whether appellant should have been allowed a set-off of $350, as a credit on appellees' account. This is the only question pre-

sented by the record, as there is no dispute that appellant had the goods, as charged. The grounds for claiming the set-off are, that appellant, in the summer of 1872, purchased of Crawford, Chamberlain & Co. a fountain, which was placed in his yard, but not being satisfactory to appellant, it was agreed that they should take it back and furnish him with vases or other goods in its stead.

It appears that appellant examined and perhaps selected two posts at the business house of Crawford, Chamberlain & Co., and saw drawings of others that were satisfactory, and six of that pattern were ordered for him. After this had all occurred, about from the 18th to the 21st of March, 1873, Crawford, Chamberlain & Co. sold out their stock or made an assignment of it to Brown, and he about the same time sold it to appellees without reservation, or any notice that appellees had given any order or claimed any of the goods embraced in the stock, so far as this record discloses. About the 22d of April, 1873, Crawford, one of the members of the firm of Crawford, Chamberlain & Co., called on appellees and stated that he had an order from appellant for the two lamp posts and six Boulevard lamp posts, and if appellees would pay him a commission he would fill the order at their store, otherwise he would send for them to Philadelphia. This seems to have been the first time they had seen Crawford. They accepted and filled the order, and delivered the posts to appellant; and on the next day Crawford had the fountain removed, and by permission of appellees it was stored at their business house.

It is claimed that Crawford was the agent of appellees, but dealt with these goods as his own, and from that fact appellant had the right to set off any claim held against Crawford as though the posts had been his property. It is a rule, that where a factor or agent has the property of another in his possession, and a person not having notice, or chargeable with notice, purchases the property, supposing it to belong to the factor, the purchaser may set off a claim he has against the agent, or any claim he holds against the true owner. But he cannot, as

against the agent, if he knows the facts, or is chargeable with notice. In this case, however, Crawford was not in the possession of the goods, but they were in the possession of appellees, who had purchased them free from any claim of Crawford, Chamberlain & Co., and of appellant. The goods were legally theirs and they sold them.

But even if Crawford was the agent of appellees, which the evidence, we think, fails to show, still Johnston, appellant's book-keeper and business agent, had notice that the goods belonged to appellees, as he was so notified at their interview on the 22d of April. Crawford told the book-keeper that he would see and let him know whether appellees would sell the posts, and there seems to be no doubt that he called the same day and informed him they would sell the posts. Here was direct notice to the agent and business man of appellant, and no rule is more uniformly recognized than that notice to an agent, within the scope of the agency, is notice to the principal. So in the case at bar, there was actual notice to appellant's agent, which so operated on appellant, that appellees, and not Crawford, were the owners of the goods. Appellees seem to have been profoundly ignorant of all arrangements that existed between appellant and Crawford, as to the exchange of the fountain for vases or other goods. There is no evidence that they knew of the arrangement, and hence there can be no presumption that they intended to carry out the arrangement.

But if Crawford had been the agent of appellees, and appellant had purchased the goods, supposing that they belonged to him, still we fail to see how a claim not against him, but against his late firm, could be set off in this case. It is not claimed that he was acting for his late firm, but for himself, in making the sale. An individual claim against an agent may, but a joint claim against him and others cannot, be set off in such a case. So that, in any view we have been able to take of the case, we are unable to see that the court below erred in the view he took of the law, and the evidence fully warrants the finding. The judgment of the court below must be affirmed.

Judgment affirmed

The Toledo, Peoria and Warsaw Railway Company
v.
Robert Johnston.

1. Negligence — *in suffering stock to be at large.* In an action by the owner of stock against a railway company for killing the same, no contributory negligence is chargeable to the owner in letting the stock run at large when it breaks out of its pasture without his fault.

2. Interest — *on value of stock killed.* The owner of stock killed by a railway company on its track, for want of a fence, is not entitled to interest on its value from the time of the killing.

3. Measure of damages — *stock killed by negligence.* The damages for stock killed by a railway company through negligence merely, as, a neglect to fence their track, is compensatory only. To authorize more, circumstances of aggravation must be shown.

Appeal from the Circuit Court of Iroquois county; the Hon. N. J. Pillsbury, Judge, presiding.

Messrs. Ingersoll & Puterbaugh, for the appellant.

Messrs. Blades & Kay, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

This is an appeal from the circuit court of Iroquois county. The judgment was rendered in favor of Robert Johnston, in an action on the case against the Toledo, Peoria and Warsaw Railway Company, to recover damages for killing plaintiff's stock upon the road. The negligence of the company was alleged to be in failing to fence their track.

Appellants attempted to show contributory negligence on the part of plaintiff, by suffering the stock killed to run at large. The evidence is, that the animals broke out of the owner's pasture, without his fault, consequently, he cannot be chargeable with negligence.

Another point made by appellants is, giving this instruction to the plaintiff: "If you shall, from the evidence, find the

defendant guilty, you should assess and allow interest at six per cent on what you shall, from the evidence, find to be the value of the property killed and injured, from the date of the killing to this time."

This instruction was wrong, and should not have been given. The case referred to by appellee as sustaining this instruction does not support it. In that case the point was made but was not decided, the cause going off on another point. What was said, therefore, must be regarded as *dictum* merely. *Chicago and N. W. Railway Co.* v. *Shultz*, 55 Ill. 421.

Another point is made, that the damages are excessive. The value of the property, as estimated by disinterested witnesses, Mr. Alexander and Mr. Parker, who appraised the animals, was fixed, the highest at four hundred and fifty dollars. The jury found four hundred and ninety-eight dollars and eighty-eight cents as damages, and this, by the addition of interest, under the direction of the court. In such cases the damages must be compensatory only, unless circumstances of aggravation are shown, which is not pretended.

For the reasons given the judgment must be reversed, and the cause remanded for a new trial, unless the plaintiff shall remit all of the damages above four hundred and fifty dollars.

The remedy is statutory, and the limit of the recovery is, ordinarily, the value of the property.

Judgment reversed.

WILLIAM EDWARDS

v.

FARMERS' INSURANCE COMPANY.

1. INSURANCE — *description of property in policy.* Where an application is for insurance "on hay in the stack and in the field," and the policy issued upon the application is upon "hay in stack within fifty feet of

stable," the discrepancy is not such as to entitle the insured to rescind the contract of insurance.

2. SAME — *construction of policy.* Where a policy of insurance refers to an application, and by apt words makes the application a part of the policy, the two instruments will be construed together.

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

Messrs. STEWART, PHELPS & STEWART, for the appellant.

Mr. ALMON KIDDER, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This suit was brought on a note given to the insurance company to secure the several annual premiums to become due on a policy of insurance upon the property of appellant. He insists the policy did not describe accurately all the property embraced in his application, and therefore he had the right, for that reason, to rescind the contract of insurance, which he alleges he did as soon as the error was discovered.

The policy by its terms included appellant's dwelling house, barn, granary, grain, hay, and other articles usually found on a farm. The amount insured on the property enumerated was $3,000, for a period of five years.

The variance between the policy and the application, it is alleged, consists in a misdescription of the item of hay — included in the policy. The application asked for insurance "on hay in the stack and in the field, $200;" and the policy reads, "$200 on his hay in stack within fifty feet of stable." All other property enumerated in the application, it is conceded, was accurately described in the policy.

The misdescription insisted upon is not material. The thing to be insured was "hay in the stack," and in that particular the policy follows the application. In either case, it was in the field, and it is wholly immaterial whether it was "within fifty feet of stable." That part of the description may be rejected

and the remainder is a substantial compliance with the application, that it is described as "hay in the stack."

But, aside from this view, the policy refers to the application for a "more particular description" of the property insured, and by apt words makes it "a part of this contract" of insurance. The application having thus been made a "part of the policy," the two instruments must be construed together. When this is done there is no difficulty in determining what property was insured. There was no misdescription of any item. All the property appellant contracted to have insured was embraced by appropriate description in the policy, and hence the right of rescission insisted upon did not exist.

No error appearing, the judgment will be affirmed.

Judgment affirmed.

AMANDA S. TAYLOR
v.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

1. AGENT — *cannot bind principal beyond the scope of his agency.* An agent of a railroad company, appointed for the purpose of transacting some limited or specified business for the company, cannot bind the company outside of its legitimate business, or make contracts for it which the company never authorized any one to make.

2. SAME — *passenger agent cannot bind principal by contract to look after freight.* The agent of a railway company, who is employed for the sole purpose of soliciting passengers to patronize the road of the company, and who is not held out by the company as their agent for any other purpose, has no power to bind the company by a contract to receive freight from another road, and transport it to the depot of, and ship it on the road for which he is such agent.

3. CARRIER — *duty as to freight between connecting lines.* A common carrier by railroad is not bound by law to watch for and ascertain the arrival of freight at the depots or wharves of other common carriers, and transport the same to its own depot, and is not bound by any agreement to do so, made by an agent employed by it for the sole purpose of soliciting passenger business.

Statement of the case.

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

Messrs. KILGOUR & MANAHAN, for the appellant.

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

This was an action, brought by Amanda S. Taylor against the Chicago and Northwestern Railway Company, to recover for certain millinery goods which had been shipped from Danville, Maine, to plaintiff, at Chicago.

The declaration contains one count against the defendant as common carrier, and three special counts alleging an undertaking on the part of the defendant to watch for the arrival of the goods at Chicago, and, upon such arrival, to obtain them and carry them to Sterling, in this State; that the goods arrived at Chicago, and defendant neglected to get and forward the same, whereby they became lost to plaintiff.

A verdict and judgment were rendered in favor of the defendant in the court below, and the plaintiff appealed.

The substance of the testimony, on the trial, was as follows:

The property in question was a large box and show case, containing millinery goods worth about $2,000, of about 490 pounds weight, which were shipped as freight from Danville, Maine, to Chicago. The plaintiff and her husband came to Chicago by the Grand Trunk and Michigan Central railroads.

At Chicago, Robert Taylor, the husband of plaintiff, purchased two tickets for their passage from Chicago to Sterling, over defendant's road, at the city office of the company, near the court-house, and near where they stopped. Taylor then went to the Wells street depot of defendant to check their trunks to Sterling, and to see about getting the goods transferred. He went to the baggage-master of the defendant in the depot, showed him his checks for trunks, and showed him his bill of lading, or receipt for the goods, from the Grand Trunk railway company. The baggage-master said that was Orb's business. Taylor found Orb in the office in the same

building, but a few feet from the baggage room of the defendant. He showed Orb his bill of lading or receipt. The latter said he would send the goods right along as soon as they came, and in the centre of the bill of lading, or receipt, Orb wrote the following:

"To be shipped to A. S. Hobbs, Sterling, Ills.
EDWARD ORB, Agt. C. & N. W. R. W. Co."

This was September 20, 1871.

Taylor told Orb he came by the Grand Trunk road. His checks showed he came by the Grand Trunk railroad and Michigan Central to Chicago. The Grand Trunk depot is in the Michigan Central depot. Orb went there eight or nine times for the goods, and was told they had not come. They were unloaded on the second of October, 1871, at A. S. Spencer's dock on the Chicago river, at Chicago, and there remained until they were burned in the fire of October 8th and 9th of that year. The cars of the Grand Trunk road come across to the United States shore at Sarnia, and in Michigan the Grand Trunk railway makes a junction with the Michigan Central railroad.

Orb was employed by the appellee to solicit passengers for said company over its road, and for no other purpose whatever. He never had any authority to solicit freight, or to make contracts for the company. In addition to this employment, and wholly independent of it, Orb ran an express wagon on his own account, and engaged in the business of transferring light goods, for which he received pay himself, and with which the company had nothing to do.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The railway company is here sought to be charged with the duty to watch at the wharf, or at the depot of the Grand Trunk railway, or its connecting lines in the city of Chicago, and to ascertain the arrival of appellant's goods, and have them trans-

ported by wagon to its own road, by reason of a contract made by one Edward Orb. To maintain the suit it is necessary to prove that Orb had authority from the company to make such a contract on its behalf, or that he was held out by the company to the public as having such authority. He was an agent of the company, but not an agent to watch for and ascertain the arrival of freight or baggage of passengers at the depots or wharves of other roads, and transport the same to appellee's road. Such business was not within the scope and object of appellee's charter. Appellee was a common carrier only by railroad. It was not bound by law to transact such business as the above, and never did transact such business. It was not bound to have, and never did have, an agent for such purpose. Orb was in the employment of the company merely as a passenger agent, whose business consisted only in soliciting the patronage of the traveling public for appellee's line of road, it being no part of his employment to watch for the arrival of freight or baggage at other depots, or to convey it across the city in wagons to the company's own depot; he was not provided by the company with the means for such purpose. Orb was himself, on his own account, as an expressman, engaged in the business of transferring light goods, and the contract which he made with appellant was for himself, and not for the company. It cannot be that an agent of a railway company, appointed for the purpose of transacting some limited and specified business for the company, has a right to bind the company outside the legitimate business of the company, and to make contracts for it which the company never authorized any one to make.

It is clear from the testimony that Orb was never authorized by the railroad company to make the contract which is declared upon.

And we fail to discover, from the evidence, that the company held Orb out to the world, or permitted Orb to so hold himself out, as the agent of the company authorized to make such contracts. There is no pretense that Orb ever made a

contract on behalf of the company, which was known to or recognized by the company, of the character of the one declared upon; or that any one ever made such a contract for the company, or that the company ever had any thing to do with such business. Orb was known as the passenger agent, or emigrant agent of the company, nothing more. What the baggage-master of the company said when shown the bill of lading for the goods, that "that was Orb's business," is what the proof shows. The transfer of those goods was Orb's private business, and did not pertain to the company. The signing by Orb of his name in the way he did to the writing which he made in the bill of lading from the Grand Trunk railway, did not bind the company, because it was done in reference to a matter in which Orb had no agency. And however he may have so held himself out thereby, there is no evidence of its being known to, or acquiesced in, by the company; and the company evidently could not be affected by that isolated instance of the manner in which Orb held himself out.

There was an exclusion by the court below of certain testimony offered by plaintiff as bearing upon this point, and it is insisted there was error in this. The testimony offered was, that the husband of appellant, after obtaining the two tickets at Chicago for a passage over appellee's road to Sterling, asked the person of whom he bought the tickets, about the transfer of the goods in question, and was directed by such person to Edward Orb, as agent of the defendant, who attended to that business, and who would be found at the Wells street depot of defendant; but on objection, the evidence was excluded, and exception taken. The evidence shows that this ticket office, where the tickets were bought, was in the central business portion of the city, away from appellee's depot and place of general business; and there is nothing from which to infer that this ticket seller had any other authority from the company than merely to sell tickets. The company would not be bound by the declarations of the person who was selling the tickets, about a matter not within the line of his business. This seller

of tickets, nor no one else connected with the company, is asked by Taylor where the latter shall go to find an officer of the company authorized to make a contract on the part of the company to transfer his goods across the city.

He had no reason to believe that the company was itself doing any such business, or would make a contract to do it; all that he could have had reason to expect from application to and inquiries of agents of the company, would be aid, in the way of information, in the means of getting his freight transported through the city to appellee's depot. We see no error in the exclusion of the testimony.

We are of opinion the verdict is clearly sustained by the evidence.

There are numerous instructions in respect to which exceptions are taken. But the case is so clearly one for the defendant upon the evidence, that we deem it unnecessary to review the instructions, as we do not see that the jury could have been misled by them to appellant's injury. The judgment will be affirmed.

Judgment affirmed.

The Chicago, Burlington and Quincy Railroad Company

v.

Ruby Van Patten, Administratrix, etc.

1. Error *will not always reverse.* Where the right is so clearly with the successful party that the result would have followed had the jury been properly instructed, the judgment will not be reversed, but where the right of the party is not clear, and there is error in the instructions which may have influenced the jury, a reversal will be had, and the cause remanded.

2. Negligence — *what is, on the part of one killed by a locomotive.* Where a person is riding in a wagon drawn by a team under his control, and is familiar with a railroad crossing, and from the point where the wagon road

turns to cross the track, distant about four rods, an approaching train is plainly visible for a distance sufficient to enable him to check his team before crossing, and he does not look in the direction of the approaching train, but keeps his head averted to an opposite direction, and drives upon the track, where he is killed, he will be guilty of contributory negligence.

3. SAME — *right of recovery in case of mutual negligence.* Where a party killed was guilty of contributory negligence, his personal representative cannot recover unless the negligence of the defendant contributing to cause the death, was gross, in comparison with which the negligence of the intestate was slight.

4. SAME — *presumption as to negligence of plaintiff's intestate.* In an action against a railway for causing the death of a person through negligence, where the proof clearly shows negligence on the part of the deceased, it is error to instruct the jury that the law presumes that he exercised proper care and caution on the occasion. If there was no proof of his negligence, such an instruction might be proper.

5. PRESUMPTION — *not indulged against proofs.* Where there is clear proof of a fact, no presumptions can be indulged except such as arise upon the proof.

6. SPECIAL VERDICT — *instructions in respect to.* If the court exercises its discretion in instructing the jury to find specially in answer to certain interrogatories, its power is exhausted, and it is error to say to them that if they are unable to answer the interrogatories because of the uncertainty of the evidence, they can so report.

APPEAL from the Circuit Court of Peoria county; the Hon. J. W. COCHRANE, Judge, presiding.

This was an action on the case by Ruby Van Patten, administratrix of the estate of Matthew B. Van Patten, deceased, against the appellant. The material facts of the case are stated in the opinion of the court. The jury found for the plaintiff, and assessed her damages at $5,000, upon which judgment was rendered, the court refusing to grant a new trial.

Messrs. MCCULLOCH, STEVENS & WILSON, for the appellant.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This case was before us at a former term, and will be found reported in 64 Ill. 512, to which we refer for a statement of the grounds of the action.

The last trial in the court below, like the first, resulted in a verdict and judgment in favor of the plaintiff.

When we can see, from all the evidence, the right is so clearly with the successful party that the same verdict must necessarily have been rendered had the jury been correctly instructed on the law, our practice is to decline to reverse and remand for error in the instructions alone; but when the right of the successful party is not clear, and we are of opinion there is error in the instructions which may have influenced the jury in determining their verdict, there must be a reversal that another jury may pass on the issues under proper instructions.

In the record before us there is evidence showing that the plaintiff's intestate was guilty of negligence contributing to the injury which resulted in his death, and on account of which the suit is brought. He was, at the time, riding in a wagon, drawn by a pair of mules which seem to have been entirely under his control. He was familiar with the crossing, and the train was on regular time. The wagon road on which he was traveling, after running parallel and not far distant from the railroad track, turns, at a point about four rods distant from the track, and crosses it nearly at right angles. At and from the point where the wagon road turns to cross the railroad track, a train can be plainly seen for a distance sufficient to enable a person to check an ordinary team before passing on the track. The intestate did not look in the direction from which the train was coming, but kept his head averted, looking in an opposite direction, apparently at some persons who were driving hogs, and, without checking or attempting to check his team, and thus drove on the track and was struck by the advancing engine. So far as we have been able to discover, there was no controversy in this respect. His conduct, therefore, was clearly and unquestionably negligent. *Ch. & A. R. R. Co.* v. *Jacobs*, 63 Ill. 178; *St. L. A. & T. H. R. R. Co.* v. *Manly*, 58 id. 300; *T. W. & W. R. R. Co.* v. *Jones*, 76 id. 311; *C. B. & Q. R. R. Co.* v. *Lee, Admx.*, 68 id. 576. The only question, then, was whether the defendant was guilty of a de-

gree of negligence in comparison with which this negligence of the intestate was slight. This was to be determined from the evidence alone. There was no room to indulge in presumptions of what the intestate did or did not do, for his acts were clearly and fully in proof before the jury. Nevertheless, the court, by the fifth instruction given at the instance of the plaintiff, told the jury:

"The law presumes the deceased, in approaching the mill crossing, exercised proper care and prudence; and, unless the jury believe from the evidence that the deceased did not exercise care and prudence in approaching said crossing, he cannot be regarded as guilty of negligence."

It may be, if there had been simply evidence of the defendant's negligence resulting in the injury complained of, and no evidence of what the intestate's conduct was, this instruction would have been unobjectionable. But in view of the evidence as it was, the tendency of the instruction was to mislead, and we doubt not it did mislead the jury. They must have understood it applied to the evidence before them, and, notwithstanding there was clear proof of the plaintiff's negligence, still it must be considered with reference to the legal presumption that he was not negligent. When there is clear and incontestable proof of a fact, no presumptions can be indulged except such as arise from the proof. How much, or whether any evidence was sufficient, in the estimation of the jury, to overcome this legal presumption that the intestate was not negligent, under the peculiar form of the instruction, can, of course, only be conjectured. It may, however, be inferred, from their finding, that the presumption was of controlling importance, for it is difficult otherwise to reconcile the verdict with the evidence.

The instruction should have been refused, and the giving of it was error.

The defendant requested, and the court instructed the jury to find specially, in answer to the following interrogatories:

"*Int.* 1. In what particulars were the servants of the defend-

ant guilty of negligence in causing the death of Matthew B. Van Patten?

"*Int.* 2. At what rate of speed was the train which caused the death of said Matthew B. Van Patten moving at the time of the accident?

"*Int.* 3. Could the said Matthew B. Van Patten, from his position on the road at the point where the same turns out of the public road westward to the place of the accident as indicated on the map shown in the evidence, and from that point until he reached the railroad track, have seen the approaching train; if so, for what distance could he have so seen the same?

"*Int.* 4. Did the said Matthew B. Van Patten at any time before the accident occurred, and while the train that caused his death was within sight, look in the direction of said train as it approached; if so, at what point did he so look?"

The court then, of its own motion, and against the defendants' objection, remarked to the jury that if they were unable to render a special verdict in answer to the interrogatories, because of the uncertainty of the evidence, they could so report in the way of a special verdict.

The jury, with their general verdict, returned the following special verdict:

"*First.* We, the jury, find the greatest negligence on the part of the defendant's servants, in causing the death of Matthew B. Van Patten.

"*Second.* In not giving the proper signals.

"*Third.* In running at an unusual rate of speed."

The defendant objected to receiving the verdict, but the court overruled the objection and gave judgment on the general verdict, for the plaintiff.

It was provided by the fifty-first section of the Practice act, in force July 1, 1872, "The court may, at the request of either party, require the jury to render a special verdict upon any fact or facts in issue in the cause, which verdict shall be entered of record," etc. When the special finding of fact is inconsistent

with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

When the court exercised its discretion and instructed the jury to find specially in answer to the interrogatories, we think its power in that respect was exhausted, and that it was then the duty of the jury to obey the instruction. By subsequently informing them that if they were unable to answer the interrogatories, because of the uncertainty of the evidence, they might so report, etc., the jury were made to understand that, in the opinion of the court, there was uncertainty in the evidence upon the points presented by the interrogatories, and, also, that, although the evidence was too uncertain to enable them to specifically answer the interrogatories, they might, nevertheless, be able to return a general verdict. We think the tendency of this was to mislead the jury. The interrogatories embrace the vital issues in the case. Unless the jury were able to find that the answers to them were unfavorable to the defendant, their verdict should have been for the defendant. If no instruction to find specially in answer to these interrogatories had been given, it would still have been the duty of the jury to have believed from the evidence, before they returned a verdict for the plaintiff, that the defendant was guilty of negligence which caused the injury to the intestate; that the intestate was not guilty of contributive negligence, or, if guilty of such negligence, that it was slight and that of the defendant gross when compared with each other. It is idle to say a jury might intelligently return a general finding embracing these issues, and yet, by reason of the uncertainty of the evidence, not be able to answer the interrogatories.

The special findings, both in omitting to make answer in reference to the negligence of the intestate, and in their phraseology, show that the jury acted upon an incorrect understanding of the law applicable to the case. They find *the defendant was guilty of the greatest negligence* in causing the intestate's death, in not giving the proper signal, and in running at an unusual rate of speed. This was not sufficient to

authorize the general verdict. If the comparison was with reference to other acts of the defendant, supposed to be negligent, it was immaterial. If it was with reference to the conduct of the intestate, as is most reasonable to infer, then it afforded no basis for the judgment, since we have frequently held the mere fact that the defendant's negligence is greater than that of the injured party, when he is guilty of contributive negligence, does not authorize a recovery.

The judgment is reversed and the cause remanded.

Judgment reversed.

LETITIA S. BALDWIN *et al.*
v.
ALEXANDER POOL.

1. PURCHASER IN POSSESSION — *of his rights.* Where land is sold and *in possession under* a contract to convey upon the payment of the purchase money, executed, and the purchaser let into possession, the purchaser is in equity the owner, subject only to the lien of the seller for the unpaid purchase money, and has a right to the free use and enjoyment of the rents, issues and profits, so long as he is not in default under the contract.

2. A vendor of land having let a purchaser into possession under a contract to convey, cannot interfere with one having a privilege from such purchaser in the enjoyment thereof, where there is no default under the contract of purchase, and no lessening of the security for the purchase money occasioned thereby.

APPEAL from the Circuit Court of Peoria county; the Hon. JOSEPH W. COCHRANE, Judge, presiding.

Messrs. H. M. & S. D. WEAD, for the appellants.

Messrs. STARR & CONGER, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in chancery, filed by Letitia S. Baldwin and Thomas Baldwin, her husband, in the circuit court of Peoria

county, against Alexander F. Pool to enjoin him from digging a raceway and building a dam on land claimed to be owned by complainants.

The defendant, Pool, answered the bill, and exceptions were filed to the answer; the court overruled the exceptions, and complainants filed their replication.

The defendant filed a cross-bill, to which complainants demurred, which the court overruled; complainants thereupon answered the cross-bill, to which a replication was filed.

Proofs having been taken before the master, the court, upon hearing the cause, entered a decree dissolving the injunction and dismissing the bill. The complainants bring the record here by appeal.

It appears from the record that on the 1st day of March, 1873, the appellant Letitia S. Baldwin, being the owner of a certain tract of land, containing two hundred acres, sold the same to Mahala Thurston for $7,000. Two thousand dollars of the purchase money was paid down, and promissory notes were given for the deferred payments, payable in installments. A bond for a deed was executed and delivered to Mahala Thurston, providing that, upon the payment of the balance of the purchase money at certain specified times, the appellants would convey the premises by general warranty deed of conveyance. Mahala Thurston, upon receiving the bond for a conveyance of the land, was let into possession under the purchase, and while she was in possession and in no respect in default under the contract, and on the 29th day of June, 1873, she conveyed, by an instrument in writing, to the defendant, Pool, the privilege or right to build a low dam across the creek on one corner of the land, to draw off the water in a mill-race to his mill; at the same time Pool executed a contract not to flood the adjoining lands.

In the month of September, after this right was conveyed to Pool, Mahala Thurston sold her contract of purchase which she had obtained of complainants to one William Baldwin, and delivered over her contract to him and possession of the land, he

having notice of the purchase made by Pool; at the same time she delivered Baldwin the contract Pool had given her not to flood the adjoining lands.

Pool commenced work some time in June, 1873, on the land under the right granted him by Mahala Thurston, and prosecuted the work contemplated in the instrument of writing he had obtained until he was enjoined by a writ issued upon the filing of this bill.

The only question which we deem it necessary to consider is, whether the final decree dissolving the injunction and dismissing the bill was proper, under the evidence disclosed by the record before us.

It is neither claimed nor pretended by the complainants that Mahala Thurston, or Wm. Baldwin, her assignee of the contract of purchase, who assumed the payment of the balance of the purchase money, is insolvent, nor is there any claim that the balance of the purchase money will not be paid, and the land likely to fall back to complainants on account of default in payment.

Neither is it pretended that the acts done or to be done by the defendant, Pool, on the land will in the least cause an irreparable injury, or in any manner lessen or impair the security of complainants for the balance of the purchase money.

Complainants, as we understand their position, predicate the right to maintain their bill solely upon the ground that they are the owners of the property, and that the defendant has no right to go upon their property and construct a dam across the creek and make the mill-race in the bill described.

The main question, then, to be considered is, what were the rights of the complainants and Mahala Thurston in regard to the lands sold after the sale and while the purchaser was in possession under the contract? The complainants held the naked legal title, while the equity was in the purchaser. She was, in equity, the owner, subject to the lien of complainants for the balance of the unpaid purchase money. She was not a mere tenant at will, as is insisted by appellants. The com-

plainants having sold Mahala Thurston the lands, and she having been let into possession under her contract of purchase, she had the right to the free use and enjoyment of all the rents, issues and profits thereof without hindrance from the complainants so long as she was not in default under the contract; had the complainants invaded the possession of the premises they would have been trespassers. In *Smith* v. *Price*, 42 Ill. 399, where land had been sold under a contract and the purchaser let into possession, and the vendor went upon the premises and removed young trees and ornamental shrubs, in an action of trespass by the purchaser this court said: "The defendant had no right of entry, and his entry was a trespass, and he is liable for all injuries done to the premises, which was in fact the property of the plaintiff, subject to the lien of the defendant for the unpaid purchase money." See, also, *Stow* v. *Russell*, 36 Ill. 23.

We are at a loss to perceive upon what principle complainants can object when no default in payment has occurred, and the security for the payment of the purchase money has in no manner been lessened or impaired.

Mahala Thurston being the equitable owner of the property, her interest was such that it could have been sold upon execution. She could mortgage it for the payment of her debts. She could sell or create a privilege or easement upon any part of the premises which would be valid and binding, but liable to be defeated should there be a failure to pay the balance of the purchase money according to the terms and conditions of the contract of purchase. *Baker* v. *Bishop Hill Colony*, 45 Ill. 264; *Lombard* v. *The Chicago Sinai Congregation*, 64 Ill. 477.

The contract, therefore, which the defendant obtained of Mahala Thurston under the facts and circumstances of this case we regard as a sufficient justification as against the acts charged in the complainants' bill; its validity in the future will, however, depend upon whether there shall be a faithful compliance with the terms and conditions of the contract of sale

on the part of the purchaser, Mahala Thurston, and her assignee.

The decree of the circuit court will be affirmed.

Decree affirmed.

TOWN OF DORR
v.
TOWN OF SENECA.

1. PAUPERS — *where chargeable.* A person who goes into a county or town and makes no arrangement for a home, and who has no home or fixed actual residence, but hires out and is employed by one or more persons, and so continues for six months, and then becomes a pauper, comes within the second class of persons named in the 15th section of the Pauper act of 1845, and is a charge upon such town or county.

2. RESIDENCE — *actual and apparent.* Actual residence is determined by intention and acts, whilst apparent residence consists of acts without intention coupled with them.

3. A person being unmarried and employed away from his former home, without any intention of returning, or of making the place where employed his actual, fixed and permanent residence, has no actual place of residence, but he has a residence at the place of such employment within the meaning of section 15 of the Pauper law of 1845.

4. EVIDENCE — *to prove residence of pauper.* In a suit where the question is as to the place of residence of a pauper, under the act of 1845, it is not improper to prove the statements of the pauper as to where she considered her home previous to the time she became a town charge.

5. Nor is it error in such case to prove what was said by the brothers-in-law of the pauper, in reference to their making a bargain for her wages with those who employed her, as tending to show the relation of the parties, and whether the brothers-in-law regarded their houses as her home.

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

Messrs. SLAVIN & SMITH, for the appellant.

Messrs. COON & CURTIS, for the appellee.

Opinion of the Court.

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

This was an action brought by the town of Dorr against the town of Seneca, to recover for the expense of keeping a pauper claimed to be chargeable to the latter. A trial was had by the court and a jury, resulting in a judgment in favor of the town of Seneca, from which this appeal is prosecuted.

It is first urged that the court below erred in the admission of evidence. The main question in the case was, as to the residence of the pauper at the time and for the preceding six months to her becoming a town charge. This being the question, it was not improper to prove her statements as to where she considered her home previous to the time she became a town charge. Nor was it error to prove what was said by her brothers-in-law in reference to their making a bargain for her wages with those who employed her from the time she came to the country. It tended to show the relation of the parties to each other, and whether the brothers-in-law regarded their houses as her home. But even if it did not, still it could not have misled the jury in their finding.

It is next urged that the finding is not supported by the evidence in the case. We think it tends strongly to prove that the pauper regarded Albright's as her home. She left her child there and paid its board from her earnings, from her arrival in this country until the commencement of this suit. She left a bed there in like manner, and it was stipulated that the persons should bring her there or to Kneebush's, who lived near to Albright's, as often as once in four weeks, they imposing the condition when bargaining for hiring her to different persons, and she called Albright's her home, and had contracted with him to board her when she was out of employment.

Opposed to this is the fact that she hired out for two years and nine months before she became a charge, with persons residing in the town of Seneca; and the two brothers-in-law testify that she had no home with them, or, in fact, at any place

But they evidently swore as to their conclusions as to what constituted a home, and not to facts from which a home might be inferred. It is apparent that it was understood that when out of employment she would return to Albright's, and remain until she could again obtain work. It may be she had no such contract as could be enforced, but such was the arrangement and understanding among the parties, and the evidence was sufficient to warrant the jury in finding that she and Albright understood and intended that his house was her home, when she was out of employment.

But exceptions are taken to the instructions given for the defendant. To determine whether they are correct involves the construction of the fifteenth section of chapter 80, R. S. 1845, entitled "Paupers." That section is this: "The term 'residence,' mentioned in this chapter, shall be taken and considered to mean the actual residence of the party, or the place where he or she was employed; or, in case he or she was in no employment, then it shall be considered and held to be the place where he made it his or her home." The first section of the amendatory act of 1861 provides that any person becoming chargeable as a pauper in this State shall be chargeable as such in the county in which he or she resided at the commencement of six months immediately preceding his becoming so chargeable.

The fifteenth section seems to have provided for three different conditions of residence. The first is where the pauper has a fixed, well-known, permanent place of abode. The second is where such person has no such abode, but has been employed by some one else; and the third is where the person has no fixed permanent place of abode, nor has had any employment as specified, when the place the party made his or her home is regarded the place of residence, and the place where chargeable. In each of these three cases, the status, or condition specified by the statute, must have existed at the commencement of the six months before the party became chargeable.

We are now brought to consider the question as to which of the three classes made by this statute this pauper belongs. She evidently does not to the last, but must to either the first or second class. Did she, according to the first clause, have a permanent, fixed place of abode, or residence, at Albright's? She, no doubt, left Germany with the fixed purpose of reaching Kneebush's, in the town of Dorr. She arrived there, and, as far as her intention and acts could do so, with a single woman, that undeniably became her home for a time. She had no other, nor did she then or ever afterwards claim any other. She made an arrangement, intended to be permanent, that Albright's should be her home when out of employment. Nor is there any evidence that this arrangement was ever changed. She always spoke of Albright's or Kneebush's as her home.

She left her child and her little property at Albright's, and it was never removed from the town, and only temporarily to Kneebush's on one occasion. She, in pursuance to her agreement, paid him two dollars a week for her board at his house, during the time she was out of employment, and boarded with him. This evidence tended strongly to show that Albright's was the place of her actual and permanent residence, and fully warranted the jury in finding that it was, and that the town of Dorr was liable for her support.

Where a person comes into a county or town, and makes no arrangement for a home, but hires out and is employed by one or more persons, and such a person has no home or fixed actual residence, such person falls within the second class of persons fixed by the 15th section of the pauper act.

It is of frequent occurrence that persons hire for wages constantly away from their father's house, and yet they and all others know that their actual residence is with their father, although they as seldom return to their father's as did the pauper in this case return to Albright's. Nor do such persons usually do more, if even as much, to retain such actual residence as this pauper did. And yet they vote and exercise all

the rights of residents and citizens in the municipal division in which the father resides, and their right to do so is never challenged or doubted. Persons frequently leave their homes for years, intending to return, engage in business abroad, or find employment, and acquire an apparent new residence, and yet their actual residence is their former home. Thus the statute intended to make a distinction between the actual and the apparent residence of paupers. Although the apparent residence of this pauper was in the town of Seneca, the evidence warranted the jury in finding her actual residence in the town of Dorr.

Actual residence is determined by intention and acts, whilst apparent residence consists of acts without intention coupled with them. A person being unmarried and employed away from his former home, without any intention of returning, or of making the place where employed his actual, fixed and permanent residence, has no actual place of residence, but has an apparent or temporary residence at the place of such employment, and has a residence at the place of employment under the second class of the statute.

In this view of the statute the court below committed no error in giving the instruction asked by defendant. Although they may not be literally accurate, they announce correct legal propositions, and could not have misled the jury in finding their verdict.

It then follows that the instructions given were proper, and we perceive no error for which the judgment should be reversed, and the same is affirmed.

Judgment affirmed.

THE BANK OF CHICAGO

v.

CHARLES J. HULL.

1. PRACTICE — *to require affidavit of merits from defendant.* The statute does not require the affidavit accompanying the plaintiff's declaration to be made by the plaintiff. If an affidavit is filed by any one showing the nature of the plaintiff's demand and the amount due, the defendant is required to file an affidavit of merits with his pleas.

2. SAME — *bill of particulars.* Where the plaintiff, in a suit against a bank for a balance of deposit, attaches to his affidavit the bank-book containing the entries made by the bank, and showing the balance due, this will be a bill of particulars, notwithstanding its being sworn to, so as to prevent a continuance.

3. SAME — *striking plea without affidavit from files.* Where the statute is complied with by the plaintiff, if the defendant files a plea without affidavit of merits, it is proper to strike the same from the files.

APPEAL from the Circuit Court of Cook county; the Hon. LAMBERT TREE, Judge, presiding.

Messrs. SHUFELDT, BALL & WESTOVER, for the appellant.

Messrs. CHASE & CROOKER, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

There is nothing in the points made by appellant on this record. The proceedings show full compliance by the plaintiff below with the Practice act. The declaration was accompanied by an affidavit showing the nature of plaintiff's demand and the amount due him, and to the affidavit he attached the bank-book, written up by the defendants, containing their own entries, and showing from their own figures the balance due the plaintiff. This was a full "bill of particulars," and none the less so, by being sworn to.

The statute (sec. 36) does not require the affidavit to be made by the plaintiff himself. He is required to file an affida-

vit simply showing the nature of his demand and the amount due. There was no ground for a continuance.

The statute having been fully complied with by the plaintiff, it was incumbent on the defendants to accompany their plea with an affidavit of merits. Having no meritorious defense, no affidavit of merits was made, and the court struck their plea of the general issue from the files, all which was proper, and in strict pursuance of the statute, and the judgment is affirmed.

Judgment affirmed.

MARY E. STOLZ *et al.*

v.

HENRY DRURY.

NEW TRIAL *in ejectment, under the statute.* When a motion is made by a party for a new trial, in open court, on the same day a judgment is rendered in an ejectment suit, and he pays all the costs within two days thereafter, and during the same term of court, he has done all he is required to do to entitle him to a new trial under the statute, and the court has power to vacate the judgment and award a new trial in such case, even after the expiration of the period limited by the statute, and should do so at the request of the party.

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

Mr. CHARLES KELLUM, for the appellants.

Mr. R. L. DIVINE, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The statute in force at the time this cause was commenced, and under which appellants claim a new trial as a matter of right, provides, the court in which such judgment shall be ren

dered, at any time within one year thereafter, on the application of the party against whom the same was rendered, upon payment of all costs and damages shall vacate such judgment, and grant a new trial.

It is not controverted a motion was made for a new trial, under this statute, on the day the judgment in ejectment was rendered, and two days thereafter, during the same term of court, the defendant paid all the costs in said cause to the clerk of the court; but the objection taken is, the judgment was not in fact vacated by any order of the court within the period limited by the statute.

The exact point urged by counsel was decided by this court against the position assumed, in the case of *Myers* v. *Phillips*, 68 Ill. 269. In that case all costs had been paid and a motion for a new trial entered in open court before the expiration of one year, but the judgment was not, in fact, vacated by any action of the court. It was insisted, as in the case at bar, that after the expiration of the period limited by the statute the court had no jurisdiction to vacate the judgment and grant a new trial. But, it was held, the defendant, having made his application and paid the costs within one year, had substantially complied with the requirements of the statute, and was entitled to have the judgment vacated and a new trial granted. Here, the defendant made his application in open court, as in that case, and paid the costs within one year after the rendition of the judgment. It was, perhaps, no fault of his, the court took no formal action on the motion to set aside the judgment. The defendant may have had no power sooner to move the court to action in the premises. The motion to vacate the judgment was made at the earliest moment possible, and the costs paid within two days thereafter. This was all the law required the defendant to do to obtain his new trial. More than this he could not do, except to respectfully call the attention of the court to the fact that such motion had been made and the costs paid.

The court and the parties, however, treated the judgment at

the February term, 1873, as having been previously vacated, for the court at that time entertained a motion, without any objection on the part of appellee that the cause was not then pending, to substitute appellants for the nominal defendant, which was done.

The decisions cited by counsel in this court are not in conflict with the rule here announced. In *Emmons* v. *Bishop*, 14 Ill. 152, the costs had been paid within one year after the rendition of the judgment, and a petition for a new trial filed with the clerk. It was held that this was not sufficient, but that it was imperative the application should be made to the court within the statutory period. No application having been made, it was not necessary for the court to decide he must obtain a new trial within a year.

The point made in this case, and in *Myers* v. *Phillips*, *supra*, was not raised or decided in *Gibson* v. *Manly*, 15 Ill. 140, or in *Rees* v. *The City of Chicago*, 40 id. 107. Those cases announced the correct doctrine on the facts as presented by the records, but are not analogous cases with the one we are considering. They are not authorities against the views stated in this opinion.

The court erred in not granting a new trial to appellants under the statute, and in not entertaining the motion for a change of venue, for which the judgment must be reversed and the cause remanded.

Judgment reversed.

NICOLAUS AMBRE

v.

MICHAEL WEISHAAR.

1. WILL — *attestation — what is, in the presence of the testator.* If the witnesses to a will, while signing their names thereto, as such witnesses are in such a place that the testator can see them if he chooses, they are

to be regarded as in his *presence*, within the meaning of the statute; and it is not necessary that they shall be in the same room with the testator, or that he shall actually see them sign.

2. Where a will was drawn and witnesses sent for at the request of a testator, and after signing by him at his request, the witnesses went from the bedroom where he was, into a dining-room to attest the same, on account of the want of conveniences for doing so in the bedroom, and he knew that the attestation was going on in the dining-room, and approved it, and from the position he occupied in the bed could have seen the witnesses while signing: *Held*, that the will was attested in the presence of the testator.

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

This was a bill in chancery, by Michael Weishaar against Nicolaus Ambre, to set aside the will of Barbara Ambre. The opinion states the material facts.

Messrs. WILSON & PERRY, for the appellant.

Mr. WM. HOPKINS, and Mr. ARNO VOSS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in chancery to contest the validity of the will of Barbara Ambre, made on the 13th day of September, 1869, and which had been admitted to probate in the county court of Cook county.

The court below, on hearing without a jury, decreed against the will and set the same aside.

On this appeal from the decree, the only real question which arises upon the record is, whether the will was attested in the *presence* of Barbara Ambre.

The attestation did not take place in the same room where she was. Charles Sauter, one of the two attesting witnesses, and who drew the will, testifies that after it was signed by Mrs. Ambre he looked for some place in the bedroom where the witnesses could sign, and finding none, they, at the request of Mrs. Ambre, went into the dining-room, to witness the will

there; that they went to the front of the dining-room table, about the middle of it, and there signed their names to the will.

This table was thirteen feet distant from the head of the bed in the bedroom, where Mrs. Ambre lay, and stood about opposite the bedroom door, into the dining-room, a little to the left in going into the dining-room. The partition wall between the two rooms was eighteen inches thick. The passage way between the rooms was not at right angles with the partition wall, but inclined three inches to the left in going into the dining-room, thus increasing the facility of view from the bed to the table. The bed stood in the bedroom lengthwise with the entrance into the dining-room, with the head at the partition wall, about a foot from the door into the dining-room, and at the right in going into the dining-room. It was in evidence, that the door stood open at the time of the attestation; that Mrs. Ambre's position in bed was, that she was bolstered up at an angle of about forty-five degrees; that the bolstering brought her head and shoulders about one-third of the way down from the head of the bed; that at the time of her signing the will, she was raised, so that she sat upright in bed; that she remained in that position for some time afterward, and after the attesting witnesses had gone into the dining-room. As to her physical condition at the time, her attending physician testifies that her disease was erysipelas, terminating in gangrene of the right hand and arm; that he thought she could turn herself in bed, except that she could not move her right arm; that she could move her head one way and the other, nearly as well as anybody; that if she had desired to do so, he thought she could have turned in bed partly upon her right side.

Two witnesses, the physician and John Marx, testify that they were at this table in the dining-room at the time Mrs. Ambre signed the will; that they saw, from their position at the table, the group around her bed, and saw her, her arms and shoulders, and, as Marx testifies, her head. Margaret Rich,

the daughter of Mrs. Ambre, who was attending upon her, testifies that she stood behind the bed of Mrs. Ambre, and, from her position there, saw the attesting witnesses at the table, in the dining-room, while in the act of attesting the will. John Sauter, one of the attesting witnesses, and who drew the will as before named, who had been accustomed to draw wills for twenty years, and had been a justice of the peace for that length of time, testifies that he knew at the time that the witnesses must sign in the presence of the testatrix or the will would be invalid, and that before attesting the will, he looked around to see that the door between the rooms was open; saw that it was open and then attested the will; and says that a line drawn from Mrs. Ambre's head, as she lay in bed, would strike the table somewhere in the centre.

The physician states, that from where Mrs. Ambre lay at the time, by turning her head she could have seen the witnesses at the table in the dining-room while they were signing the will. The other witnesses named, also add their opinion that she could have so seen.

It is true, all this testimony is not uncontradicted. There is some testimony that the door was closed at the time. But the whole testimony leaves no doubt upon our minds that the door was open. There is conflicting testimony as to Mrs. Ambre's position in bed, as, whether she was lying down or sitting up.

But the chief conflict of testimony is, in the opinions of witnesses, as to whether Mrs. Ambre could have seen the attesting witnesses subscribe their names. A majority in number perhaps of the witnesses testify that she could not.

But there is this important distinction between the opinions of the two classes of witnesses.

The opinions of the witnesses on the part of appellee do not seem to be based upon facts, upon actual observation made at the time, as to the ability of seeing from the position Mrs. Ambre was in, to that of the attesting witnesses at the table; whereas, the opinions of the witnesses for appellant were based upon the fact that they themselves actually did, at the

time, see and observe from the one position to the other, and we regard the latter witnesses as of a more reliable character than the former.

Without further dwelling upon this conflicting testimony, we will say that, after a consideration of the entire testimony and the surrounding circumstances, we can come to no other conclusion than that the testatrix was in such a situation that she might have seen the attestation.

The cases are very numerous, and not entirely harmonious, in regard to the point what will constitute a sufficient presence of the testator at the time of the attestation by the witnesses.

It is held not to be necessary that the testator and the witnesses should be in the same room, or the same house, at the time of the attestation, in order to constitute actual presence, within the statute. And an attestation taking place even in the same room, if done in a clandestine and fraudulent way, will not be regarded as an attestation in the presence of the testator. It is not necessary that the testator should actually see the witnesses signing. In *Doe* v. *Manifold*, 1 M. & S. 294, Lord ELLENBOROUGH, Ch. J., lays down the rule, that it is "not necessary the devisor should actually see. In favor of attestation, it is presumed if he might see he did see." And when the devisor "cannot by possibility see the act doing, that is out of his presence."

In *Dewey* v. *Dewey*, 1 Metc. 352, the court, on this subject, say: So the provision that the instrument shall be attested by three witnesses, "in the presence" of the testator, has been liberally construed, it being held sufficient evidence of the presence of the testator, if the facts show a possibility of his seeing the witnesses subscribe their names, unless controlled by other evidence, showing that in fact he did not see them, and that, therefore, it was not done in his presence. Redfield, in his treatise on Wills, 248, § 7, in remarking upon the latter portion of the above, as to controlling evidence, says: "But the English cases treat the presumption of the execution being in the presence of the testator, if so that he might have observed

it, as one not liable to be rebutted by evidence that he did not in fact see it witnessed." We should be quite unwilling to allow evidence that the testator did not in fact see the will witnessed, to have any controlling influence as to the attestation being in his presence. We should regard such a rule one that would be productive of mischief, and in very many cases wrongfully defeat the disposition of property by will. In *Hagan* v. *Grosvenor*, 10 Metc. 56, the court say: "The decisions have been various, but we consider the law as settled, * * * and that all which is required is that the testator shall see their (the witnesses') attestation, or be in a situation where he can see it." We regard it as sufficiently established by the authorities, that if the witnesses to a will, while signing their names thereto as such witnesses, are in such a place that the testator can see them if he chooses, they are to be regarded as in his *presence*, within the meaning of the statute; that it is not necessary that they should be in the same room with the testator, or that he should actually see them sign. In support of the principles above expressed, in addition to the authorities already cited, reference may be had to the following: 1 Redfield on Wills, 245, *et seq.*; *Shires* v. *Glasscock*, 2 Salk. 688; *Davy* v. *Smith*, 3 id. 395; *Todd* v. *Winchelsea*, 2 Car. & P. 488; *Hill* v. *Barge*, 12 Ala. 695; *Nock* v. *Nock*, 10 Gratt. 115; *Lamb* v. *Girtman*, 26 Ga. 629; *Wright* v. *Lewis*, 5 Rich. 216; *Watson* v. *Pipes*, 32 Miss. 468; *McElfresh* v. *Guard*, 32 Ind. 412.

Considering that Mrs. Ambre, at the time, was possessed of entire consciousness; that it was at her own request that the witnesses went from the bedroom into the dining-room to attest the will, on account of the want of conveniences for doing so in the bedroom; that she knew the attestation was going on in the dining-room, and approved it; and, in view of all the other evidence under the legal rules affecting it, we do not hesitate to say, that the proof is very satisfactory that the will was attested in the presence of the testatrix.

As to the question which has been adverted to, of the *effect*

of the will to pass any portion of the property devised, of course that does not come up in this proceeding.

The decree of the court below will be reversed, and the cause remanded for further proceedings.

Decree reversed.

MARY E. JONES

v.

GEORGE V. BYRD.

APPEARANCE — *after default for the purpose of making motion to set aside default, is not a general appearance.* An appearance and the entry of a motion by a defendant in an attachment suit, who has not been personally served, to set aside a default rendered against him upon a notice by publication, is not such a general appearance as will authorize a personal judgment. If any judgment is authorized in such case, it is *in rem* only.

APPEAL from the Superior Court of Cook county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Messrs. HERBERT & QUICK, for the appellant.

Messrs. HUTCHINSON & WILLARD, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

We deem it necessary to notice but a single error assigned upon this record. Suit was commenced by attachment, and notice given to defendant by publication. There was no personal service on the defendant, but she appeared, after default, and moved to set it aside. Upon this the court rendered judgment that the "plaintiff have and recover of the defendant his damages, $463.65, in form aforesaid assessed, together with his costs and charges in this behalf expended, and have execution therefor.

The appearance and entry of the motion to set aside the default, did not constitute a general appearance and authorize a personal judgment. If any judgment was authorized, it should have been *in rem* only. *Klemm* v. *Dewes*, 28 Ill. 317.

The judgment is reversed and the cause remanded.

Judgment reversed.

FRANK PARMELEE
v.
ELIAS LOWITZ.

1. COMMON CARRIER — *what constitutes.* One who for hire carries passengers and their baggage, and also baggage alone, for all persons choosing to employ him, from, to, and between railroad depots and hotels, and other places in a city, is a common carrier of goods.

2. SAME — *of goods, liable for all losses not inevitable.* A common carrier of goods, who receives and undertakes to carry a trunk from a railroad depot to the owner's residence, is answerable for all losses, except such as are inevitable, that may occur whilst the trunk is in his possession, and until it is delivered to the owner.

3. A common carrier of goods who receives and undertakes to carry a trunk for one not a passenger with such carrier, is responsible for the delivery of the trunk and its contents, notwithstanding the contents consist of articles not usually carried as baggage, unless the owner has been guilty of some fraud or deception.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. JOHN LYLE KING, for the appellant.

Mr. ALLAN C. STORY, and Mr. RUFUS KING, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This is an appeal from a judgment rendered in the circuit court of Cook county, in favor of Elias Lowitz against Frank Parmelee, for the sum of $180.40.

It appears from the record, that in September, 1871, appellee was a passenger from New York to Chicago, on the Pittsburgh, Fort Wayne and Chicago railroad; that his baggage, consisting of a trunk, was checked from New York to Chicago. A short time before arriving at Chicago appellee delivered his check for the trunk to a servant of appellant, who received the trunk to be carried for hire from the depot to appellee's residence in Chicago. When the trunk was delivered to appellee, by the driver of appellant, it had been opened and a part of the contents abstracted. The loss of the goods occurred while the trunk was in the possession of the servants of appellant. Among the articles taken from the trunk were two patterns of women's dress goods — silks in the piece, purchased for plaintiff's wife and daughter, in New York. These were of the value of $111. Other articles lost were of the value of $69.40.

The appellant was the proprietor of a line of omnibus and baggage wagons, and engaged in carrying, for hire, passengers and their baggage, and also baggage alone, for all persons choosing to hire from, to, and between the various railroad depots and hotels, and different parts of the city in Chicago; that appellant had agents to solicit such business on all incoming trains. As is shown by this record, appellant was clearly a common carrier of goods as well as passengers, in the city of Chicago. *Parmelee* v. *McNulty*, 19 Ill. 556.

In order to determine whether the finding of the court upon the evidence was correct, it will be necessary to consider the duties and obligations of appellant as a common carrier of goods.

It is said by Kent, vol. 2, page 597: "The carrier for hire in a particular case, and not exercising the business of a common carrier, is only answerable for ordinary neglect, unless he by express contract assumes the risk of a *common carrier*. But if he be a *common carrier*, he is in the nature of an insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the excepted cases of the act of God, meaning inevitable accident, without the intervention of man, and public

enemies. This has been the settled rule of law for ages, and the rule is intended as a guard against fraud and collusion, and it is founded on the same broad principles of public policy and convenience which govern innkeepers."

Appellant, as a common carrier, received the trunk of appellee at the depot in Chicago, and agreed for a certain price to deliver it at the residence of appellee. The law required him to safely carry and deliver it with its contents. This he failed to do, but suffered a part of the contents of the trunk to be stolen while he was the custodian and insurer of the goods, and we are aware of no principle of law upon which he can escape the responsibility that attached to his undertaking as a common carrier.

It is, however, insisted by the counsel of appellant, that the dress goods taken from the trunk were not baggage such as is ordinarily carried by passengers, and, therefore, appellant was not liable for the loss of those articles. And in support of this position we are referred to authorities where passengers upon railway or steamboat lines, who paid simply the fare of a passenger, and had baggage checked and met with loss, could not recover for the loss of goods which were not strictly denominated baggage.

Had the goods been taken from the trunk while it was in the possession of the railroad company, and were this a suit against the company to recover for the loss, then the position assumed, and the authorities cited might be regarded with some force.

But the case under consideration is not at all similar to the cases cited by appellant in his brief. Appellee was not a passenger with Parmelee. He did not pay or contract for fare. The relation between carrier and passenger did not arise or exist between them. When the trunk was received no inquiry was made by appellant as to its contents, and so far as his liability was concerned, it was of no importance whether it contained baggage or merchandise.

Appellant had no greater right to be informed of the con

tents of the trunk, than a railroad company has to be informed of the precise contents of a box of merchandise which is received for shipment.

The common carrier is answerable for the loss of a box or parcel of goods, though he be ignorant of the contents, or though those contents be ever so valuable, unless he made a special acceptance. 2 Kent, 603.

This is the recognized rule, unless the owner of the goods has practiced a fraud or imposition upon the carrier by concealing the true value of the goods, and there is no pretense from this record, that any fraud, or deception, or concealment, was practiced by appellee.

The law prescribing the duties of appellant as a common carrier of goods, required him to safely carry and deliver the trunk and its contents to appellee, unless prevented by the act of God or the public enemies. This duty the record shows he failed to discharge, and he must be held responsible for the loss.

The judgment will be affirmed.

Judgment affirmed.

EDWARD R. ALLEN

v.

MICHAEL STENGER.

1. ASSUMPSIT — *when it lies for money had and received.* An action for money had and received will lie whenever a defendant has received money which in justice belongs to the plaintiff, and which he should, in justice and right, return to the plaintiff.

2. Where the mortgagor in a chattel mortgage sells the mortgaged property on a credit, the proceeds of which sale are to belong to the mortgagee when collected, and after the death of the mortgagor, his administrator collects the purchase money and deposits it with one who is at the time apprised of these facts, an action for money had and received will lie at the suit of the mortgagee against the party so receiving the money on deposit.

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

Messrs. BROWN & SOUTHWORTH, for the appellant.

Messrs. PARKS & LITTLE, for the appellee.

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

About the 12th day of October, 1869, appellee, to secure a debt owing him by Robert Groch, took from him a mortgage on about 1,000,000 brick. Groch, during his lifetime, sold a portion of the brick. Afterwards Groch died and his son was appointed administrator of his estate, and collected various sums of money, which was deposited with appellant. Subsequently the son died, and appellant was appointed administrator *de bonis non* of Groch's estate. Before appellant received the money from the administrator he was notified by appellee that the money for which the brick was sold belonged to him and he should claim it. A demand was made on appellant for the money before suit was brought. On a trial below, before the court and a jury, a verdict was found in favor of plaintiff, and after overruling a motion for a new trial, a judgment was rendered on the verdict, which defendant now seeks to reverse.

It is urged that appellee should look to the estate of the mortgagor for his money, and not to appellant. It appears that he received the money, knowing it to be the proceeds of the brick of appellee, or on which he had a lien and was to have the brick or the proceeds; that the brick had been sold by appellee's agent. Knowing these facts, and being notified by appellee that he should claim the money, we can hardly suppose that appellant would be so reckless as to report this money as a part of the assets of Groch's estate in his hands to be administered. If he so reported them, he did so with a full knowledge of the facts.

Was he, then, liable to pay the money to appellee? There is no pretense that the latter was not entitled to the brick or, when sold, to their proceeds. But the question is as to the remedy he shall pursue for its recovery. It may be a matter of doubt whether appellee could prove up his claim for the price of the brick sold by the mortgagor, when he did not receive the money, against the estate. The agent sold the brick of his principal on time, and died, and his administrator collects the money and pays it to appellant, who knows the facts and knows appellee claims the money as his. In what manner did this become the money of the estate, any more than had the administrator collected money due to any other person and deposited it with appellant, he knowing all of the facts? Had appellant received this money supposing it belonged to the estate, and without knowledge that it belonged to appellee, and had applied it to payment of the debts of the estate under the order of the probate court, he would have been manifestly protected, and appellee's only remedy would have been in the probate court for his claim as a trust fund, because, by failing to proceed or give notice of his claim in time to prevent appellant from applying it as assets, appellee would have been estopped from looking to appellant for it.

Then does an action lie for money had to the use of appellee. Assumpsit always lies to recover money due on simple contract. And this kind of equitable action to recover back money which ought not in justice to be kept is very beneficial and, therefore, much encouraged. It lies only for money which, *ex equo et bono*, the defendant ought to refund. Chit. Contr. 474. When, therefore, according to this rule, one person obtains the money of another, which it is inequitable or unjust for him to retain, the person entitled to it may maintain an action for money had and received for its recovery. And it is not necessary that there should be an express promise, as the law implies a promise. The scope of the action has been enlarged until it embraces a great variety of cases, the usual test being, does the money, in justice, belong to the plaintiff, and has the de-

fendant received the money, and should he in justice and right return it to plaintiff? These facts create a privity, and the law implies the promise to pay.

Tested by these rules, we have no hesitation in saying the action lies in this case. Appellant received money for appellee's brick sold by his agent, which was known to him when it came to his hands. It then follows that appellant has money which justly belongs to appellee, and it is inequitable for appellant to hold it, and hence the right to recover. The judgment of the court below must be affirmed.

Judgment affirmed.

ROBERT STUART

v.

SOLOMON MCKICHAN.

1. BOOKS OF ACCOUNT—*presumed to be correct, as between partners.* Partnership books of account are presumed to contain a true history of the business and a true record of the transactions between the partners. In the absence of proof to the contrary, reliance is properly placed on such books in stating the partnership account.

2. PARTNERSHIP—*right of partner to credit for interest paid.* Where one is taken as a partner in a business on account of his financial credit, and to raise money to prosecute the business, and he is credited by the book-keeper for the interest paid by him in procuring loans, and the other partner having examined the books, makes no objection to such entries, they may properly be allowed in stating the partnership account.

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

MR. T. S. DICKSON, for the appellant.

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

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from a decision of the Superior Court of Cook county, rendered in a suit in chancery, wherein Solomon McKichan was complainant, and Robert Stuart was defendant.

The important questions made in that court arose upon exceptions to the master's report, which was confirmed with the exception of one item, and a decree accordingly.

The propriety of this decree is questioned by Stuart, who brings the case here, and insists that his exceptions should have been allowed. We do not propose to consider all the exceptions, but those only we deem important. Nor do we propose to go into the minutiæ of the testimony, but will consider such facts only as appear prominent in the record.

The prominent facts are these: In the summer of 1865, and up to the autumn of 1869, these parties had several contracts to pave certain streets in Chicago. The first contract was between appellant and appellee, and one Andrew Gray, as copartners, in 1865. Soon after it was entered into, Gray disposed of his interest to appellant and appellee, so that they became equal partners, each entitled to one-half the profits. In 1869 it was claimed by appellee that appellant had caused an estimate to be taken on the work done, which he appropriated to his own use. Appellee thereupon filed a bill to enjoin appellant from negotiating this voucher, whereupon appellant filed his bill to investigate all the partnership transactions from 1865 up to 1869, and for an account and a dissolution of the partnership. It was then agreed that the two suits should be consolidated, and such decision as might be rendered should settle both cases.

A large amount of testimony was taken, and the cause heard and referred to a master to state an account. This was not long prior to the fire of October, 1871. Nearly all the papers, files and vouchers were destroyed by that fire. Since the fire, the files have been restored, and testimony retaken, and the cause again referred to the master to state an account.

The master in due time made his report, to which appellant

filed twenty exceptions. As we have said, the court disallowed all the exceptions, save as to one item, and confirmed in all things else the report.

When the cause was before the master, the books of account and vouchers were produced before him, and before the court also, in considering the exceptions. Those books are presumed to contain a true history of the business, and a true record of the transactions between these partners. It would appear that appellant was to superintend the work on these contracts, and appellee to raise the means by which to carry them on, he being a man in high financial credit, and to keep the books and accounts of the firm. With the knowledge of appellant, one McDougal was placed in charge of the books, whose ability is not questioned, and through whose hands all the accounts and vouchers passed. There being no proof to the contrary, reliance is properly placed on the books so kept.

The first exception taken to the master's report is, that appellee charged and was allowed against the firm the interest and discounts he was required to pay for the use of the money he raised for the partnership. It is claimed by appellant that by the terms of the copartnership appellee was to raise the money necessary to carry out the contracts. It appears from the books kept by McDougal that the interest on moneys borrowed to carry on the work was charged to the firm in the account of "expenses." These books were open to the inspection of appellant at all times, and he knew from an examination of them from time to time that these charges were on the books, and he made no objection to them. It is in proof, also, by McDougal, the book-keeper, and by appellee, and by Gray, that it was expressly understood by the parties, and spoken about at the time the copartnership was formed, that the interest which would have to be paid on loans of money for the work was to be charged to the firm account as expenses. McDougal testifies he called appellant's attention to those charges for interest paid; that he looked over the book time and again with him to see the different entries and told him

the rate of interest the bankers were charging; that it was an understood thing at the beginning that the firm should pay interest on such moneys as appellee might borrow for the use of the firm. It would seem appellee was in the concern for the special purpose of raising money by his commercial credit. We think the court was fully warranted in disallowing this exception.

The next exception of importance is in disallowing certain payments on behalf of the firm for gravel and other material. Appellant testifies that he kept a memorandum book when on the street where work was being done, in which he would, from time to time, as he paid out money, enter the amounts in this memorandum book. It is proved, to our satisfaction, that for all these amounts he was duly credited by the book-keeper on the books of the firm. Of this there can be no doubt, and the proof is made still stronger by the fact that in 1871, while these suits were in progress, before the fire of that year, and when appellant's memory must be supposed to have been as clear as it was in 1873, when he testified, Alfred Spink was selected by himself as a very competent person to examine these books and to state an account, and to whom, as Spink testifies, appellant presented all the memoranda and accounts against the firm. None of these claims which he now seeks to recover were presented to Spink. Spink examined these books with great care, and found them correct, in the main, they showing appellant had been credited with all he then claimed. These claims were not thought of before the fire. We have examined the testimony carefully, and fail to see that the court below misunderstood it, or mistook its force. We think it fully establishes the fact that appellant received on the books of the firm all the credits to which he was entitled, and has no cause to complain of the decree.

Something is said about appellee appearing on the books as a large debtor to the firm. We understand this was so in ap-

pearance only, his share of the profits not having been credited to him at the time.

On the whole record, we are of opinion justice has been done, and we affirm the decree.

Decree affirmed.

WILLIAM B. FONVILLE *et al.*

v.

JAMES MONROE *et al.*

1. PRACTICE AND PLEADING — *variance between writ and declaration.* A variance between the writ and declaration is a matter pleadable in abatement, and where no attempt is made in the court below to avail of it, it cannot be assigned for error in this court.

2. It is not error to render a judgment in favor of a plaintiff named in the summons, although he is not named in the declaration, if no question is raised in the court below on the variance.

3. APPEARANCE — *what constitutes.* Where a defendant, not served with process, files a demurrer to a special count and the general issue to the common counts, and the demurrer is overruled and the plea stricken from the files, and defendant, afterward, on his own motion, obtains an extension of time to file a plea with an affidavit of merits, there is a full appearance, and a judgment against such defendant is not erroneous.

APPEAL from the Circuit Court of Kankakee county; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding.

Mr. S. R. MOORE, for the appellants.

Mr. G. S. ELDRIDGE, and Mr. HAMILTON K. WHEELER, for the appellees.

MR. JUSTICE SCOTT delivered the opinion of the Court:

The point is urged that the name of Charles D. Reed appears in the summons, as one of the plaintiffs, but not in the declaration, and because of the omission it is insisted it was

error to enter judgment in his favor, with the other plaintiffs. Objections of this character cannot be taken for the first time in this court. Variances between the writ and declaration are matters pleadable in abatement. No attempt was made to avail of the error in the court below. This not having been done, the alleged variances, if any exist, cannot now be assigned for error. Reed was a plaintiff in the suit, and the judgment in his favor, with the other plaintiffs, was proper. *Prince* v. *Lamb*, 1 Breese, 378.

Appellant Dunham was not served with process, and it is insisted, inasmuch as his plea was stricken from the files, there was no appearance, and, therefore, no judgment could be rendered against him.

Both defendants had filed the general issue to the common counts and a demurrer to the special count of the declaration. The demurrer was overruled, and the plea stricken from the files. Afterward, as appears from the record, the defendants, on their own motion, obtained an extension of time in which to file a plea with an affidavit of merits. This was a full appearance, and the judgment against both defendants was proper.

The other questions raised are answered by the opinion in *Fonville* v. *Sausser et al.*, 73 Ill. 451.

The judgment will be affirmed.

Judgment affirmed.

ALGERNON S. VAIL *et al.*

v.

JAMES MIX *et al.*

1. PRESCRIPTION — *easement or right to overflow land.* A right to overflow land, like easements in general, may be acquired by an uninterrupted and adverse enjoyment for twenty years, or for the period of time fixed by the statute of limitations for the right of entry upon lands.

Opinion of the Court.

2. INJUNCTION — *party precluded from, after long acquiescence.* Where the owners of land, which is overflowed by a dam, acquiesce in the erection of the dam, and permit the party erecting the same to make large expenditures in the same and in building and maintaining a mill, and suffer the dam to be kept up for twenty-four years, their acquiescence for so great a time will preclude them from enjoining the rebuilding and repair of a part of the dam carried away.

3. STATUTE CONSTRUED — *condemnation for mill.* The provision in the statute relating to mills and millers, which prohibits the erection of a dam, etc., which will injure the health of the neighborhood by the overflow of lands, has application only to proceedings had under that statute, and does not apply on bill for injunction to prevent the repair of a dam, long before erected.

4. INJUNCTION — *nuisance affecting public health.* For a threatened injury to the public health, as by the erection of a dam and the consequent overflow of lands, a court of equity will not interfere at the suit of a few private individuals, unless it be shown in the bill that their health is or will be directly affected by the nuisance.

APPEAL from the Circuit Court of Kankakee county; the Hon. N. J. PILLSBURY, Judge, presiding.

Mr. C. R. STARR, and Mr. W. F. SINGLETON, for the appellants.

Mr. S. R. MOORE, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill for an injunction, brought by Algernon S. Vail, Alfred Brown, David Lynds, and Enos Van Kirk, on the 26th day of June, 1874, in the Kankakee county circuit court, to restrain appellees from repairing the mill dam across the Kankakee river, at Momence, in Kankakee county. Upon the hearing of a motion to dissolve the temporary injunction which had been granted, upon bill, and answers, and affidavits filed therewith, the court below dissolved the injunction and dismissed the bill.

Three of the complainants, Vail, Brown and Lynds, take this appeal to reverse the decree.

The leading facts are as follows:

This mill power was established where it is now situated, prior to the year 1842. At the point where the dam is situated, there is an island in the river, which divides the river into two branches, known as the north branch and the south branch. Prior to 1842, a dam was built across the north branch, and this dam made power sufficient to run the mill until 1849, and run both a grist mill and a saw mill. This dam is maintained near the centre of the island, and no question is made concerning it. In 1849, the erection of the dam in question was commenced across the south branch, at the head of the island, about eighty rods above the dam across the north branch, and was finished in the spring of 1850.

These dams have been maintained permanently, and continuously up to the present time, excepting occasional breaks which were immediately repaired. In March, 1874, a portion of this dam, on the south branch, at the head of the island, went out. An undivided two-thirds part of this water power and mill privilege was purchased by George W. Cass, in 1870, which he now owns. He does not wish to have the dam repaired, being largely interested in lands above the dam affected by overflow. The owner of the remaining one-third interest was about to proceed in the work of repairing the dam, when this bill was filed and the temporary injunction obtained.

The bill alleges that the repair of the dam will cause the several lands of the complainants to be overflowed with water and damaged: those of Vail to the amount of $3,500; those of Brown, $1,800; those of Lynds, $4,000; those of Van Kirk, $5,000; that they never consented to the building of the dam; that their damages have never been assessed, or released by them; that the owner of the said undivided one-third interest is insolvent; that he threatens to enlarge and increase the dam for the production of increased water power; and the bill further charges that the health of the neighborhood will be injuriously affected by the repair of the dam, and prays that the defendants may be enjoined until they shall first have had

a jury empannelled to assess the damages of complainants, and until the jury so empannelled shall find that the erection of the dam will not affect injuriously the health of the neighborhood. The bill is filed in behalf of the complainants, and all others in like situation who shall come in and contribute to the expenses of the suit.

There is no proof of the allegation in the bill of the insolvency of the defendant, who was about to proceed and make the repair, but proof to the contrary. The charge of any intention to enlarge and increase the height of the dam is entirely disproved by the evidence. The proof shows the break in this dam to be about thirty feet; that the length of the dam is from two hundred and fifty to three hundred feet; that it is important for the safety of the remaining portion of the dam that the repairs be speedily made; that delay will endanger the carrying away and destruction of the entire dam, and that to rebuild it would involve an expense of from two to four thousand dollars, so that to stay the work of repairing this dam until the time prayed for would be to expose the owner of the mill property to the hazard of a large pecuniary loss.

The proofs make out a case of large damages to a great number of persons as likely to result from the overflowing of lands, to be caused by the erection of this dam, and much more so to other persons than the complainants; but none others have come in under the bill and become parties, and we can only consider the case of the complainants.

As respects the claim for damages to their lands, we are of opinion that their acquiescence in the maintenance of the dam has been for so long a time that they are not entitled to the interposition, by injunction, of a court of equity in their behalf. The dam has been maintained since 1850, some twenty-four years. The proofs show that during all this time Vail and Lynds have lived upon these lands they claim will be damaged, near the dam, and were cognizant of the building and maintenance of the dam, and of the overflowing of their lands caused thereby. Vail himself assisted in the building of

the dam. True, they testify that they did not consent, and that they claimed damages, and that they were promised they should be paid. But the fact remains that they did suffer this adverse use of their lands, by the backing of water upon them for this length of time, and the expenditure for the erection of the dam and mill to be incurred, without having their damages previously paid or ascertained. The lands of Brown, in addition to having been similarly affected for the same length of time, appear to have come to him some five or six years ago, in right of his wife, to whom, as the heir of one Robert Hill, the lands had descended; and that Hill, June 1, 1850, by his deed, conveyed to Chatfield, Strunk & Mix, the persons who built the dam, "All my (his) right, title and interest in or to the head of the island as may be in the northeast quarter of section 19, town 31, range 14, known as Mill Island; also sufficient ground and privilege adjoining a mill-dam to the east shore of the Kankakee river, at or near the section line dividing the southeast quarter of section 18 and the northeast fractional quarter of section 19, town 31, range 14, and sufficient ground on said east bank for the building of abutments and protection of said mill-dam." In answer to this, Brown merely shows that Hill had previously conveyed the northeast quarter of section 19 to one Samuel Hill. But the lands of Brown are the S. frac. S. W. ¼ section 17 and the frac. S. ½ S. E. ¼ section 18 in said township and range. And as we understand the second clause of the above grant, it was a grant of the privilege, by the ancestor owning the lands claimed by Brown, to erect this dam, and the fact of a previous conveyance having been made by Hill of the N. E. ¼ of 19, would not detract from the effect of the grant as respects these lands of Brown. As respects Brown, this grant of privilege seems to be a further ground to preclude him from claim for relief.

Van Kirk not having joined in the appeal, it is unnecessary to consider his case.

A right to overflow land may, like easements in general, be acquired by an uninterrupted and adverse enjoyment for

twenty years, or for the period of time, whatever it may be, limited by the statute of limitations for the right of entry upon land. Angell on Water Courses, § 372. Whether the acquiescence has been such in this case as to bar an action at law for damages, we need not decide. We are satisfied that it has been such as to justify the refusal of an injunction.

The claim for relief on the ground of a nuisance seems to be based mainly on provisions contained in the statute in regard to Mills and Millers, Revised Statutes 1874, providing a method for the ascertainment of the damages to lands in case of the erection, repair, or increase in height of a mill-dam, one provision being that "no such dam shall be erected, or increased in height, or maintained, when the health of the neighborhood will be injuriously affected thereby;" another, that "the jury which shall be empannelled to ascertain the damages shall also inquire whether the health of the neighborhood will be injuriously affected by the overflow of any land, and if they shall find that it will be so affected, the petition shall be dismissed."

So far as respects any proceeding under this statute, it would be subject to be defeated by the fact that the health of the neighborhood would be injuriously affected by the contemplated work. But these provisions do not control in case of a bill in chancery of this character.

For an injury to the public health, it would seem the proceeding, instead of being on the part of three or four individuals, should be on the part of a representative of the public, upon the information of the proper public officer. It is true, that it is laid down that in case of a public nuisance a court of equity will not only interfere, upon the information of the Attorney General, but also upon the application of private parties directly affected by the nuisance. 1 Story's Eq. Jur., § 924.

But there is no allegation in the bill, or proof whatever, that these appellants themselves ever have been, or will be, in any wise affected, as respects health, by reason of the dam, the allegation and proof only being that the health of the neighbor-

hood will be injuriously affected. The only injury which they suggest, in respect to themselves, is damage to their lands.

We are of opinion the appellants have failed to show any equitable claim to relief, and that the injunction was properly dissolved, and the decree will be affirmed.

Decree affirmed.

GEORGE C. KNIGHT

v.

E. W. HURLBUT *et al.*

1. PROMISSORY NOTE — *when it becomes obligatory.* The defendants, under an agreement with the plaintiff, that they would sign their father's note to the plaintiff as sureties, executed a note and delivered it to the plaintiff, who agreed to get the signature of the father of the defendants, who was to be the principal in the note. The plaintiff never presented the note to defendants' father for his signature, nor did the father ever sign it: *Held*, that as between the parties, the note was not obligatory, not being signed by the father.

2. CONSIDERATION — *want of.* Where a note was signed by two persons as sureties for their father, and delivered to the payee who undertook to get the father's signature but failed to do so, it was held that the note was given without consideration and could not be collected by the payee.

WRIT OF ERROR to the Circuit Court of Iroquois county; the Hon. N. J. PILLSBURY, Judge, presiding.

Mr. M. B. WRIGHT, and Mr. L. H. HAMLIN, for the plaintiff in error.

Messrs. DOYLE & KING, for the defendant in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The evidence, as preserved in the record, shows, with reasonable certainty, that the note which is the subject of the present controversy, was signed by the defendants, as sureties, in fact,

and sent by them to the plaintiff, under the agreement that he was to procure it to be signed by their father, and then accept it in liquidation of certain of his indebtedness; and that he neglected to obtain their father's signature, or to present the note to him for that purpose.

The note never having been assigned, the only question is, can the plaintiff recover on it, in direct violation of the terms of the agreement upon which it was signed and intrusted to him?

As between the parties the note was imperfect, until it was signed by the principal. It was not placed in the plaintiff's hands, there to remain until a contingency should happen, whereby it was to become obligatory, but it was intrusted to him to be delivered to the principal for his signature, after which, upon his redelivering it to him, it was to become obligatory, but not until then. All that preceded the signing and delivery of the note by the principal were but so many steps in its execution.

Treated as a promissory note from the defendants alone, to the plaintiff, it is, moreover, without consideration.

The judgment is authorized by the evidence, and is in conformity with *Stricklin* v. *Cunningham*, 58 Ill. 295. See also *Seymour* v. *Cowing*, 1 Keyes (N. Y.), 534; *Miller* v. *Gambie*, 4 Barb. 146; Edwards on Bills, 186.

Judgment affirmed.

Thomas McLean
v.
John McBean.

1. Pleading — *in suit against devisee for devisor's debt.* Where an action is brought against an heir or devisee, under the statute, for the debt of his ancestor or devisor, the facts authorizing such action must be distinctly set forth in the declaration. No recovery can be had under the common counts for work and labor performed, etc.

2. Heirs — *liability for ancestor's debt.* An heir or devisee is under no legal liability to discharge the debt of his ancestor or the devisor from whom he takes real estate, except when the personal estate of such ancestor or devisor is insufficient to pay the same.

3. Consideration — *is essential.* It is essential to every contract or promise that it be founded upon a good consideration.

4. Same — *promise to pay devisor's debt.* The devise of real estate to a party, not creating any liability to pay the devisor's debt, it not being shown there was no personal estate left, a promise to pay the same by the devisee, without any other consideration, is void, and cannot be enforced.

5. But even if the devise had created a legal liability to pay the devisor's debt, a verbal promise by the devisee to pay the same, without being released from liability under the statute, will be without consideration, and void.

Appeal from the Superior Court of Cook county; the Hon. John Burns, Judge, presiding.

Messrs. Hoyne, Horton & Hoyne, for the appellant.

Mr. Ira W. Buell, for the appellee.

Mr. Justice Craig delivered the opinion of the Court:

This was an action of assumpsit, brought by John McBean, in the Superior Court of Cook county, against Thomas McLean, for filling, grading and paving in the year 1858 or 1859, Washington street, in the city of Chicago, in front of property then owned by Thomas McLean, Sr., father of appellant.

The declaration contained the common counts, to which appellant filed three pleas, general issue, the statute of limitations and the statute of frauds. A jury having been waived, a trial was had before the court, which resulted in a judgment in favor of appellee, for $400.

It appears from the record, that the work for which this suit was brought to recover was performed in 1858 or 1859. Appellee testifies that the work was done at the request of property owners fronting on Washington street, including Thomas McLean, Sr. The only other witness called by appellee, however, testifies that McLean objected to having the work done

at the time, for the reason that the buildings on his property were old, and he was receiving but small rents; but aside from this fact, appellee testified that McLean, Sr., several times promised to pay him for the work, and a like amount that Mr. Peck, another property owner on the street, should pay.

The evidence tends to show the work was worth $1,600, but no settlement was effected between McLean, Sr., and appellee, up to the time of his death, which occurred in 1865.

The property fronting on Washington street was devised to appellant and his sister, who were the only children and heirs-at-law of Thomas McLean, Sr.

In 1869 or 1870, Mr. Peck settled with appellee for the work on the street fronting his property, and paid fifty cents on the dollar upon the cost of the work.

Appellee proves by Mr. Barker, that in 1869 or 1870, appellant agreed to settle and pay on the same terms that Mr. Peck had; that he would pay $400 for himself, and his sister would pay a like amount. Appellee himself testified that appellant made a like promise to him in New York in 1871.

The evidence of both of these witnesses is squarely contradicted by appellant, who, in his evidence, says he never at any time promised or agreed to pay the demand or any part of the same.

Appellee bases his right of recovery against appellant solely upon this promise, when the clear conflict in the evidence is considered, in connection with the fact that this account was standing unsettled from 1858 to 1865, the date of the death of McLean, Sr., for whom the work was claimed to have been done, and from that time no effort whatever having been made to enforce its collection until 1869 or 1870, it is not going too far to say the evidence is very unsatisfactory upon which to sustain a judgment. We are not, however, inclined to disturb the judgment upon this ground, as there is another question fatal to a recovery.

A recovery is not claimed on the ground that appellant was

devisee of his father, and as such liable for the debt. Where an action is brought against the heirs or devisees, under our statute, the facts authorizing it must be distinctly set forth in the declaration. *Ryan* v. *Jones*, 15 Ill. 2. In this case the declaration contains merely the common counts. No recovery could, therefore, be had against appellant as devisee.

It does not appear from the evidence contained in the record before us that appellant was liable as devisee.

The personal estate of a decedent is primarily liable for the payment of debts; no resort can be had to real estate until the personal estate is exhausted, or until it has been determined insufficient to discharge all legal liabilities of the deceased; and the statute which authorizes an action against a devisee does so only where the personal estate of the ancestor is insufficient to pay the debts. Revised Laws of 1874, page 524, section 12.

It nowhere appears from this record that the personal estate of Thomas McLean, Sen., was insufficient to pay and discharge all his liabilities. There was then no legal liability resting upon appellant to pay the account of appellee.

If it be true, then, that appellant promised to pay appellee his account, amounting to the sum of $400, can an action be maintained upon that promise?

It is essential to every contract or promise that it be founded upon a good consideration. If the promise upon which this action was brought was without consideration, it would be void, and no action could be maintained upon it. It is, however, claimed by appellee that the consideration was the devise of the lands fronting upon the street where the work was done; but we have shown that the devise of these lands created no legal liability upon appellant to pay the debt. The promise, then, was a bare, naked one, based upon no legal liability, and we are unable to perceive any consideration upon which it could rest.

But even if it was true appellant was liable under the statute as devisee to pay the debt, we apprehend this action could not be maintained on the promise claimed to have been made. In *Runnamaker* v. *Cordray*, 54 Ill. 303, which was an action

brought upon a promise to pay a judgment rendered in a foreign State, the declaration containing the common counts, it is said "The first question presented is, whether plaintiff could recover on the verbal promise of defendant to pay the judgment. Such a promise is without consideration, and cannot increase or change the liability of the debtor. The recovery of the judgment imposes the obligation to pay, and that obligation is in nowise increased or changed by the verbal promise.

"The verbal promise does not extinguish the binding force of the judgment. It remains unimpaired. Nor does the promise create a new debt or undertaking of binding force."

The same may be said in regard to the liability of appellant under the statute, if any exists, and the verbal promise upon which this action is brought.

We are, therefore, of opinion that the promise upon which this action is brought was made without consideration and that no action can be maintained upon it.

The judgment will be reversed.

Judgment reversed.

JEREMIAH COLLINS *et al.*

v.

HYRAM THAYER.

1. LIMITATION — *of suit to recover money paid on voidable contract.* In a suit to recover back money paid upon a voidable contract, the statute of limitations begins to run from the time the contract is terminated by one party or the other, and not before.

2. A verbal contract for the sale of land is voidable at the will of either party, but not absolutely void, and the parties have a right to rely upon each other to perform it, until some act is done by one or the other manifesting an intention to terminate it.

3. But when any thing is done by either party, manifesting an intention to terminate a contract voidable under the statute of frauds, the statute of limitations will begin to run against an action to recover money paid on such contract from that time.

4. STATUTE OF FRAUDS — *rights of parties to a voidable contract.* The vendor of land, under a verbal contract for the sale of real estate, may terminate it and recover possession of the land, or the purchaser may terminate it and recover payments he may have made, and this, too, with performance or an offer to perform the contract.

5. RECOUPMENT. In a suit by a purchaser of land, under a verbal contract which has been terminated at the option of either party, to recover payments made on such contract, the vendor may recoup the value of the use and occupation of the land, if it has been occupied by the purchaser, unless he has been compelled by law to pay the same to the owner of a paramount title.

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

This was a suit brought by the appellee against the appellants, for the recovery of money paid by him under a verbal contract for the purchase of land. The facts are stated in the opinion.

Messrs. DICKEY & CAULFIELD, and Mr. W. T. HOPKINS, for the appellants.

Mr. S. W. HARRIS, and Mr. JAMES N. READING, for the appellee.

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

It appears that appellants, some time in the early part of the year 1865 or 1866, entered into a verbal contract to sell to appellee a half section of land. The price to be paid was $40 per acre, in six equal annual installments; all unpaid amounts to draw eight per cent interest per annum. Appellants were to convey a good title. The agreement was never reduced to writing. Appellee paid, in a lot of cattle, $850 in August, 1866, and in another lot of cattle, $2,000, in October, 1868. There being some doubt as to the validity of the title, it was understood that if appellants should be unable to convey a good and valid title, they should refund the payments made on the

purchase, with interest. Appellee, by arrangement, went into possession, and occupied the land, until in the month of January, 1873, when he was evicted under a judgment, in an ejectment suit, in favor of one Riggs, recovered under a different title. After the cattle were paid, in 1868, and appellee had refused to make further payments, Jeremiah Collins swears he notified appellee that they did not consider themselves any longer bound by the contract.

Appellee testified, and it seems to be conceded, that in February, 1874, he caused a notice to be served on appellants, that on a specified day he would pay the balance of the money due on the original contract, and that he would require them to make a deed for the land pursuant to the agreement; that on the day named he took a sufficient sum of money to make the tender, and went to the house of Jeremiah Collins, but he was not at home, but he said that he did not know that he would have let them have it if they had made a warranty deed for the land.

Appellants set up and relied upon the statute of limitations of five years. To this plea a replication was filed, that the cause of action did accrue within five years before the suit was commenced. A trial was had, resulting in a verdict and judgment in favor of plaintiffs for $3,839. A motion for a new trial was entered and overruled, after verdict and before judgment. The record is brought here, and various errors are assigned.

The first question we propose to consider is, when did the statute of limitations begin to run? This contract was voidable under the statute, and, by objecting, either party had at pleasure the right to terminate and refuse to execute it. But until it was terminated the purchaser was not bound to sue. The parties had a right to rely upon each other to perform the agreement until some act was done terminating its existence. Courts will enforce such contracts, unless the statute of frauds is interposed as a defense. All courts, to render the statute availing, require that it must be set up in some mode, and re-

lied upon as a defense. Hence it is reasonable to say the contract is not absolutely void, as are contracts that are prohibited to be made by the statute, as, where they are immoral or contravene sound policy. But such a contract is voidable, at the will of either party, unless so far executed as to take it out of the operation of the statute. It then follows that the statute of limitations did not begin to run until one party or the other brought it to an end. If, as he testifies, Jeremiah Collins notified appellee, that from the time he mentioned he and his brother would not be bound by the contract, it was then at an end, and appellee had no right further to rely upon the agreement, and the statute began at that time to run, and would bar an action to recover back the purchase money at the end of five years from that date.

On the other hand, if no such notice was given, then the verbal agreement was clearly ended when appellee gave notice that he would make a tender and demand a deed. And the statute then began to run, and would become a bar in five years from that date. And it did not matter whether he made a valid tender, or what amounted to a tender, as he thereby manifested an intention to terminate the contract, which could have been done simply by giving notice that it was at an end. The contract being voidable under the statute at the election of either party to terminate it, notice only was required by one party to the other that it was ended, or by the performance of any act which manifested such an intention. The object in attempting to make the tender was no doubt under the supposition that appellee was bound to show that he was ready and willing to perform his part of the agreement before he could recover the purchase money paid under the contract. Had the agreement been in writing, and valid and binding, this would no doubt have been true. But as each of these parties must have known that either could at any time terminate it, and for its execution it depended upon the concurrent continued consent of the parties until its final consummation, it does not depend upon the same rule that governs binding agreements.

Each knew that the other might at any time sue for and recover any thing paid or advanced to the other.

The seller could end the contract and sue for and recover the possession of the land, or the purchaser could terminate it, and sue for and recover back payments he may have made. This, too, without performing or offering to perform his part of the agreement. Where the contract is valid and binding, either party, to place the other in default and rescind the contract must perform or offer to perform his part of the agreement according to its terms. Here, neither was required to do any act before he terminated the agreement, because the statute, to bind the parties beyond their mere consent, requires that it shall be in writing, and thus placed beyond the withdrawal of that consent by either party.

The next question is, was the inability of the vendors at all times after sale to convey according to their agreement, a sufficient excuse for appellee in not performing his agreement according to its terms? We have no doubt it was. And even further, had they been able to convey a sufficient title, he could, nevertheless, have refused to pay, as we have seen, and recovered the amount he had paid, if not barred by the statute of limitations, and that is a fact to be found by the jury, and not for us to determine.

It is also urged that the court erred in refusing to instruct that if appellee took possession under the agreement, and afterward occupied the land, appellants had the right to recoup the value of the use of the land whilst so occupied, against the claim of appellee. He, by agreeing to purchase, and entering into possession under appellants, thereby acknowledged that they were the owners of the land. He also knew that they or he might at any time change his relation from that of an occupant as a purchaser, to that of a tenant at will, liable to account for rents. It is unjust for appellee to hold this land for years under the contract, such as it was, and then escape from paying for what he has received to his profit and benefit. And unless evicted by paramount title, and a liability to ac-

count for the rents to the true owner, he is liable to account to his vendors for its use. *Whitney* v. *Cochran*, 1 Scam. 209, which sustains the rule that he must account to his vendors.

It is, however, contended that appellants offered to prove, but were not permitted by the court, that they had paid to Riggs, who recovered the land in ejectment, all rents from 1864 till 1873, the time when appellee was evicted. When a tenant is evicted by paramount title, and suggestions are filed, and a judgment recovered against the tenant for rents and profits, which he pays, there can be no doubt that he may sue his landlord and recover back any rents paid him and included in the judgment. Or where the recovery under the suggestions is greater than the amount of rent agreed to be paid, and he pays such excess, he may no doubt recover it from the landlord, although he paid no rent. And it is for the reason that the landlord is bound to maintain the possession of the tenant and keep him harmless in the occupancy of the land. It then follows, that if such a relation exists between landlord and tenant, appellants, by virtue of the relation, might pay the rent, and look to appellee to pay them fair and reasonable rent.

Suppose a landlord, believing he was owner of the demised premises in fee, leases the same to a tenant for a stipulated rent, and the tenant is evicted by paramount title, and a judgment for use and occupation is recovered against him, and it is paid by the landlord, will any one doubt that the landlord may sue for and recover the stipulated rent? And this, too, whether such recovery were more or less than the rent reserved in the lease. Or, under such circumstances, does any one suppose that, although the landlord paid the recovery against the tenant, the latter might nevertheless recover back rents paid under the lease, or refuse to pay rents accrued and unpaid?

It then follows, the court below erred in excluding this evidence; and in so far as the instructions are opposed to the views here expressed, the judgment must be reversed and the cause remanded.

Judgment reversed.

JOHN W. SMITH
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

1. CRIMINAL LAW — *as to reasonable doubt.* If the jury have a reasonable doubt of the guilt of one tried for crime, they must acquit him. But this doubt must spring from the evidence, and cannot be searched for outside of it.

2. An instruction "that a reasonable doubt means in law a serious, substantial and well founded doubt, and not the mere possibility of a doubt," and that "the jury have no right to go outside of the evidence to search for, or hunt up doubts in order to acquit the defendant, and arising out of evidence, or for the want of evidence," was *held* free from any well founded objection, except that the word "*serious*" might have been omitted, as not improving it.

3. ACCESSORY — *one present, aiding or encouraging.* When one defendant shoots a person with a revolver, deliberately and intentionally, a co-defendant present at the time, who in any way or manner aids or advises, or encourages such shooting, when not necessary, or apparently necessary, to save the defendants' lives, or prevent their receiving great bodily harm, is equally guilty with the one who does the shooting.

4. INSTRUCTION — *as to matters not involved.* An instruction embracing matters not in controversy on the trial, and which cannot enlighten the jury on the questions before them, is irrelevant and properly refused.

5. PRACTICE — *witness not on indictment.* On the trial of one for crime, the court, in the exercise of a sound discretion, may allow a witness whose name is not indorsed on the indictment to be sworn and testify for the prosecution, though his name has not been furnished the defendant before arraignment.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

Messrs. E. & A. VAN BUREN, for the plaintiff in error.

Mr. CHARLES H. REED, State's Attorney, for the People.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an indictment, in the Criminal Court of Cook county, against John W. Smith and James Jordan, for an assault upon

Cornelius Tighe with a loaded pistol, with intent to kill him. The defendant Smith was found guilty, and his term of imprisonment in the penitentiary fixed at fifteen months.

The record is brought here by writ of error, and various errors assigned.

The first point made is, that the verdict is against the evidence. There is some conflict in the testimony, but as to the fact of shooting by the prisoner and inflicting a serious bodily injury upon the prosecuting witness, there is no conflict. The point is, was the prisoner justified, under the circumstances? On this point the controversy arises. The prosecutor, Tighe, the person shot, makes out a clear case, without the shadow of justification, and he is corroborated, in some particulars, by other witnesses, especially as to the fact of his having a pistol at the time of the shooting. He and the other witnesses examined as to that fact testify that he had no pistol, whilst the prisoner and Jordan testified he had one and had drawn it. This conflict was for the jury to settle, and we think the jury were justified in finding that Tighe did not, with a pistol in his hand, as argued, assault the prisoner, or conduct in such manner toward him as to induce the prisoner's belief his life or limb was in any danger. And there is some testimony from which it might be inferred, the attempt on Tighe was premeditated by the prisoner. But the idea that the prisoner had a reasonable apprehension his life was in danger from Tighe is dispelled by his own testimony, for he says, he intended to fire over his head. Surely, a man armed with a loaded pistol, violently assaulted by another so armed, seeing his life or limb in danger, would never think of firing his weapon over the head of his assailant, but would take such aim as would at least cripple him, in order to protect his own life or limb.

The evidence justifying the finding, we are next to consider if the law was properly given to the jury.

It is complained by the prisoner that the court erred in giving the first instruction for the people.

The instruction was as follows: "The court instructs the jury that a reasonable doubt means, in law, a serious, substantial and well founded doubt, and not the mere possibility of a doubt. The jury have no right to go outside of the evidence to search for or hunt up doubts in order to acquit the defendants, not arising out of evidence or for the want of evidence."

This instruction is free from any well founded objection, and in substance has been sanctioned by this court in numerous cases. It is not obnoxious to the criticism of the prisoner, that the jury might convict, if there was no evidence. It is a well-recognized principle, if the jury have a reasonable doubt of guilt, they must acquit. This doubt must spring from the evidence, and cannot be searched for outside of the evidence. A serious doubt is a reasonable doubt, and nothing more. The term "serious" might well have been omitted, as it does not improve the instruction, but its use could do no harm.

It is complained the court erred in giving the people's second instruction. That was as follows: "If the jury believe, from the evidence, that the defendant Smith deliberately and intentionally shot the witness Tighe with a loaded revolver, as charged in the indictment, and that the defendant Jordan was present, and in any way or manner aided or advised, or encouraged such shooting, when it was not necessary, or apparently necessary, to save their own lives or prevent their receiving great bodily harm, then the jury should find the defendants both guilty."

This instruction was called for by the testimony of Tighe, which implicated Jordan in the transaction, and was to instruct the jury if they were both art and part in the assault, and no necessity existing for it, they could both be guilty. It could not mislead the jury, so far as the prisoner's case was involved. If, by possibility, it might be supposed to be misleading as to him, the jury were fully instructed at prisoner's request, on the law of the case as applicable to him, and they were very comprehensive.

One instruction asked by the prisoner was refused, and of

this complaint is made. That instruction embraces matters not in controversy in the case, and could not have enlightened the jury on the questions before them. It was wholly irrelevant, and was properly refused.

An objection is made that one Brennan, whose name was not indorsed on the indictment, nor his name furnished the prisoner before his arraignment, was permitted to be sworn and to testify on behalf of the prosecution.

The doctrine is settled in this court that, in the exercise of a sound discretion, this may be allowed. *Gardner* v. *The People*, 3 Scam. 83; *Gates* v. *The People*, 14 Ill. 436; *Perry et al.* v. *The People*, id. 499.

In this particular case, the prisoner could not have been surprised or prejudiced, as Brennan was known to the prisoner as a witness on the preliminary examination before the magistrate, and the prisoner might reasonably conclude he would be called again as a witness. The court exercised a proper discretion. On a full examination of the whole record, we are satisfied the prisoner has had a fair trial, under proper instructions from the court, and we will not disturb the judgment, but affirm the same.

Judgment affirmed.

CHARLES N. WHITMAN
v.
HENRY C. FISHER.

1. JUDICIAL SALE — *not affected by reversal of decree.* The reversal of a decree construing a will as authorizing the executors to sell and convey land at private sale, on mere errors in the proceedings, will not avoid a sale made by the executors to a *bona fide* purchaser for value, if the court rendering the decree had jurisdiction of the subject matter, and of the persons of those interested.

2. JURISDICTION — *depending on term of court being held.* Where executors gave notice of applying to the circuit court on a certain day in the

next term, being the fourth day, for an order to sell lands to pay debts, etc., and filed their petition before the first day of such term, but no court was held at such term, it was held that the proceeding was continued by law, and the court had jurisdiction at a succeeding special term to render a decree.

3. JUDICIAL SALE — *presumption in favor of jurisdiction.* After the lapse of over twenty years from a sale and conveyance of land by an executor made under a decree of a court of competent jurisdiction, for a full consideration to one buying in good faith, every reasonable intendment will be indulged in favor of the jurisdiction of the court making the decree, rather than to hold the sale invalid, and the action of the court will be referred to its statutory or general jurisdiction, as may be necessary to maintain its jurisdiction.

4. PROCESS — *service in chancery cases.* An indorsement of service of a chancery summons, "executed by leaving copy with A. B. and C. (the defendants), this," etc., is sufficient to confer jurisdiction of the persons of the defendants, its obvious meaning being that the officer delivered a copy to each of the defendants.

5. ADMINISTRATOR'S SALE — *power of court to order.* A court of equity has no original jurisdiction to order the sale of real estate of a deceased person to pay debts, or for any other purpose, so as to bind the infant heirs' legal estate. The power is derived from legislative authority, and does not exist except in cases where the statute expressly confers it.

6. CHANCERY JURISDICTION — *to construe wills.* When purely legal titles are involved, and no other relief is sought, a court of equity will not assume jurisdiction to construe a will, but will remit the parties to their remedies at law; but if any trust is reposed in the executors, they may seek the aid and direction of a court of equity in the management or execution of the trust.

7. SAME — *when executor has a trust.* Where, by the terms of a will, the executors are charged with the administration of the assets of the estate differently from that directed by the statute, this will create in them a special trust, and in case of doubt as to the mode of its execution, a court of equity will assume jurisdiction on application by the executors for a construction of the will.

8. PURCHASER — *not affected by application of purchase money.* Where power is given by will to executors to sell real estate to raise funds with which to pay legacies, as the legatees become of age, a sale and conveyance made after one of them arrives at majority, being in the due execution of the trust created, will be valid, even though the proceeds are applied in the payment of the testator's debts. The purchaser is not required to see to the proper application of the purchase money.

APPEAL from the Circuit Court of Winnebago county; the Hon. WILLIAM BROWN, Judge, presiding.

This was an action of ejectment, by Charles N. Whitman against Henry C. Fisher, for the recovery of an undivided interest in a tract of land sold and conveyed by the executors of Seth S. Whitman, deceased, to John Fisher, in his lifetime. The substantial facts of the case appear in the opinion. A trial was had before the court alone, resulting in a finding and judgment for the defendant.

Messrs. WILLIAMS & THOMPSON, and Messrs. CRAWFORD & MARSHALL, for the appellant.

Mr. C. M. BRAZEE, and Mr. WM. LATHROP, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Both parties in this action claim title to the premises described in the declaration from a common source, viz.: under the will of Seth S. Whitman, in whom was the legal title at the time of his death.

The testator, after directing the payment of his debts out of his personal estate, unless some other arrangement could be made, and the erection of a suitable family residence near Janesville, made provisions for the payment of specific legacies to each of his children, as they respectively became of age, then disposed of all his property as provided in the tenth paragraph of the will, as follows: "10th. That after my youngest surviving child becomes of lawful age, the residue of all my property at that time be divided as follows, viz.: To my beloved wife, Matilda Whitman, I will and bequeath one-third of my property for her support and maintenance during her natural life, and at her decease to be divided between my surviving children, or given for missionary purposes, at her discretion; and the other two-thirds of my property be equally divided between my son C. Coldon Whitman, Julia H. Whitman and Charles N. Whitman."

Proof was made that appellant was the youngest child surviving the testator, and having become of age, it is under this clause of the will he claims an undivided interest in the premises as devisee, and as heir at law of his brother C. Coldon Whitman, who died after the will was admitted to probate, without leaving him surviving wife, child or descendants of any child or children.

Appellee is the heir at law of John Fisher, who was the purchaser of the entire premises at a sale made by the executors named in the will. The title derived under this sale, it is now insisted, is the paramount title. The principal question, therefore, that presents itself, is, whether the title in fact passed to John Fisher, by virtue of the executor's deed of the date of April 19, 1854.

The executors being in doubt as to whether they had the power under the will to sell real estate for the purpose of paying debts and for other purposes named in the will, filed in the circuit court of Boone county a petition or bill in chancery, and among other things they asked the court to construe the will in this regard. The heirs were all made defendants to this proceeding, by due service of process, and on the final hearing the court decreed that "the executors have and rightfully and lawfully may exercise the power to sell and convey the above described real estate, of which the said Seth S. Whitman died seized, either at private or public sale, for the purposes and objects specified in the said will."

Under this decree, or under the will as thus construed by the decree, the executors sold at private sale for a full price, and conveyed the land to John Fisher. The sale was made in 1854, but in 1859 the decree of the circuit court construing the will was reversed on error in this court. It is conceded, however, that neither the reversal of the decree nor errors in the proceedings would avoid the sale, provided the court that pronounced the decree had jurisdiction of the subject matter and person of appellant.

Treated as a proceeding under the statute for leave to sell

real estate to pay debts, it is insisted the order of sale was clearly void. The notice of the application was, the executors would apply on the 6th day of October, which would be on the fourth day of the October term, 1853. The court for that term should have convened on the third day in the month, but no judge appearing, it stood adjourned until the next day, at the hour of four o'clock, when, under the statute, it stood adjourned until court in course. No court being in session, proof of the publication of the notice could not be made at that term, and none was made until the December special term. Hence it is contended the court failed to acquire jurisdiction, and its future action was without authority of law, and therefore void.

Counsel cite in support of the position assumed the case of *Knickerbocker* v. *Knickerbocker*, 58 Ill. 399. That case does not sustain their view of the law.

The provision of the statute is: if no judge shall attend on the first or second day of any appointed term, the court shall stand adjourned without day, and all suits and proceedings therein "shall stand continued until the next term of the court, as if the same had been continued by order of the court." The reason for the decision in *Knickerbocker* v. *Knickerbocker* is, that neither the petition nor the notice of the application was filed at the term to which the notice was given, and hence there was no cause pending to be continued by operation of law. But that is not this case. Here, the petition or bill on which the court acted was on file at the date the court ought to have convened for the October term, and had been from the twelfth day of September previous. As was said in the former case, "jurisdiction of the subject matter is obtained by filing the petition." This was done, and there was a cause pending upon which the court at the October term could have acted and continued it if necessary, with leave to make proof of publication, but there being no court in session, the law continued the cause and the jurisdiction of the court was preserved.

The court had the undoubted jurisdiction, under the statute, to entertain a petition on the application of the executors for the sale of lands belonging to the estate, to pay the debts of the testator. Jurisdiction of the person of the appellant was acquired by publication of the notice of the application as required by the statute.

If no other reason existed, the court having had jurisdiction of the subject matter and the persons of the parties whose interests were to be affected, notwithstanding the decree was reversed for irregularity that intervened, the sale might still be maintained on the ground it was a judicial sale. It was made over twenty years ago. The purchaser bought in good faith, for a full consideration, and after the lapse of so great a period, every reasonable intendment will be indulged in favor of the jurisdiction of a court of general jurisdiction, rather than declare the sale invalid. The action of the court will be referred either to its statutory or general jurisdiction, as may be necessary to maintain its jurisdiction. It is, and has been, the policy of the law to maintain judicial sales, and in this policy the public interest is best subserved.

But the decision of this case need not be placed on this ground, although it could be maintained. We are not inclined to regard the proceedings as a petition under the statute to sell real estate to pay debts. However inartistically drawn, it has more of the elements of a bill in chancery than of a petition under the statute. The complainants, in their prayer, expressly invoke the aid of a court of equity, where the matters alleged are only cognizable. The summons issued was in chancery, and was served as the law directs such process shall be served. All the proceedings were treated as being on the chancery side of the court. When the cause was before this court, at a former term, it was not determined whether it was a proceeding in chancery or under the statute, but regarding it as either one or the other, there were errors in the record that would warrant a reversal of the decree. 22 Ill. 448.

Numerous objections have been taken to the regularity of

the proceedings in the circuit court, but as the validity of the title acquired under the sale is only collaterally attacked in this action, it will not be necessary to consider any but such as have respect to the jurisdiction of the court to pronounce the decree. These are, first: the court did not have jurisdiction of the person of appellant, and second, it did not have jurisdiction of the subject matter of the litigation.

As to the first point, on the filing of the bill a summons in chancery was regularly issued. It was returned by the sheriff with the following indorsement of service: "Executed by leaving copy with Ogden H. Whitman, Julia H. Whitman, Charles N. Whitman, this 14th day of September, 1853." The decree finds that "process has been duly served" on each of the defendants, and the return of the sheriff on the summons still among the files, on which the court must have acted, is not inconsistent with that finding. It is urged the service is defective for the reason it does not appear the officer left but one copy for all the defendants. The objection is hypercritical. The officer could not execute the summons, by copy, upon the several persons named in the return, without using more than one copy. The obvious meaning of the return is, he delivered a copy to each of the defendants. There were three defendants, and the fact that the officer charged fees for three copies aids the view we have taken.

The service required by the statute is by delivering a copy of the summons to the defendant. The sheriff, in this case, says he "executed by leaving a copy." "Delivering a copy" and "leaving a copy" are equivalent forms of expression, hence the service is substantially correct. *Buck* v. *Buck*, 60 Ill. 105.

The second objection urged raises the most serious question in the case, viz.: the court did not have jurisdiction of the subject matter of the litigation.

The theory of appellee is, it was a bill to have construed the will of Seth S. Whitman, and have the powers of the executors over the property under the provisions of the will determined;

that it was a matter clearly within the chancery jurisdiction of the court; that the court, having all the parties in interest before it, made its decree construing the will, declaring the executors had lawful authority to sell the real estate of the testator, and while that decree was in full force, John Fisher having purchased the land in controversy, for a full price, on the faith of the decree defining the powers of the executors under the will, the decree must be held conclusive of the construction of the will and the powers of the executors, and hence the purchaser acquired an absolute title to the property as against all persons claiming as devisee, or otherwise, under the will.

On the other hand, counsel for appellant deny the court had any jurisdiction to determine by construction of this will that it contained a power of sale in the executors, or that the court had any jurisdiction to make any decree affecting the title to the real estate of which the testator died seized, or that the bill states a case which called into action the power of the court, and insist the decree, or order, so far as it concerned the land which the testator devised to his children, was an absolute nullity.

The proposition, a court of equity has no original jurisdiction to order the sale of real estate to pay debts or for any other purpose, so as to bind the infant's legal estate, is certainly the law, and has for its support the best authorities. The power is derived from legislative authority, and does not exist except in cases where the statute expressly confers it. *Donlin* v. *Hettinger*, 57 Ill. 348; *Rogers* v. *Dill*, 6 Hill, 415; *Onderdonk* v. *Mott*, 34 Barr, 106.

But this exact question is not involved in the case we are considering. The court did not assume to direct the sale of the real estate of which the testator died seized, nor does the title of appellee's ancestor rest upon any such principle. His title is definitely placed upon the sale made by the executors under the will as construed, and not upon any order of sale made by the court. But counsel contend the court had no juris-

diction to determine by construction of the will it contained a power of sale in the executors, or that the court had jurisdiction to make any decree whatever affecting the title to the real estate, of which the testator in this instance died seized.

The principle contended for is, when no trust is created, neither the executor nor the heir or devisee who claims only a legal title in the estate, will be allowed to come into a court of equity for the purpose of obtaining a judicial construction of the provisions of the will. In a general sense this proposition is correct. Where purely legal titles are involved and no other relief is sought, a court of equity will not assume jurisdiction to construe the will, but will remit the parties to their remedy at law. The doctrine on this subject has been well stated by Chancellor WALWORTH, in *Bowers* v. *Smith*, 10 Paige, 193, and his statement of the rule with its qualifications is as accurate as any we have seen. The case of *Onderdonk* v. *Mott*, cited, *supra*, states the same general principles.

It is insisted the will created no trust in the executors in respect to the lands of the testator, that the legal and equitable title was in the heirs or devisees, and if the executors had any power of sale, it was a mere naked power, not coupled with an interest in the lands. Hence it is said the case comes within the rule stated in the authorities cited. Without regard to the question whether this is the true construction of the will, are there no facts in this case which bring it within the exceptions to the general doctrine contended for? All the authorities concur, so far as we have examined, where any trust is reposed in the executors, they may seek the aid and direction of a court of equity in the management or execution of the trust. Mr. Redfield, in his work on the law of wills, in stating some of the more recent rules of construction, adopted for declaring the legal effect of wills, says that such questions more frequently arise in courts of equity than in courts of law, "in consequence of the right of an executor or any other trustee, or even any *cestuis que trustent*, to apply to the former courts,

to determine the proper course to be pursued to carry such trusts into effect." 1 Redf. on Wills, 438.

In *Bowers* v. *Smith*, *supra*, it was ruled that "where there is a mixed trust of real and personal estate, it frequently becomes necessary for the court to settle questions as to the validity and effect of contingent limitations in a will to persons who are not *in esse*, in order to make a final decree in the suit, and to give the proper instructions and directions to the executors and trustees in relation to the execution of their trust." The chancellor then states the general rule, where there is no trust the heir is not allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will, but adds the important qualification, the decision of such legal questions belong exclusively to courts of law, except where they arise incidentally in a court of equity in the exercise of its legitimate powers, "or where the court has obtained jurisdiction of the case for some other purpose."

The facts in the case at bar bring it clearly in the equitable jurisdiction of a court of chancery as thus defined. The personal estate of the testator was in the hands of the executors, and they were charged with its administration in a manner other than as directed by the statute. This created in them a special trust. With the funds of the estate, they were directed to erect a family residence near Janesville. From what source, whether from the real or personal effects, the means for that purpose were to be derived, the will is silent. It was a question with the executors, whether the condition of the estate would justify the expenditure of a sum of money sufficient to erect a residence for the family as directed in the will. The widow of the testator, who was also one of the executors, was given the control of all the property of the testator until his youngest child became of lawful age, "for their support, education and maintenance." How was she to control all the property of the estate for the "support, education and maintenance" of the family? No directions were given in the will.

These difficulties arising in the execution of the trusts imposed upon the executors, and which they had undertaken to perform, made it eminently proper for them to apply to a court of equity for its aid and direction in the premises. We have no doubt of the jurisdiction of a court of equity to afford the requisite relief. 2 Story's Eq. Jur., § 961; *Hooper* v. *Hooper*, 9 Cush. 127; *Dimmock* v. *Bixby*, 20 Pick. 368.

Upon proper bill filed the court had the undoubted jurisdiction to determine the question for the executors, whether the house for a family residence should be built from the funds realized from the personal or real estate, or, indeed, whether, in view of the embarrassed condition of the estate, it should be erected at all. This fact alone, if no other ground existed, conferred jurisdiction on the court, and having obtained it for one purpose, it is a familiar principle it would retain it for all purposes. Hence it follows, the decree under which appellee's ancestor purchased the property, was made in a cause where the court had jurisdiction of the subject matter and the persons of the parties. Having ascertained the court had jurisdiction, he could with safety purchase at a sale under its decree, notwithstanding there might be irregularities in its proceedings. He was not bound to know the court may have adjudicated questions over which it had no original jurisdiction. Being informed the court had jurisdiction for one purpose, he could rightfully conclude it had jurisdiction for all purposes. Any other rule would be unreasonable and would expose honest purchasers at judicial sales to great hazards.

The widow was given the "control of all the property" until the youngest child should become of age, for "their support, education and maintenance," and it is a grave question, whether this grant of power did not itself imply a power of sale as to all the property, real and personal, for the purposes indicated, according to the construction given to the will by the court in its decree. But in the view we have taken it is not necessary to express an opinion on this question. The validity of appellee's title may be maintained on the ground indicated, viz.: The

land was purchased by his ancestor under a decree of court pronounced in a cause where it had jurisdiction both of the subject matter and the persons of the parties.

But there is another view that can with great propriety be taken, which is conclusive of the rights of the parties. The testator made certain bequests to each of his children, payable respectively as they became of age. Power is expressly given to the executors to sell real estate for the purpose of raising funds with which to pay these several legacies. Ogden H. Whitman, one of the beneficiaries under the will, became of age in 1852, and was entitled to the bequest in his favor. The sale to John Fisher was made in the spring of 1854. It does not appear but the exact case had arisen where the executors had the clear right under the will to sell real estate independently of the decree of the court. The purchaser was under no obligation to see to the application of the purchase money. Hence it follows, the deed of the executors in the due execution of their trust passed all the title of the testator to the purchaser of the land in controversy.

The finding of the court was correct and its judgment must be affirmed.

Judgment affirmed.

BREESE, J.: I am not prepared to concur in the conclusions reached in this opinion.

HERMAN HEIMAN

v.

THEODORE SCHRŒDER.

1. INSTRUCTION — *construed.* An instruction in a suit to enforce a mechanics' lien, that if the petitioner was hindered and prevented by the defendant from finishing and completing the work which had been entered upon, the petitioner was not precluded from recovering because the work

was not completed entirely by him, is not open to the objection that it authorized a recovery for all the work contracted to be done, and for work not done by the petitioner.

2. INTEREST — *on money due for work done under contract.* Where specific sums of money are agreed to be paid for work by an agreement in writing, the several sums will, under the statute, carry interest from the times they become due.

3. SAME — *may be recovered without being claimed in pleading.* Where interest is an incident to a debt, it may be recovered though not claimed as such in the petition or other pleading, if the sum claimed is large enough to include the same.

4. PLEADING — *when sufficient after verdict.* Where the statements in a pleading, although imperfect and insufficient in themselves, are yet of such a character as force the conclusion that all must have been proved on the trial, which ought to have been stated in the pleading to procure the verdict, then the defective pleading is aided by intendment after verdict, and the court may render judgment.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. M. MARX & SON, for the appellant.

Mr. JOSEPH PFIRSHING, and Mr. ARNO VOSS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit to enforce a mechanic's lien, brought in the circuit court of Cook county, where a trial was had before a jury, resulting in a verdict and judgment for the petitioner, the appellee.

The giving of the petitioner's first and second instructions is assigned as error.

The first one was, that if the petitioner was hindered and prevented by the defendant from finishing and completing the work which had been entered upon, the petitioner was not precluded from recovering because the work was not completed entirely by him. The objection taken to it is, that it tells the jury that the petitioner could recover for all the work contracted

to be done, whether the contract was completed or not, and for work which he had not done.

We do not consider the instruction as fairly open to such objection, or that the jury would naturally have so construed it as appellant claims it to be, or that they did so construe it, from the amount of the verdict rendered by them.

The second instruction was, that the jury might allow six per cent interest from the time the work was agreed to be paid for. Specific sums of money were agreed to be paid for the work, by an agreement in writing, and by the express provision of our statute they carried interest from the time they became due. Such interest was a legal incident to the debt. But *Mills* v. *Heeney et al.* 35 Ill. 173, and *Prescott* v. *Maxwell*, 48 id. 82, are cited as authority against the allowance of interest, because it was not claimed in the petition. What was there said upon the subject, we do not regard as applicable to the present case. In each of those cases, there was a recovery of a larger sum than that claimed in the petition to be due, and we regard those cases as deciding nothing more than that there cannot be a recovery beyond the amount claimed in the petition to be due, unless interest on such amount be claimed in the petition, in which case there may be a recovery to the extent of the amount claimed, and interest thereon. The recovery in the present case was for a less amount than that claimed by the petition to be due. The interest here, being a legal incident to the debt, claiming the debt by the petition was claiming the interest, the incident. We do not consider it necessary that there should have been a claim of the interest specifically. *McConnel* v. *Thomas*, 2 Scam. 313.

The overruling of the motion in arrest of judgment is also assigned as error.

The objection urged as ground of arrest is, that the petition does not contain sufficient averments that the times for the furnishing of the materials, performance of the work, and payment therefor, were within the several periods named by the statute, one and three years.

Where the statements in the pleading, although imperfect and insufficient in themselves, are yet of such a character as to force upon the mind of the court the conclusion that all must have been proved on the trial, which should have been stated in the pleading to have made it sufficient before the jury would have been induced to have rendered a verdict for the plaintiff, then the defective pleading is aided by intendment after verdict, and the court may render judgment. 1 Chit. Pl. 712; *Warren* v. *Harris*, 2 Gilm. 307.

At least, under the above rule, the petition in this case must be regarded as sufficient upon a motion in arrest of judgment.

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

Judgment affirmed.

In re Appeal of Abner R. Scranton.

1. Juries — *exemption from service, a mere gratuity to the citizen.* The duty of serving on juries is one of the inseparable incidents of citizenship, and can be exacted whenever and however the sovereign authority shall command, and all exemptions from such service are mere gratuities, which may be withdrawn at the pleasure of the law-making power.

2. Same — *only active members of fire companies are exempt from service.* Under the general law in force February 11th, 1874, the only exemption from service on juries on account of service in the fire department is of active members of that department.

3. The general law on the subject of juries in force February 11th, 1874, repealed all local and special laws on the subject.

Appeal from the Circuit Court of Cook county; the Hon. John G. Rogers, Judge, presiding.

Messrs. Holden & Moore, for the appellant.

Mr. Justice Scholfield delivered the opinion of the Court:

Appellant was lawfully summoned to appear as a petit juror, at the March term, A. D. 1874, of the Cook county circuit

court, and, failing to appear, he was subsequently, at the same term of court, attached on account thereof. Upon the return of the attachment, and in answer thereto, appellant alleged, as the cause of his default, that he had served as a fireman in the city of Chicago, for a period of seven years and more, and claimed, on that account, to be exempt from service on juries. The court, deeming the excuse insufficient, adjudged that he was in contempt, and that he pay a fine of five dollars.

The only question raised by this appeal is, whether appellant was exempt from serving on juries on account of the alleged excuse.

By a section of the charter of the city of Chicago, which we shall, for the purposes of the present case, assume was in force at the adoption of the present constitution, it was provided that every fireman, etc., "who shall have faithfully served as such in said city of Chicago for the term of seven years, shall be exempt from serving on juries," etc.

It is insisted that the appellant was, by virtue of this provision, justified in what he did, and that he was, therefore, not in contempt of court.

By § 22 of Art. 4 of the Constitution of 1870, it is declared that the legislature shall not pass local or special laws for the summoning or impanneling of grand or petit jurors.

Pursuant to this provision, the legislature, by a general law, in force February 11th, 1874, have declared who shall be summoned as grand and petit jurors, and who shall be exempt from serving on juries. By this law the only exemption on account of service in the fire department is of *active members* of that department. No exception is made in favor of the city of Chicago, nor would it have been competent for the legislature to have done so, under the section of the constitution referred to; and the necessary effect of this law is to repeal all prior local laws on the subject.

The claim made that appellant has a vested right in the exemption, granted by the city charter, is without foundation. The duty of serving on juries, like the duty of bearing arms

in defense of the government, is one of the inseparable incidents of citizenship, and can be exacted whenever and however the sovereign authority shall command. All exemptions of this kind are mere gratuities to the citizen, which cannot be the subject of contract between men and the State, and may be withdrawn at the pleasure of the law-making power. Cooley's Constitutional Limitations (1st Ed.) 383.

The judgment of the court below is affirmed.

Judgment affirmed.

JOHN MOHLER *et al.*

v.

JOSEPH WILTBERGER.

1. CHANCERY PRACTICE — *complainant's right to dismiss bill.* A complainant has the right, at any time before the decree is rendered, to dismiss his bill, unless a cross-bill has been filed. After decree he cannot, except upon consent.

2. SAME—*right to dismiss after decree reversed.* The effect of a reversal of a decree being to leave the cause pending for hearing precisely as if no decree had been rendered, the complainant may dismiss his bill after such reversal.

APPEAL from the Superior Court of Cook county; the Hon. S. M. MOORE, Judge, presiding.

Messrs. HARDING, MCCOY & PRATT, and Mr. T. C. WHITESIDE, for the appellants.

Messrs. AYER & KALES, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

The only question presented by this record is, whether a complainant may, before a hearing, dismiss his bill without prejudice.

We understand the practice to be well settled that the complainant, at any time prior to a decree, has the right, unless a cross-bill has been filed, to control the fortunes of his own bill, and dismiss it, as a matter of course.

After a decree has been rendered, then the complainant cannot dismiss his bill, except by consent, for the reason that after decree others aside from the complainant have a fixed and definite interest in the subject matter in litigation in the cause, and hence have a right to be consulted before their rights shall be impaired by a dismissal of the bill.

The rule is well and clearly stated in Daniells' Chancery Practice, vol. 2, page 356, as follows: "A plaintiff may move to dismiss his own bill, with costs, as a matter of course, at any time before the decree; it is said that after witnesses have been examined it is not to be prayed, except it be upon special cause, but this does not appear to be the present rule of practice. After a decree, however, the court will not suffer a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it."

It is, however, insisted that a decree had been rendered in this cause, and the motion of the complainant came too late.

It appears from the record before us that in 1866 a final decree was rendered in the cause, from which one of the defendants sued out a writ of error, and at the September term, 1870, of this court, the decree which had been rendered was reversed, and the cause remanded.

The effect of the judgment of this court left the cause pending in the court below for trial, precisely as if no decree had ever been rendered. This rule was announced in the case of *Chickering* v. *Failes*, 29 Ill. 294. The cause was governed by the same rule, so far as complainant's right to dismiss was concerned, as if no decree had ever been rendered therein. The Superior Court so treated it, and in this we perceive no error.

The decree of the Superior Court will be affirmed.

Decree affirmed.

THE TEUTONIA LIFE INSURANCE CO. OF CHICAGO

v.

ANNA BECK.

1. NEW TRIAL — *circuit judge should award when verdict is against the weight of evidence.* A circuit judge, who tries a case and sees the witnesses on the stand, has superior opportunities of estimating the value of the evidence, and the principal responsibility for the correctness of the verdict is upon him, and if the verdict is against the weight of the evidence, it is his duty to award a new trial.

2. ERROR *will not always reverse.* Even though evidence not strictly admissible is introduced, yet if the court can see that such evidence could not have misled the jury, and that their verdict is right, independent of such evidence, the judgment will not be reversed.

APPEAL from the Circuit Court of Cook county; the Hon. LAMBERT TREE, Judge, presiding.

Messrs. BARBER & LACKNER, for the appellants.

Mr. A. E. GUILD, JR., and Mr. FRANK SCALES, for the appellee.

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

This suit was brought in the court below on a life insurance policy. It bore date in October, 1869, and the application was made by Jacob Beck, and was, in case of his death, payable to his wife, Anna Beck. It contained, as stated by appellant's witnesses, this clause: "If any of the statements made in the application for this policy, upon the faith of which this policy is issued, and which are to be deemed as a part thereof, shall be found to be untrue, then this policy shall be considered null and void." And there was testimony tending to prove that the application contained a statement, among others, in answer to a question, that his health had formerly always been good, and that the applicant had never had any serious

sickness. The application seems to have been filled up, ready to be signed, by a solicitor of the company, and signed by the applicant. There is no evidence that he ever read it or understood its nature, or what would be the effect of any inaccuracy of statement in answer to these various questions; nor that he was then or afterward informed that he was required to warrant the truth of his statements in answer to these various questions, and if either of them proved to be untrue that he would forfeit his policy.

It is true, that such a statement is usually contained in small print in the conditions annexed to the policy. But these are usually difficult to read, and, as is believed, they are seldom if ever known to be contained in the policy by the holder. In this manner the honest and unsuspecting are easily overreached, and may frequently be imposed upon by the unscrupulous. When an application is filled out by an agent of the company, and the assured requested to sign it, most persons regard it as a mere form, and unless admonished of the importance of accurate answers to the questions, answers are hastily given without reflection or time to ascertain facts with precise exactness, which is frequently insisted upon after a loss occurs. In this way the people are liable greatly to be abused, and it is a matter of surprise that such bodies are still so extensively patronized.

In this case the defense interposed was, that the assured had made a false answer in stating that he had not previously been seriously sick, when it is claimed that he had been sick with *delirium tremens*. On this question there was a conflict of evidence, the physician, who was an officer of the company at the time of the trial, testifying that deceased had *delirium tremens* in June previous to receiving the policy, and that he then attended him and treated him for the disease. On the other hand, appellee states that her husband was not in the habit of drinking, and in her statement she is strongly corroborated by five other witnesses, one of whom was her husband's partner for a number of years, and had been associated

in the daily transaction of their business during all that time. In such a conflict it was for the jury to decide, and we think the evidence clearly preponderates in favor of the verdict.

If the rebutting witnesses, who, so far as we can see, stand unimpeached, are to be credited, we cannot but be satisfied with the finding. Again, the circuit judge who tried the case and saw the witnesses on the stand, and had superior opportunities of estimating the value of the evidence, has, by overruling a motion for a new trial, signified his satisfaction with the result. Had there been grounds for the motion he would have unhesitatingly granted it, as, on such a motion, the principal responsibility for the correctness of the verdict rests on the court below. If wrong, he would not hesitate to set it aside. With us, who neither know nor see the witnesses who testify, we cannot estimate the worth of the evidence as can the circuit judge. He is charged with the duty of awarding a new trial when the finding is against the weight of evidence; whilst we never do so unless it seems to us that it is clearly and almost without doubt unsupported.

It is, again, urged that the court below erred in admitting evidence that appellants, to avoid a law suit, had offered appellee $500 for a settlement. This evidence was not strictly admissible, and should have been rejected. But inasmuch as we are satisfied with the finding, independent of that item of evidence, we cannot reverse for that reason. It could not have misled the jury, as they found the full amount of the policy, with interest. That evidence did not tend, in the slightest degree, to prove that there was due to appellee $1,123.48. It could only have operated, if at all, as an admission that $500 was due. Again, at the request of appellants, the jury were instructed that such an offer, if made by way of compromise, was not evidence, and should not be considered by them in finding their verdict. This, then, we can see, corrected any wrong it was liable to inflict on appellants. The judgment of the court below must be affirmed.

Judgment affirmed.

THE WESTERN UNION TELEGRAPH COMPANY

v.

JAMES E. TYLER *et al.*

1. TELEGRAPH COMPANIES — *exemption construed.* The usual regulations exempting telegraph companies from liability for errors in unrepeated messages, exempts them only for errors arising from causes beyond their own control.

2. SAME — *requirement on blanks, no contract.* The regulation requiring messages to be repeated, printed on the blank on which a message is written, is not a contract binding in law, as the duty arises to send the same correctly upon payment of the charge required. Such regulation is void for want of consideration, and as being against public policy.

3. SAME — *burden of proof.* Where the inaccuracy in the transmission of a message is proved, the *onus* of relieving the telegraph company sending the same, from the presumption of negligence thereby raised, rests upon the company, by showing that the error was caused by some agency for which it is not liable.

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

Messrs. DENT & BLACK, and Messrs. WILLIAMS & THOMPSON, for the appellant.

Messrs. COOPER, GARNETT & PACKARD, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This case was before this court at the September term, 1871, and reported in 60 Ill. 421. It was then ably argued by counsel and fully considered by the court. The authorities were critically examined, and it was found they were not entirely harmonious as to the principles which should be applied to and govern telegraph companies, leaving this court at full liberty to adopt such rules and apply such principles to them, as might seem best calculated to protect those who are compelled to resort to those wonderful instrumentalities by

which they operate, and at the same time impose no unnecessary hardship or liability upon them.

The cause having been remanded, a new trial has been had, and the court below, as in duty bound, applied to the cause the principles we had recognized as correct, the result of which was a verdict and judgment for the plaintiffs, in an amount sufficient to cover the damages they had sustained by the negligence of the defendants in transmitting their message.

The first appeal was taken by the plaintiffs in the action, they complaining, justly, as we thought, that through and by the misdirection of the court to the jury as to the law of the case, they had been permitted to recover only the amount of the company's charges for sending the message, allowing them no damages for the loss they had suffered by reason of their negligent and careless mistake.

This appeal is taken by the telegraph company, and great efforts have been made to induce this court to depart from the ground it occupied on the first appeal, by questioning the correctness of the principles which governed our ruling. These have caused us to re-examine that case and those principles, to explore anew the whole ground, and we desire to say, and that most emphatically, there is nothing in the opinion then delivered we desire to retract or modify, fully believing it is sanctioned by reason, by law and by justice, alike demanded by public policy and public necessity.

The rule there announced is, that the usual regulations exempting companies from liability for errors in unrepeated messages, exempts them only for errors arising from causes beyond their own control, and that the inaccuracy of the message being proved, the *onus* of relieving themselves from the presumption of negligence thereby raised, rests upon the company.

And in regard to the regulation of the company requiring messages to be repeated in order to insure correct results, for which the sender is to pay fifty per cent in addition to the original cost, we endeavored to show, that such was then the

perfection to which the art of telegraphy had reached, that the real object of such a requirement was to increase the revenue of the companies. The proposition may be thus stated: The company engages to use all proper skill and care in transmitting a message over its wires for the established rates. The duty at once arises, the charges being paid, to transmit this message as delivered—not a different message, but the one delivered and no other—the sender has paid his money to have this message sent. The undertaking of the company is, *prima facie*, to send it correctly, and if their wires and instruments are in proper order, and their operators skillful and careful, it will traverse the wires precisely in the words and figures which composed it when placed upon the wires, and is sure, in that shape and form, to reach its destination, no atmospheric causes intervening to prevent. The very fact that but few cases of negligence have been brought against these companies is strong proof they do, in almost all cases, transmit messages correctly, and they can always do it if they take proper care, have the requisite skill and use proper instruments. If they will do all this, there is no need of repeating a message, and it must be regarded as a contrivance to swell their receipts. In the ordinary course of business, the newspapers inform us, and we have no reason to doubt the truth of the statement, telegrams are sent from New York to London, and answers received, in about thirty-three minutes, they having passed through thirty-six different hands, and traveled over seven thousand miles! This is done every day, such is the perfection to which the art is brought. Does an instrumentality which can perform such feats, require the fostering care of courts? Is it an infant yet in its swaddling clothes? No, but a giant power, under the control of man, whose daily exploits, guided by his care and skill, throw those of the fabled Mercury deep into shade and far in the rear.

On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a message is written, is a contract, we held, it was not a con-

tract binding in law, for the reason, the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid, the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent of the original charges.

We remain, after careful examination, of the same opinion.

Since the opinion in 60 Ill. was delivered, this subject has been fully considered by the Supreme Court of our neighboring State of Wisconsin, and in a very able opinion, delivered by the chief justice of that court, our views and conclusions are substantially approved, and they hold that regulations exempting a telegraph company from liability for its own negligence are void for want of consideration. *Comdee* v. *Western Union Telegraph Co.*, decided October term, 1873.

In the Supreme Court of Maine, the case of *Bartlett & Wood* v. *The Western Union Telegraph Company* was considered and determined. The action was brought to recover damages for the incorrect transmission of a message. The dispatch was to a grain merchant in Chicago, ordering ten thousand bushels of corn, but, as received and delivered, read, "one" thousand bushels. It required two or three days to correct the error, during which time the price of corn had advanced ten cents per bushel, making a loss to the plaintiffs of nine hundred dollars.

The court said, a rule adopted by a telegraph company as follows: "The Western Union Telegraph Company will receive messages for all stations east of the Mississippi river, to be sent during the night, at one-half the usual rates, on condition that the company shall not be liable for errors or

delay in the transmission or delivery, or for non-delivery of such messages from whatever cause arising, and shall only be bound in such case to return the amount paid by the sender," is against public policy, and therefore void. When assented to by the sender, so as to become a contract, it is equally void, as against public policy, and also because its terms are repugnant, assuming to impose an obligation, and by the same act releasing from all obligations. In an action to recover damages of a telegraph company for an error in the transmission of a message, in the absence of any rule or contract fixing the company's liability, the plaintiff makes out a *prima facie* case by proof of the undertaking, error, and damage. The burden rests upon the company to show that the error was caused by some agency for which it is not liable."

This is in perfect harmony with this case as reported *supra.*

The defendants in the case before us sought to overthrow the *prima facie* case made by the plaintiffs, on the principles settled by this court, by proposing to prove by persons understood to be skilled in telegraphy that there were certain inherent imperfections in the art and practice of telegraphy beyond the control of human agency, and which often operate to impair or interfere with the accuracy of transmission of a message. This proof the court refused to receive, and we think properly. The opinion in this case then before the court, on this trial assumes there are causes, atmospheric and others, not under the control of the operator, to prevent the accurate transmission of a message. It was not proposed to prove the mistake in this case was occasioned by any of those causes. The testimony was therefore unimportant. Besides, the testimony was rather of a speculative character, and too remote to be connected with this case, and was properly rejected. As well might a common carrier by railroad, to discharge itself from liability for loss of goods, offer to prove that carrying goods by that mode was subject to accidents, the causes of which had not been satisfactorily ascertained.

As to the instructions, we are of opinion the court properly disposed of them. And in reviewing the whole case we find no occasion to take back any thing that was said in the first opinion, or to abandon any position therein taken. The only safe rule for the public is to hold these companies to the same liabilities as natural persons, who, when they undertake for a compensation to perform a duty or work, shall perform it, or to be excused shall show a good reason for the exemption, and the *onus* must rest upon the company.

In this case no reason is shown; the negligence is established, by which a loss occurred to the plaintiffs, and justice, reason and public policy demand the company shall make good the loss, and this they will do by the affirmance of the judgment of the Superior Court.

The judgment of that court is affirmed.

Judgment affirmed.

HARRIET ALBEE, Adm'x, etc.

v.

WILLIAM H. WACHTER.

1. BILL FOR ACCOUNT—*sufficiency of proof.* On bill by one partner against his copartner for an account, the complainant, during the defendant's lifetime, proved by a third party who had examined the firm books, the amount of the profits and the amount he found due the complainant. This the defendant never attempted to explain or deny, though he had ample time, and after his death his administrator failed to explain or rebut it by testimony. It also appeared that the complainant had no access to the books, which the defense never produced: *Held*, that although the evidence was somewhat unsatisfactory, yet, under the circumstances, it was sufficient *prima facie* to uphold a decree in complainant's favor.

2. EXECUTION — *cannot issue against an estate.* It is error to award an execution against an administrator upon a decree against the estate of his intestate. The decree should require the administrator to pay the sum found to be due, in the due course of administration.

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

This was a bill in chancery, exhibited by William H. Wachter against Cyrus P. Albee, in his lifetime, to settle a partnership and state an account between the parties. Before the decree the defendant died, and Harriet Albee, his administratrix, was made defendant in his place. From the final decree in the case the administratrix appealed.

Messrs. GARDNER & SCHUYLER, for the appellant.

Mr. E. A. STORRS, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This bill was to settle a copartnership. It was filed in 1869. Before the death of Cyrus P. Albee, which occurred on the 25th day of March, 1871, the issues had been made upon the original bill, and answer, and the testimony on the part of the complainant, Wachter, including his own deposition, had been taken. The books of the firm were then under the control of the defendant, Albee, and although the testimony taken tended to show a considerable indebtedness from him to Wachter, he made no effort to explain it by his own testimony, or otherwise. The record, testimony, books, and all the files, were destroyed by fire in October, 1871.

Afterward, upon leave given, the record and pleadings were restored and the cause revived, and the administratrix made a party. The testimony, on the part of complainant, was retaken, but none was offered by appellant. On the final hearing of the cause, the court found, among other things, the net profits of the copartnership from the commencement to the dissolution, amounted to the sum of $5,856.47; that complainant was entitled to one-half that sum, and decreed accordingly.

The principal error assigned is, the evidence is not sufficient to support the finding of the court.

We have examined the evidence preserved in the record, and if we exclude appellee's own testimony, which it is insisted was improperly received, we are still of opinion there is sufficient to sustain the decree of the court.

The witness Russell states he made a thorough examination of the firm books in the lifetime of Albee, and reported to him they showed the net profits of the concern to be $5,856.47. It is true, Albee, in a general way, said that amount was not correct, but how and in what way he did not undertake to explain. It seems very clear, and perhaps it is not controverted, that Albee was indebted to Wachter in some amount, and if the amount stated by Russell as appearing to be due from the books was not correct, it was incumbent on him to offer some explanation. This he did not do, although opportunity was afforded him for that purpose, nor has the administratrix, since his death, undertaken to rebut the *prima facie* case made by the evidence.

When the firm was dissolved, the books in which the accounts were kept were retained by Albee. It was not, therefore, in the power of the complainant to make any accurate statement of the accounts. No one could make such statement but Albee, and he declined to do it. It may be conceded the testimony of the amount due is not altogether satisfactory, but it is the highest grade of evidence that could be procured. If appellee's own testimony is to be disregarded, he could only support his cause by the evidence of strangers to their affairs. This he has done, and however unsatisfactory it may be, neither Albee, in his lifetime, nor his administratrix, since his death, has offered any explanatory evidence.

Were it a question of first impression with us, we should feel constrained to find as the circuit court did, on the evidence contained in the record.

The court inadvertently ordered execution to issue against the administratrix in case of default in payment of the amount found due by a certain day fixed. For this irregularity the decree will be reversed, and a decree rendered in this court for

the amount found due, to be paid by the administratrix out of the effects of the estate which may come to her hands in due course of administration. The appellant, however, will recover costs in this court.

Decree reversed, and decree in this Court.

JAMES C. BAIRD

v.

C. H. UNDERWOOD.

PROMISSORY NOTE — *payable on a contingency, not negotiable.* An instrument in writing for the payment of money six months after date, on condition its amount "is not provided for as agreed by C, D," not being payable absolutely and unconditionally, is not a negotiable promissory note, and suit cannot be maintained on it in the name of an assignee.

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

Mr. T. E. RYAN, for the appellant.

Messrs. BROWN & SOUTHWORTH, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action brought by Baird, the appellant, as assignee of the following instrument of writing, against Underwood, appellee, the maker thereof.

"ST. CHARLES, *Nov.* 22*d*, 1871.

Six months after date I promise to pay to the order of Lewis Klink, the sum of one hundred and twenty dollars, for value received, on condition said amount is not provided for as agreed by J. Updike.

C. H. UNDERWOOD."

Judgment was rendered in the court below in favor of the defendant, from which the plaintiff appealed.

The only question presented is, whether this instrument sued on is a negotiable promissory note, so that the assignee, the appellant, can sue and recover upon it in his own name.

It enters into the definition of a promissory note, that the money must be payable at all events, not depending on any contingency, either with regard to event, or the fund out of which payment is to be made, or the parties by or to whom payment is to be made. Chitty on Bills, 155; *Kelley* v. *Hemmingway*, 13 Ill. 604; *Smalley* v. *Edey*, 15 id. 324.

This instrument is payable six months after date, on condition its amount "is not provided for as agreed by J. Updike." In case J. Updike should provide for the amount of the instrument then it would not be payable by the maker. It is payable conditionally only, and not absolutely and at all events, and therefore is not a promissory note.

The authorities cited by appellee's counsel to the point, that an instrument is a negotiable promissory note where it is payable absolutely at a time certain, but upon the happening of some contingency will be payable before, do not conflict herewith. In such case, the time of payment must certainly arrive, and is not contingent, in the proper sense; for that means a time which may or may not arrive. This instrument is not absolutely payable by the maker at all; it is only contingently payable by him, and it was not certain at the time of the giving of the note, that it ever would be payable by the maker.

The instrument not being negotiable, the appellant has not the legal title to it, and cannot maintain the suit in his own name.

The judgment will be affirmed.

Judgment affirmed.

Syllabus.

AMANDA F. ARMSTRONG

v.

THE PEOPLE *ex rel.* Julian S. Rumsey.

APPEAL—*identity of judgment appealed from.* Where the record does not show any such judgment as the appeal professes to be taken from, the appeal will be dismissed.

APPEAL from the Circuit Court of Cook county; the Hon. LAMBERT TREE, Judge, presiding.

Mr. WILLIAM ELIOT FURNESS, for the appellant.

Mr. F. ADAMS, and Mr. T. LYLE DICKEY, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

We are unable to find in the record before us, any such judgment as that from which this appeal professes to be taken. The only judgment in the record is against certain lots in the city of Chicago. The appeal is from a judgment against the N. 10¼ acres of the W. ½ of the S. E. ¼ of the S. E. ¼ of sec. 13, T. 39 N. R. 13 E., which appears to be entirely different property from that described in the judgment. We are not authorized to presume it is the same, and the appeal must therefore be dismissed.

Appeal dismissed.

EDMUND D. TAYLOR

v.

JOHN W. BAILEY.

1. LANDLORD AND TENANT—*landlord not liable for damage caused by tenant's own negligence.* Where the water pipes in a building are of the proper size and properly constructed, a tenant occupying a room and hav-

ing the use of the pipes and water, and access to a crank by which to turn off the water to prevent freezing, and who neglects to turn off the same, whereby it freezes and bursts the pipe and damages his goods by leakage, cannot maintain an action against the landlord for damage, on account of his own negligence and want of ordinary care in not turning off the water when likely to freeze.

2. SAME—*lease construed as to liability for leakage.* A clause in a lease, exempting the landlord from liability for damage to the tenant by leakage of water, will not only be held to apply to leakage in the story or room occupied by the tenant, when it appears that the water pipes are in a room on a floor above and to which the tenant has access and agrees to keep in order, but will also apply to leakage from the pipes in such upper room

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

Messrs. DENT & BLACK, for the appellant.

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

Mr. JUSTICE CRAIG delivered the opinion of the Court.

This was an action, on the case, brought by appellee, in the Superior Court of Cook county, against Edmund D. Taylor, to recover damages sustained upon a certain quantity of teas caused by leakage of water in a certain building occupied by appellee under a lease from Taylor, as a wholesale tea store.

A trial was had before a jury which resulted in a judgment in favor of appellee for $1,471.75. The court overruled a motion for a new trial and rendered judgment upon the verdict, to reverse which the defendant, Taylor, has prosecuted this appeal.

It appears from the record that appellant formerly owned a double building in Chicago, arranged into two stores, known as No. 274 and 276 S. Water street; the former he gave to his wife, and the latter to his daughter, Mrs. Strather; these stores were destroyed by the fire of October, 1871, and were subsequently rebuilt. The building contained a stairway in the center, and a partition between the stores back of the stairway. The water closets for the building were at the rear end of the

hall in the second story; the water pipe, which runs from the basement up the partition in store No. 274, supplied the water closets, and also a sink in the hall over store 276, which was a few feet in front of the water closets.

There was a crank to the rod in the hall for the purpose of shutting off the water from the main pipe, to guard against freezing in a cold night.

In September, 1872, Mrs. Strather died, leaving only one child, Cora, an infant. In January, 1873, Cora having no guardian, appellant directed D. Cole & Sons to lease her property. Under this direction they made a contract with appellee to lease him the first floor and basement from January 15th, 1873, to the 1st of May, 1873, at $75 per month. A lease was prepared and executed by E. D. Taylor, appellant, agent, as a party of the first part, and by appellee as party of the second part. One provision of the lease read as follows: "The said party of the second part is to keep all side-walks in front of the premises in good order, ashes, garbage, and slops of every kind and nature, clear and clean off, and from or about the said premises at his own costs, and also to keep sewer and catch basin clean, so it will carry off the slops and waste water, at his own cost, and in case of any damage caused by leakage of water the said first party shall not be responsible therefor."

The lease also contains this clause: "The second party is not to keep, or cause to be kept, any spirits in said premises, and also to keep the hydrants and pipes, fences and privies and all other parts of the house in good order, free of all costs to said first party during this lease."

The lease also contains a clause that the party of the second part has received the premises in good order and condition, and that he will return them in like good condition.

On the night of the 28th of March, 1873, the water pipe in the hall in the second story of the building burst, which was caused by freezing, and the water went through the ceiling and did the damage to appellee's teas, for which this action is brought.

In the view we take of the record before us, the judgment cannot be sustained, for two reasons.

First — It is apparent that the damage appellee sustained is to be traced to his own negligence or want of ordinary care in not turning off the water when it was liable to freeze and burst the water pipe.

It seems to be clearly established by the proof, by those who were competent to judge, on an examination made in January or February, previous to the accident that caused the damage, that the sink was properly constructed; that the water pipe was of proper size and in good condition, guarded and packed where packing was necessary, and that there was a rod in the hall for the purpose of turning the water off. Under these circumstances we are at a loss to perceive upon what principle negligence or the want of care can be attributed to appellant.

Appellee, as appears from the testimony, had a key to the water closet in the second story of the building, and it was occupied by him. The lease required him to keep it in order. It was an appurtenant to the premises leased, and as the water pipe in that part of the building was constructed for the use and benefit of the water closet, it, too, must be regarded under his control. J. T. Griffiths, a witness for appellant, testified, after the pipes had been packed he went to the plaintiff's store and told him distinctly that there was a place to turn the water off, and to use care in turning it off, as they were liable to be flooded at any time if they did not use care. While it is true this is denied by appellee, yet we see no reason for disregarding the evidence of this witness, who seems to be entirely disinterested.

Under these circumstances we can only attribute the damages sustained to the negligence of appellee. Had he taken the precaution to have used the appliances prepared for his protection and turned off the water, the accident would not have occurred.

But, aside from this question, there is another point fatal to a recovery.

The lease expressly provides, in case of any damage caused by leakage of water, Taylor, appellant, shall not be held responsible.

It is insisted that this clause in the lease must be confined to the basement and first story of the building, which were actually occupied by appellee.

The building was leased to be used as a wholesale tea store. The teas were kept in the first story of the building. We cannot conceive in what manner it was possible for appellee's teas to be liable to damage from leakage that would occur from water in the basement. Such is not possible. From what direction was leakage contemplated by the parties when the lease was executed? Evidently from the second story, as that was the only direction from which water could come which was likely to damage the goods of appellee.

By referring to another provision in the lease, it seems plain that the construction contended for by appellee is not tenable. The lease provides in express terms that the appellee shall keep in good order the hydrants and pipes, privies and all other parts of the house.

There was no privy connected with the premises except the one in the second story of the building. This, then, was the one intended by the parties to be embraced in the lease. The water-pipe which burst was connected with the privy, and that, too, must have been one of the water-pipes intended to be embraced in the lease.

In order to arrive at the intent of the parties, the various provisions of the lease must be considered and compared together. When this is done, a reasonable and fair construction of the lease will not hold appellant responsible for damages occasioned by leakage.

From these views it follows that the Superior Court erred in the instruction given for appellee, and in refusing instructions one, two and seven, which were asked in behalf of appellant, for which the judgment must be reversed and the cause remanded. *Judgment reversed.*

SCOTT, J., dissents.

Syllabus.

WILLIAM FORBES
v.
HENRY BALENSEIFER.

1. EASEMENT — *can be acquired only by grant or prescription.* An easement, being connected with and appurtenant to real estate, so far partakes of the character of land that it can only be acquired by grant, or prescription, which implies a previous grant.

2. LICENSE — *what constitutes — and whether revocable.* A verbal agreement between the several owners of several tracts of land, by which each gives to the others a right of way over his land, amounts to a mere license, revocable at the will of either of the parties.

3. A verbal license to pass over the land of another may be revoked either by express notice, by obstructing the land licensed to be used, by appropriating it to any use inconsistent with the enjoyment of the license, or by a sale of the land without reserving the privilege to the licensee, and in all such cases the rights of the licensee are terminated.

4. A license does not become executed and irrevocable merely because the licensee has availed himself of the privileges of a license and entered upon their enjoyment, but cases may arise where to revoke would be a great wrong and oppression, and amount to a fraud on the part of the licensor, and in such case a court will, to prevent the fraud, hold the licensor estopped from revoking the license.

5. DEDICATION *for highway — must be accepted.* A dedication of land to public use as a highway must be accepted and appropriated to the uses intended, and until there is such acceptance the owner may withdraw his offer and appropriate the land to any other purpose he may choose.

6. SAME — *how acceptance of dedication may be evidenced.* An acceptance of a dedication of a highway may be evidenced by the public officers taking charge of the road and repairing it at public expense; or, where it needs no repair, by placing it on the map of roads for the proper district, and by its being used by the public, but mere travel by the public is not evidence of acceptance.

7. INSTRUCTION. An instruction that if land was laid out as a public highway by the owner, and the public recognized and accepted it, it would, in law, be a public highway, is erroneous in not telling the jury what is necessary to constitute an acceptance.

APPEAL from the Circuit Court of Marshall county; the Hon. JOHN BURNS, Judge, presiding.

Messrs. BARNES & MUIR, for the appellant.

Messrs. PELEG & PERLEY, for the appellee.

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

Appellant brought an action of trespass, before a justice of the peace, against appellee, to recover for injury to and destruction of his corn by appellee's hogs and cattle. A trial was had before the justice, when appellant recovered a judgment for $150 and costs. The case was removed by appeal to the circuit court, where another trial was had by the court and a jury, which resulted in a verdict and judgment in favor of the defendant, and plaintiff brings the case by appeal to this court.

It appears that the owners of four several tracts of adjoining lands, some three or four years previous to the trial, agreed that in fencing these lands each would leave out a rod of ground in width along the dividing line between them, so as to form a lane two rods in width between their farms, from the north to the south side, where this lane intersected at right angles with a public highway. The fences were so built, and it was understood that the lane was to be for the benefit of each proprietor. Subsequently one of the owners sold his farm to appellant, without, so far as we can see from the record, making any reservation. This agreement was never reduced to writing, but only existed in parol, and seems not to have intended the lane as a public highway, but simply as a pass-way for the owners of these lands.

After appellant purchased one of the tracts he closed the lane, by erecting gates, as he claims, with the consent of appellee, but the latter denies that he ever gave consent. It appears that appellee has to pass over a strip of appellant's land to reach this lane, and that appellant forbade appellee's crossing over this strip, but he disregarded the prohibition and subsequently passed over it repeatedly to get out at the lane, and appellant claims that he left the gate open and the fence down,

by which the stock got in and destroyed his corn. The court, against the objections of appellant, permitted appellee to prove the declarations of appellant's grantor, to show this was a private way, which appellee was entitled to use as such, and this is assigned as error.

An easement, being connected with and appurtenant to real estate, so far partakes of the character of lands that it can only be acquired by grant, or prescription, which implies a previous grant. Washburn on Easements, 23. It then follows that this evidence was incompetent to prove appellee had a right of way over appellant's land, as that could only be done by deed, or such long and uninterrupted use as the law would imply a grant, neither of which is claimed in this case. But any verbal agreement which appellant's grantor may have made with appellee for passing over his land could give appellant no vested right of way.

It at most would amount to a mere license, and such a license is revocable at the pleasure of the licensor; and a revocation may be made in different modes. It may be done by express notice, by such acts as are entirely inconsistent with the enjoyment of the license, as, by obstructing the land licensed to be used, by appropriating it to any use inconsistent with the enjoyment of the license, or by sale of the land without reserving the privilege to the licensee. In all such cases of revocation the licensee's rights are terminated. A license, unlike an easement, is not an interest in the land, but only a privilege to go upon the land for a specified purpose, but is revocable at the will of the owner, whilst an easement is irrevocable. Wash. on Eas. ib. But it is urged that an executed license is not revocable, and the case of *Russell* v. *Hubbard*, 59 Ill. 335, is referred to in support of the proposition. In that case it was held that where an adjoining owner induced another, who intended to erect a frame building, to change it to a brick structure, to join his building to the wall of that of the licensor, and afterward insisted upon his removing it, which would have been of great expense to the licensee, besides destroying

his building, it was held that the license was executed and the licensee and his grantees acquired a right to so use the wall, and that the licensor was estopped to revoke it.

In that case the doctrine was limited to cases where a large sum of money had been expended under the license, partly for the benefit of the licensor, and the position of the licensee had been so changed at the request of the licensor that he could not on a revocation be restored to his original position or be compensated in damages, and having been induced by the licensor to so act, it would have been a fraud to permit a revocation, and that the facts of that case were held to take it out of the general rule which was stated and fully recognized, that the licensor might revoke at pleasure. It was there only intended to hold that cases might arise when to revoke would be a great wrong and oppression, and amount to a fraud on the part of the licensor such as a court would interpose to prevent by holding that he was estopped from revoking the license, and the facts there presented such a case, but not that because a licensee had availed himself of the privileges of a license, and had entered upon their enjoyment, it thereby became executed and irrevocable. The declarations of appellant's grantor, whether made before or after his conveyance, were not admissible to prove the grant, and it was error to admit them. If offered to prove a license, they were improper, because he had conveyed the land over which the license extended, and thereby revoked it.

It is urged that a number of appellee's instructions have no evidence on which to base them, and that they were calculated to mislead the jury, and it was error to give them. The third of his instructions informs the jury that if the former owner laid out a public highway, and the public recognized it and accepted it, then, in law, it would be a public highway, and that defendant could not commit a trespass over the line so fenced out, nor by the removal of any obstruction to free travel along such line as was in the boundaries thus fenced out. We have examined the testimony in the bill of exceptions care-

fully, and fail to find any evidence upon which to base this instruction. There is no pretense that the road was established under the statute, or by prescription, nor do we see the slightest evidence that there was a dedication to public use. It has been said many times by this court, and if any principle is settled, it is, that a dedication, to be valid and binding, must be given by the owner of the land to the public for a highway, and must have been accepted and appropriated to the use intended; that there must be evidence of acceptance, and until there is, the owner may withdraw his offer and appropriate the land to any other purpose he may choose; that an acceptance can be evidenced by the public officers taking charge of the road and repairing it at public expense, or, where it needs no repair, by placing it on the map of roads for the proper district, and by its being used by the public. But mere travel by the public is not evidence of an acceptance. And in all cases it must appear from declarations or convincing circumstances that the owner intended to dedicate the use of the land to the public. No such intention appears in this case. There is no evidence that the public accepted the dedication if one had been intended. The evidence only shows that other persons than the parties occasionally traveled over the road. And the instruction failing to inform the jury what was necessary to constitute a dedication and its acceptance, they may have, and probably did conclude that the travel by the public was an acceptance and was all that was required to create it a public highway.

The fourth instruction refers to and re-announces the rule contained in the third, and for the reasons we have given it failed to announce the law of this case. But it is said that the court should not reverse even if these instructions are erroneous, if they could not have misled the jury, or where we can see that substantial justice has been done. We do not see that these instructions did not mislead the jury, on the contrary we are of opinion that they may have done so; nor can we say that the finding of the jury is clearly

right and that substantial justice has been done. It was error to give these instructions.

By the sixth of appellee's instructions the jury are informed that if they believe that the former owners of the land laid out the road before the acts complained of had been committed, and worked and traveled it amongst themselves as a highway, that would amount to a license to each owner to so use it unless revoked by the owners of the land, and that neither of such owners, nor his grantee, could commit a trespass against any of the other owners or their grantees, by passing over it, nor by the removal of obstructions to free travel therein, till the license was revoked. This instruction was vicious, because it announced an incorrect rule of law, and as framed the jury could only consider whether all of the owners or part of them and the grantees of the others had united in revoking the license. We are aware of no principle of law which requires all the parties to a mutual license to join in its revocation. A verbal license is no more out of the statute of frauds because it is mutual among several, than when it is simply made from one person to another. A verbal agreement between four persons that each shall have a license to pass over a designated portion of the land of each, is within the statute of frauds equally with any other such license. The statute has made no exceptions on account of numbers, and no reason is perceived why it should. Under such a verbal license or agreement either, any, or all of the parties would have the same right to revoke a license as would the licensor to revoke such privileges to a single person. They both stand upon and are governed by the same rule. This instruction was manifestly wrong, as there was no pretense that all of these persons joined in a revocation, and as they did not, this instruction ended the case.

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

Judgment reversed.

CHARLES V. MARSH
v.
PETER KAUFF.

CONTRACT — *right to damages for delay caused by the party claiming them.* Where a written contract for the building of a stable provides that the work shall be completed by a specified day, and that the contractor shall pay the sum of thirty dollars a day for each day's delay after the date mentioned, the employer will have no right to exact damages for a delay caused by his own act in stopping the work.

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

This was an action of assumpsit, brought by Peter Kauff against Charles V. Marsh, to recover a balance due on a contract for building a stable for the defendant. The opinion of the court states the material facts of the case.

Mr. THOMAS H. MARSH, for the appellant.

Mr. ROBERT T. LINCOLN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the Superior Court of Cook county, on a written contract, dated April 3, 1873, by which Kauff, the appellee, agreed with Marsh, the appellant, to build for him a stable and finish it on or before May 17, of the same year, for the sum of three thousand seven hundred and fifty dollars, which appellant was to pay in installments as the work progressed. In the contract was this clause: "The contractor shall pay the sum of thirty dollars a day for every day's delay after the date mentioned above."

The action was brought to recover an unpaid balance claimed to be due on the work. A jury was waived and the cause submitted to the court for trial.

There was a special plea interposed, to which a special demurrer was put in, which was sustained on the ground that the plea amounted to the general issue. The record shows the facts alleged in the plea went to the court sitting as a jury. The proper plea was a plea of set-off, but it is not material. It claimed damages for the delay according to the stipulation in the contract.

It appears from the record, after the completion of the stable, the defendant set up a claim for thirty dollars a day for delay. When this claim was made it was agreed to submit it to arbitration. The arbitrators were chosen — they met and heard the parties, and then adjourned to find Mr. Lareau, the architect. At this juncture appellant left, saying he would not be needed further. After finding the architect, the arbitrators heard his statement and made an award in favor of appellee. Appellant declined to abide by it, as he did not think the finding correct.

On the trial it does not appear that appellee claimed any thing under the award or any benefit from it. The justification of the court, in failing to find the damages liquidated by the contract, may be attributed to this fact, leaving out of view the ambiguity in the terms, as there are two dates mentioned in the contract that the work was interrupted by appellant himself, at a point of time after the foundation was laid and appellee ready to go on with the superstructure. Owing to disappointment in money arrangements, appellant directed his architect to stop work on the building, and he would pay reasonable damages to the contractor. The delay being caused by appellant, a demand for damages therefor comes with a bad grace, and was properly disallowed by the court.

We can perceive no error in the finding and judgment, nor do we deem it necessary to cite authorities on the point, that a delay caused by the party himself excuses the other party from performance, but refer to the general principle as found in Comyn's Digest, title "Condition," L. 6.

Judgment affirmed.

Syllabus.

NELSON MASON *et al.*

v.

JOSEPH M. PATTERSON *et al.*

1. DECREE — *construed as to whether sale under passed title of one or two defendants.* Where a creditor's bill sought to subject the equitable interest of A and B in land to sale for the payment of their debts as members of a firm, and the decree ordered the sale of the property as prayed for, and directed, that the master "upon the sale of said premises, or any part thereof, make, execute and deliver to the purchaser or purchasers thereof a deed of conveyance, conveying to the purchasers thereof all the right, title and interest in said premises conveyed by the said A, in and by the several trust deeds set forth in said original and cross bills herein," etc.: *Held*, that the direction to the master could not have the effect to make the decree for the sale of A's interest only, but that the reference to the deeds of trust was simply to identify the property to be sold, and that a purchaser under said decree acquired the interest of both A and B, and succeeded to their equitable right to enforce the execution of a deed from the party holding the legal title.

2. SAME — *whether made in term time or in vacation.* Where a decree is entitled as of a certain term of court, and is so certified in the record, this will be conclusive evidence that the decree was made in term time and not in vacation, and the record cannot be impeached.

3. CHANCERY — *evidence not necessary as to defendant defaulted.* Where an adult defendant is in court and is defaulted for failing to answer in pursuance of a rule of court, a decree may be rendered against him without evidence; but when the decree recites that the cause was heard upon the pleadings and proof, and also upon the agreement of the parties filed, the recital of a hearing upon proofs is conclusive in a collateral proceeding.

4. ESTOPPEL — *by decree rendered on default.* Where a creditor's bill is filed to subject to sale the equitable title of A and B in real estate, owned by them under a contract of purchase from C, and the cross-bill filed in the cause, C being a party duly served, alleges full payment of the purchase money by A and B to C, and C suffers a decree against him by default, and the interests of A and B are sold under the decree, on bill by the purchaser against C to compel a conveyance of the legal title, the latter will be estopped by the default from asserting that he has any claim on the land for purchase money, or for any other cause.

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

This was a bill in chancery, filed by Joseph M. Patterson, William L. Patterson, J. Bradley Crandall, Eliza Crandall, Ansel A. Terrell, John Charter and Simeon Sampson, against Nelson Mason and Robert Cochran, for the specific performance of a contract for the sale and conveyance of lot 1 in block 39, west of Broadway, in the city of Sterling, Whiteside county, Illinois, made by Nelson Mason to Allen G. Schenck. It appeared that Schenck transferred one-half of his interest in the contract to his partner B. G. Wheeler. On a creditor's bill against Wheeler, Schenck and Mason, the equitable interest of Wheeler and Schenck was found, and their interest ordered to be sold. The premises were sold under this decree, when Silas R. Wilson became the purchaser of a part thereof, and James Galt of the balance. The complainants derive their title through this sale by mesne conveyances from Wilson and Galt. On the hearing the court decreed that Mason convey the premises to the complainants within sixty days, etc. From this decree Mason and Cochran appealed.

Messrs. DINSMOOR & STAGER, for the appellants.

Messrs. KILGOUR & MANAHAN, and Mr. JAMES M. WALLACE, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

While this case is not entirely free from doubt, we are of opinion the decree may be maintained on the facts proven.

Appellees, claiming to be the equitable owners of the real estate which is the subject of this litigation, filed their bill against appellants to compel a conveyance to themselves of the legal title that was alleged to be in Robert Cochran.

Nelson Mason was formerly the owner in fee simple of this property. On the 28th of January, 1857, he sold it to Allen Schenck, one of the two members constituting the firm of B.

G. Wheeler & Co., bankers, doing business in Sterling. Schenck afterward sold an undivided one-half interest to his partner, Wheeler, and made an assignment to that effect on the back of the contract he held from Mason. No deed was ever made to them, but the legal title was afterward conveyed by Mason for a fraudulent purpose to his son-in-law, John A. Bross, who made a will devising it back to him. Pending the proceedings to subject this property to the payment of the debts of Wheeler & Co., to which he was made a defendant, Bross died, leaving a widow and one child surviving. Although leave was obtained for that purpose, the cause was not revived as to the widow and heir. But afterward, by a sale made in pursuance of a decree of court made in a cause to which the widow and heir of Bross were made defendants, Mason became again reinvested with the legal title in the property. This latter proceeding was perhaps nothing more than a device adopted and conducted in the name of certain alleged creditors to get the legal title out of the heirs of Bross. None of the appellees were parties to that proceeding, nor does it appear they had any knowledge of its pendency.

In order to a clear understanding, it will be necessary to recur to some of the principal facts connected with the origin of appellees' title. On the 18th day of May, 1858, Buel G. Wheeler and his wife executed and delivered to Mason, as trustee, to secure him and other parties named as indorsers on the paper of Wheeler & Co., a trust deed on this lot, with other real estate. At the same time Schenck assigned to Mason for a like purpose his interest in the contract for a deed of the lot purchased of him, and Wheeler on that or a future day assigned all his interest in that contract to Mason.

Wheeler & Co. having failed, and a part of the indebtedness referred to in the trust deed not having been paid, the holders instituted proceedings in the Whiteside circuit court to subject all the property assigned to Mason to the payment of their claims. Other creditors of Wheeler & Co. came in

and asked to become complainants with a view of having their claims paid out of the trust property. A change of venue was awarded and the cause sent to Stephenson county, where a decree was rendered directing a sale of all the property assigned to Mason, or so much of it as might be necessary for that purpose, to pay the creditors of Wheeler & Co. The title obtained by the purchasers at the sale made under that decree is now held by appellees. There is no pretense the conveyance by Mason to Cochran was in good faith. Being a resident of another State, it was made to him with a view to transfer the litigation, in regard to the property, into the United States court.

A great number of objections have been taken to the validity of the decree under which appellees claim to have acquired the equitable title to the premises, but it is not deemed necessary to consider all of them.

It is contended the decree did not direct the sale of the interest of Allen Schenck in the property. The construction sought to be given the decree is not warranted. It will be observed the prayer of the bill is for the sale of the interest of both Wheeler and Schenck in the lot, and the decree following the prayer of the bill directs the sale of the entire property. The recital at the close of the decree, the master "upon the sale of said premises or any part thereof, make, execute and deliver to the purchaser or purchasers thereof a deed of conveyance, conveying to the purchasers thereof all the right, title and interest in said premises, conveyed by the said Buel G. Wheeler and Helen C. Wheeler to the said Nelson Mason, in and by the several trust deeds set forth in said original and cross-bills herein," is a mere matter of description. The entire lot was described accurately in the trust deeds set out in the original and cross-bills, and, doubtless to avoid the restatement of an extended description, reference was made to the trust deeds of Buel G. Wheeler for a description of the property the special master was to convey on making the sale as before directed. It plainly appears from the context, the

court ordered the sale of the entire estate of all the parties in interest who had been made defendants. The case of *Hofferbert* v. *Klinkhardt*, 58 Ill. 450, is an authority that favors in some degree this construction.

But if there was a defect in the decree in this regard, appellees have since this suit was commenced obtained a deed from Schenck for any interest he may have had in the property, and set it up by way of an amended or supplemental bill. This places his title, whatever it was, in appellees, and that is sufficient to authorize them to maintain this bill as against Mason and all persons claiming under him.

The suggestion the decree was made in vacation has no foundation in fact. It is entitled as of the December term, 1866, and is so certified in the record. This is conclusive, and we will not permit the record to be impeached.

It is said it does not appear the cause was ever heard by the court. There was a stipulation signed by a part of the defendants to the effect, the decree might be entered at the December term, 1866, or in vacation. Mason did not sign this stipulation. But at a previous term he was ruled to answer at a succeeding term and, failing to do so, was defaulted. He was in court by service of process. The decree recites, the cause was "heard upon the pleadings and proofs filed herein, and also upon the agreement of the parties filed herein." This was all and even more than the law required the court to do. It was in the power of the court to render a decree against all adult defendants upon default, without evidence. But it did not choose to do this. Proofs were heard, and the recital in the decree to that effect cannot be challenged in a collateral proceeding.

The only questions in the case of any considerable moment are, whether there was any thing due Mason from Wheeler and Schenck, or either of them, for the balance of the purchase money for the property, or whether there was any thing due him for expenses incurred in the execution of the trust.

The weight of the evidence indicates the entire purchase

money was fully paid. Confessedly, it was all paid unless it was the last installment. That, however, was credited to him on his bank pass-book by Wheeler & Co. But he says he only drew a few checks on the bank after that credit was given, and the balance never was paid. On this question the testimony is conflicting. Wheeler and Schenck both testify it was paid. The bank-book bears unmistakable evidence that some leaves are missing. It had been balanced and checks returned to March 5. At that date the balance of the account was $81.61, which was entered as a credit to the depositor. On June 16, the full amount of the last installment, $324.90, due on the contract, was credited on the pass-book under the item of $81.61. The account appears to have been again balanced. The bank was debtor to the amount of the last two items, $406.51, but there are no corresponding credits for checks returned.

These facts make it incumbent on appellant to offer some satisfactory explanation of the condition of the pass-book, which we do not think the record contains.

But whatever may be the fact as to the payment of the balance of the purchase money, we are of opinion Mason is estopped by the proceedings had in the Stephenson county circuit court, to say it was not. Both the original and the cross-bills allege full payment of the contract price of the land sold to Wheeler and Schenck, and the default admits the truth of the allegation. An opportunity was afforded Mason to assert whatever rights he had in the premises, and if he had not been paid, to insist upon his claim. But having failed to do so, the law will not permit him to assert the contrary against *bona fide* purchasers under that decree over his solemn admission, by the default upon the record, that he had been fully paid the purchase money for the land.

This view is conclusive against the claim now insisted upon for expenses in the execution of the trust under the trust deed. It is too late to advance such a claim against remote grantees of the purchasers under that decree. If he had any equities in

the premises, he should have had them adjusted in the former litigation. Superior equities have obtained in appellees that must prevail.

After a most careful consideration of all the points raised, we are of opinion the decree must be affirmed.

Decree affirmed.

The Milwaukee and St. Paul Railway Company

v.

William H. Smith.

1. Carriers — *implied contract as to place of delivery.* The rule in this State is, that where goods are delivered to a railway company marked to a place not upon the line of its road, but beyond the same, with no other directions or without any express contract as to the place of delivery, the law will imply an undertaking on the part of the carrier to transport and deliver the goods at the place to which they are marked.

2. Lex loci — *governs contract of carrier.* Where goods are delivered to a carrier in Wisconsin, the contract to be performed there, the laws of that State will govern as to the construction of the contract, and determine the extent of the carrier's undertaking.

3. Evidence — *common law of a State, how shown.* The unwritten or common law of another State may be proved by the testimony of competent witnesses instructed in its laws.

Appeal from the Superior Court of Cook county; the Hon. Arthur A. Smith, Judge, presiding.

This was an action of assumpsit, brought by Smith against the appellant, to recover damages for the breach of an alleged contract of the defendant as a common carrier. By agreement the cause was tried by the court without a jury, who rendered judgment in favor of the plaintiff for $1,554.51.

Mr. CHARLES M. STURGES, and Mr. SANFORD B. PERRY, for the appellant.

Messrs. TENNEYS, FLOWER & ABERCROMBIE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action brought by attachment in this State, against the appellant, to recover for the breach of an alleged contract, in failing to carry certain goods and chattels from Milwaukee, in the State of Wisconsin, and deliver the same at Eau Claire, in said State.

The facts of the case were these: The appellant was a Wisconsin corporation, owning and operating a line of railway running from Milwaukee, in the State of Wisconsin, to La Crosse, in said State, Milwaukee being its eastern and La Crosse its western terminus. It was the ordinary course and general business usage of appellant to receive at Milwaukee from consignors, to be carried on its railway, goods and merchandise, marked and directed to places beyond La Crosse, and off the line of its railway, and the same to carry to La Crosse, and there, as a forwarder, within a reasonable time, to deliver to other carriers for forwarding to or towards the places to which such goods and merchandise were marked and directed. Eau Claire is a town in Wisconsin. The customary route and mode of transporting goods and chattels from La Crosse to Eau Claire, was by way of the Mississippi river, on which La Crosse is situated, by steamboats owned and operated respectively by the Northwestern Union Packet Company, and the Northern Line Packet Company, to Reed's Landing on said river, and thence to Eau Claire by small steamboats running on the Chippewa river, on which Eau Claire is situated. On or about May 13, 1870, appellee delivered to appellant at Milwaukee, for carriage, the goods in question, marked and directed to appellee at Eau Claire. Within a reasonable time thereafter appellant safely carried the goods to La Crosse, and there delivered the same to the Northwest-

ern Union Packet Company, for carriage for the appellee to or towards Eau Claire. There were no directions to and no express promise or undertaking upon the part of appellant, in respect of the carriage from Milwaukee to any place whatever.

The only contract in that respect is such an one as the law implies from the facts above stated. There is no dispute about the facts.

The only question is as to the law — whether that implied a contract on the part of appellant, to carry to, and deliver at, Eau Claire.

According to the law of this State, as decided in the case of *I. C. R. R. Co.* v. *Frankenberg et al.* 54 Ill. 88, and recognized in later decisions, the contract was one to carry to, and deliver at, Eau Claire. Such an agreement would be implied from receiving the goods marked and directed to that place. But it is not the law of this State which is to govern — it is that of Wisconsin. The transaction took place in that State, and the performance was to be there. It is an established principle, with respect to personal contracts, that the law of the place where they are made shall govern in their construction, except when made with a view to performance in some other State or country. *The Pennsylvania Co.* v. *Fairchild et al.* 69 Ill. 260. There is no statute of Wisconsin upon the subject, according to the testimony. It depends, then, upon the unwritten or common law of Wisconsin. Such law of a foreign State is to be proved by the testimony of competent witnesses instructed in its laws, under oath.

There appears in the record the concurring testimony of three practitioners of law in Wisconsin, of more than twenty years' standing, whose practice has been continuous and extensive, and in the highest courts in the State, that upon the state of facts in this case, the promise and undertaking which, under the law of that State, would arise upon the railway company, would be one to carry and deliver, or offer to deliver to the connecting line at La Crosse, unless prevented by the

act of God, or the public enemies — that such is the contract implied by the unwritten law of the State of Wisconsin. There is no opposing testimony.

This would seem to be sufficient to settle the question as to what is the law of Wisconsin.

But inasmuch as the witnesses, on cross-examination, state that they do not think the law of Wisconsin to be different from the common law, and as there has been no direct decision of the Supreme Court of Wisconsin upon the question, the testimony of the witnesses, it is said, amounts to no more than an opinion on their part that such is the common law; and that this court must say for itself what the common law is upon this point; and that it is what this court decided it to be in the *Frankenberg case*. But the common law is not unvarying in all places where it prevails. It exists with more or less of modification in the different States, and it is not unchangeable in the country of its origin.

The rule adopted by this court in the *Frankenberg case*, that when a carrier receives goods to carry, marked for a particular place, he is bound to carry to and deliver at that place, agrees with the present rule of the common law in England. But this court admitted, in the case of *Illinois Central Ry. Co.* v. *Copeland*, 24 Ill. 332, where it first expressed a preference for this rule, that the first English case which adopted it was that of *Muschamp* v. *The Lancaster & Preston Junction Railway Co.*, decided in the Court of Exchequer in 1841, and reported in 8 Meeson & Welsby, 421; and it was also said in the *Copeland case*, as well as in that of *Frankenberg*, that the consideration of public convenience had weight with this court in determining upon the adoption of that rule; and it was further said, in the latter case, that the received doctrine among the courts of this country might be said to be, that the carrier was not responsible beyond his own route, except upon his special undertaking so to be liable.

Now the question is not, what is the common law of England, or of this State, but what is the common law, in this respect, of

Wisconsin? The courts of that State are free to act upon their own notions of public convenience, as well as the courts here. A rule which this court deems to be promotive of public convenience, the courts of Wisconsin might hold to be otherwise. The witnesses, or some of them, state one ground of their opinion as to what the law of Wisconsin is, to be judicial recognition.

The case of *Conkey* v. *The Milwaukee and St. Paul Railway Co.*, decided by the Supreme Court of Wisconsin, and reported in 31 Wis. Rep. 620, was in evidence. The decisions of that court, so far as we have been referred to them, indicate a leaning in favor of the rule of law as testified to by the witnesses, and may be said to add strength to their testimony.

Persons transacting business and entering into contracts within a State, must be supposed to seek and rely upon the information to be obtained from the legal profession of such State, in regard to the legal force of their contracts. The result of the best professional advice in the State of Wisconsin at the time the transaction in question took place, as to its legal effect, would have been, as we must believe from the evidence, that it was only a contract to safely carry to La Crosse and deliver within a reasonable time to the connecting line at that place. That, from the evidence, we think should be held to be the law of Wisconsin.

Although this court has held the law to be different in this State, we would not be so wedded to our own decision as to impose it upon the citizens of another State as the law of that State, and enforce upon them the performance of a contract they had no reason to suppose that they had ever made, and which the best legal advice obtainable in the State where the transaction was had would have pronounced they had never entered into.

Finding that the contract in question, according to its construction by the law of Wisconsin, as testified to, was fully performed, the appellee had no cause of action, and the judgment must be reversed. *Judgment reversed.*

JAMES C. STEVENS
v.
WILLARD HOLLINGSWORTH *et al.*

1. HOMESTEAD — *whole ground exempt.* The intention of the legislature, in enacting the homestead exemption law, was not to save a mere shelter for the debtor and his family, but it was to give him the full enjoyment of the whole lot of ground exempted, to be used in whatever way he might think best for the occupancy and support of his family, whether in the way of cultivating it, or by the erection of buildings upon it, either for carrying on his own business or for deriving income in the way of rent.

2. When a debtor owns a lot upon which he resides, and upon which he has a mill, shop or other building, the whole property is his homestead, and as such exempt from execution to the extent of one thousand dollars.

3. Where the homestead of a debtor is sold on execution without any division, although it may be worth more than one thousand dollars, yet the purchaser acquires no title to any part of it which he can make available in an action of ejectment, either as plaintiff or defendant, whatever may be the rule in equity.

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

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

Mr. I. N. BASSETT, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was an action of ejectment, by appellant against appellees, which, on the trial in the court below, resulted in a judgment for appellees.

One count in the declaration is for a mill-house, machinery and appurtenances to the mill, situated on lot four in block six in Keith's second addition to the town of Keithsburg in the county of Mercer, and the only controversy is in respect to this property.

It was admitted on the trial that the lot was, from before the second day of March, 1869, until the time of trial, the homestead of the plaintiff, who was the head of a family, residing

with the same thereon; and that the defendants were in the possession of the mill-house and machinery in controversy, but of no other part of the lot.

The evidence shows that the lot is 156½ feet long, about 100 feet of the south end being occupied by the plaintiff's residence and yard, and the mill occupying about 20 by 40 feet of the north end. There is also another lot owned by plaintiff adjoining this one, on which he has fruit trees, etc.

The defendants claimed to be lessees of Abercrombie, who claimed to be the owner of the lot by virtue of a deed made to him by the sheriff of Mercer county on the fourth day of February, 1871. This deed was supported by a judgment of the circuit court of Mercer county, rendered on the second day of March, 1869, against the plaintiff, for $466, upon which execution was issued and levied on the lot, which was sold to John C. Humphreys, and he assigned his certificate of purchase to Abercrombie. There is no evidence that the plaintiff ever abandoned his residence on the lot, or that he ever relinquished, in writing, his claim of homestead in the mill. It is claimed, however, by the defendants, that he voluntarily surrendered the mill to Abercrombie, and, subsequently, with the defendant, Willard Hollingsworth, rented the same from Abercrombie.

There is a conflict of evidence upon this point, but we think the preponderance is clearly with the plaintiff.

Abercrombie is a son-in-law of plaintiff, and claims that he bought the certificate of purchase at the request of plaintiff, to keep the property from falling into the hands of strangers. Plaintiff denies that he ever requested him to purchase the certificate, but they agree that it was understood that if plaintiff would refund to Abercrombie his money, plaintiff was to retain the property.

Abercrombie swears that plaintiff gave him possession of the property when he got his deed; that he then rented it to one Young for a time, and subsequently to plaintiff, and Willard Hollingsworth, one of the defendants; that plaintiff after-

wards requested him to rent the property to one Brewer; that plaintiff and Hollingsworth being unable to agree, he resumed possession of the property, and then rented it to the defendant Willard Hollingsworth. He says that plaintiff did not object to this, but did not seem pleased with the arrangement.

Plaintiff swears that he rented the mill to Dunn and Thompson on the 15th day of June, 1870; that they afterwards sub-let it to Hinsey and Smith, who sub-let it to Young; that Young, on quitting the mill, surrendered it to plaintiff; that he remained in possession until the eleventh day of December, 1873, when Abercrombie came into the mill, saying that he was going to take plaintiff's place; that for fear of having trouble he went out of the mill, fully determined to test the title to the property. He further swears that the defendant Willard Hollingsworth was his partner in the mill at the time; that he (Hollingsworth) refused to let plaintiff have any thing to do with the mill, after Abercrombie ordered him out, and thenceforth refused to recognize him as his landlord; that, when he first let Hollingsworth into the mill, Hollingsworth was to pay him $500 per annum rent; that subsequently it was agreed between plaintiff, Hollingsworth and Abercrombie that Hollingsworth should pay Abercrombie $250 per annum, which Abercrombie was to apply on what he had paid for the certificate of purchase; and that plaintiff agreed to pay Abercrombie as much more as he could. He positively denies that he ever rented the property from Abercrombie.

Plaintiff is sustained in his version in regard to the renting to Young by his son, Charles Stevens, and G. L. Dunn. He is sustained in his statement that he and the defendant Willard Hollingsworth went into partnership while he was himself in possession of the mill, and that Hollingsworth rented from him and not from Abercrombie, by David Hinsey, who swears: "Willard Hollingsworth, one of the defendants, ordered Stevens, the plaintiff, out of the mill. This was after Abercrombie came and took possession. Hollingsworth told me that, in the first place, he had arranged to run the mill in

partnership with Stevens, and was to pay Stevens $22 per month, and furnish means to run the mill, and that Stevens was to keep up the engineer's part."

By Charles Stevens, who swears: "Hollingsworth first went into partnership with father. * * * Father had possession and continued in possession until Hollingsworth came into the mill with father. * * * I heard Abercrombie say he was satisfied when he got his money back, and father said he would pay him out of the rent of the mill."

And by B. C. Taliaferro, who swears, after proving demand made by him on the defendants for the possession of the mill, for plaintiff: "Hollingsworth refused to give possession; he stated to me that he had commenced running the mill in partnership with Stevens, in the first place, but he had afterwards rented of Abercrombie; that he was running it under Abercrombie's lease and would not give Stevens possession."

We are not satisfied, from the evidence, that plaintiff ever voluntarily surrendered possession of the property to Abercrombie, but, on the contrary, are of opinion that it was agreed between these parties that Abercrombie, instead of insisting on his claim of ownership to the property, was to accept from plaintiff what he had paid for his certificate of purchase; and that the rents were to be appropriated in this way. This view, in connection with the fact, which seems to have been known, that Abercrombie had the certificate of purchase, sufficiently explains why Brewer, in desiring to rent the property, deemed it important to have Abercrombie's consent to any negotiation he should make, and why plaintiff consulted him in that respect.

This brings us to the question, did Abercrombie's deed give him a legal right to the possession of the property? It is insisted, for the defendants, that notwithstanding plaintiff's dwelling-house, etc., is on the same lot with the mill, yet inasmuch as the mill itself is no part of his residence, and he uses an adjoining lot, in part, for fruit and vegetables, and the portion occupied by the mill may be separated from the residue

of the lot without inconvenience, it cannot be a part of his homestead. *Linton et al.* v. *Quimby*, 57 Ill. 271, and *Loomis* v. *Gerson*, 62 id. 11, are cited in support of the position. In the first of these cases lots 12, 13, 14 and 15 had been sold on execution, and it was asked that the sale be set aside for the reason that they were the complainant's homestead. The court set aside the sale as to lot 13, only. It was shown that complainant's residence was on this lot, and that it greatly exceeded in value $1,000. This court held that the complainant had received all the relief to which he was entitled. It was, however, said: "If the lots had been sold in a body, it would have been impossible to give this relief without setting the sale aside as to the other lots. But, as they were sold separately, complete justice can be rendered to Linton as to his homestead rights without doing a wrong to Quimby. The fact that each lot was sold separately, and that the lot on which Linton's house was situated was confessedly worth more than one thousand dollars, makes it easy to fix the precise limit to which the court should go in administering equitable relief." It will thus be seen that whatever inferences, applicable to the present case, can be drawn from that case, are against the defendants. Here, the sale was of the entire lot, and it is impossible to apportion the amount bid to any particular part of it.

In the other case referred to, it was held, on bill filed to set aside a sale on the ground that the premises were a homestead, it appearing that the premises were worth $1,800, that the sale should not be absolutely set aside, but that the purchaser should be allowed to pay the $1,000 to the defendant in execution, if he so chose, and retain the property. But this was upon equitable principles purely, and manifestly can have no application in an action of ejectment, where the naked legal title only can be considered. Moreover, instead of being an authority to show that the right of homestead does not extend to the entire lot upon which the dwelling-house is located, it by implication recognizes the opposite doctrine.

The language of the statute is, "The lot of ground and the buildings thereon, occupied as a residence," etc., "shall be exempt," etc.

In *Walters* v. *The People*, 18 Ill. 197, it was held a tract of timber, a mile from the farm land, and not adjoining, yet from which supplies of timber, rails, firewood, etc., were alone derived for the support of the farm, was not a part of the homestead. And this construction was given to the statute on account of its peculiar phraseology. It was said: "This lot of ground may be but a few feet square, while the debtor owns thousands of acres in many other tracts. It may, again, contain thousands of acres in one compact body, embracing many surveys or legal subdivisions."

The *dictum* in *Reinbach* v. *Walter*, 27 Ill. 393, does not assert a contrary principle. In that case there were two lots, and it does not appear that a division should have been made, except by the lines of the lots. But the question was not before the court, anyhow, and what was said in this respect was but *obiter dictum*.

In *Thornton* v. *Boyden*, 31 Ill. 211, which was ejectment for eighty acres of land, it was held competent for defendant to show that the land adjoined his dwelling-house, which was on a town lot, and was claimed by him as a homestead.

In *Hubbell et al.* v. *Canady*, 58 Ill. 426, bill was filed to set aside a sale on execution of the west half of a certain town lot. The whole lot was 60 by 120 feet. The dwelling-house was mostly on the east half of the lot; about four feet of it, and seven feet of the smoke-house, were on the west half, as also the garden, fruit trees and well. There was a store-house 20 by 45 feet on the west half of the lot, which set back six or eight feet from the end, and was in the occupancy of a tenant. It was held that the whole lot constituted the homestead, and was exempt from the sale.

It was said: "The whole lot of ground is covered by the exemption, not some part of it, and the lot included all the buildings upon it.

"We are not to regard the intention of the legislature as being only to save a mere shelter for the debtor and his family, but that it was the purpose to give him the full enjoyment of the whole lot of ground exempted, to be used in whatever way he might think best for the occupancy and support of his family, whether in the way of cultivating it, or by the erection and use of buildings upon it, either for the carrying on of his own business, or for deriving income in the way of rent."

We are entirely satisfied with the correctness of these observations, and there is nothing in the present case to except it from their application.

While evidence has been received to show that two or more subdivisions of real estate constitute a lot, within the meaning of the homestead act, in no instance has evidence been received to show the lot was less than a subdivision, simply because the debtor used a portion of it for prosecuting his business. It would be difficult to explain, upon any principle of correct reasoning, why the farmer shall have his farm of eighty acres adjoining his dwelling-house on a town lot, and yet the mill of the miller, or the shop of the mechanic, although on the same lot with his dwelling-house, shall not be exempt. Or, narrowing the application, why the garden, stables, yards, orchard, etc., shall be exempt, and the shop, mill or business house, although indispensably necessary to earn a support for the family, and located on the same lot of ground with the residence, shall not be exempt. The homestead, however, is not limited to the ground occupied by the residence, but to the lot of ground and the buildings thereon, and each is presumably of the same importance to the debtor.

But it is further argued that the lot exceeded in value one thousand dollars, and the judgment was a lien on the excess; that the sale, therefore, was but voidable, and that the plaintiff, having voluntarily abandoned the property and yielded its possession, Abercrombie's title became perfect

The sale was of the entire lot, and there is no pretense

plaintiff ever abandoned his residence; nor, as we have before said, does the evidence, in our opinion, show that plaintiff voluntarily abandoned the mill. He yielded simply to what he considered an intrusion, and, as he says, with the intent to assert his rights by law. It cannot be assumed that the individual, who leaves his property in the possession of a trespasser rather than resist his aggressions, thereby loses all legal remedy for the assertion of his ownership and right of possession. Yet this is, practically, what plaintiff claims to have done, and what, we think, the evidence shows he did do. No steps were taken, pursuant to the requirements of the statute, to subject plaintiff's homestead to sale, upon the supposition that the property was divisible, or that it exceeded in value $1,000.

A reference to the previous decisions of this court will, it is believed, show, without a single exception, that a title so acquired to a homestead cannot avail in an action of ejectment, either to sustain a recovery by the plaintiff, or when interposed as a defense by the defendant.

In *Green* v. *Marks*, 25 Ill. 221, the general principle was announced that a judgment and execution do not create a lien against the homestead, and the owner may sell or mortgage it, free from any lien of the judgment. In that case, however, it appears the value of the property, in fact, did not exceed $1,000; still the reasoning of the court applies with equal force where the value of the homestead exceeds that amount. The gist of it lies in these remarks: "The judgment lien upon lands, then, being conferred by statute alone, and not as a common law right, it can only attach and become effective in the mode, at the time, and upon the conditions and limitations imposed by the statute itself. Our statute is not in aid of a common law right to sell real estate, but it confers the right. * * * This statute is silent as to any lien on the homestead. The third section, it is true, authorizes the creditors or the officer having an execution, if they believe the value of the property to be of greater value than one thousand

dollars, to have it appraised, and if it is so found, to have so much of the premises, including the dwelling, set off for the debtor, if susceptible of division, as may be worth that sum, and authorizes the sale of the remainder." Then, after quoting other provisions of the act, it is added: "The legislature have manifested, in an unmistakable manner, the design to secure the debtor, and his family after his death, in the enjoyment of a home. They have carefully guarded the right, when the tract of land is of greater value than the amount of the exemption, by having the homestead of that value set off to him, if susceptible of a division, and if not, then on a sale one thousand dollars is required to be paid to him."

In *Patterson* v. *Kreig*, 29 Ill. 518, it was held it could be proven as a defense on a trial in ejectment, that the property was the homestead of the defendant. In *Smith* v. *Miller*, 31 Ill. 160, this was reasserted, but it was also there held that where a homestead which exceeded $1,000 in value was mortgaged, the mortgage was good as to the excess over $1,000, notwithstanding the right of homestead was not properly released in the mortgage.

In *Pardee* v. *Lindley*, 31 Ill. 183, it was also held that it is competent to prove, on the trial of an ejectment, that the premises in controversy are the homestead of the defendant; and it was further held that the fact that they exceeded one thousand dollars in value was immaterial in this action.

Thornton v. *Boyden*, in the same volume, at 211, refers to and approves what was said in *Pardee* v. *Lindley*.

In *Booker* v. *Anderson*, 35 Ill. 86, while it is said a mortgage or deed of trust is not a lien against the homestead, it is also said, "If worth more than that sum it was, no doubt, binding as a lien on the overplus, which could be subjected to the payment of the debt in the mode prescribed by the statute."

Brown v. *Coon*, 36 Ill. 246, overrules and modifies *Patterson* v. *Kreig*, so far, that it was held that where the homestead is conveyed, either with or without an express statutory relinquishment, and actual possession is given to the grantee, by

the voluntary withdrawal of the husband and wife, the homestead as to *such grantee, and persons claiming under him, and in his and their favor, is abandoned, but* only as to them.

But in that case it was expressly conceded to be the law, in the case of a mortgage of a homestead, without the statutory relinquishment, and not followed by an abandonment of the homestead by the mortgagor and his wife: "If the premises were worth less than $1,000, the mortgage was practically inoperative for any form of action, so long as the mortgagor should choose to assert his homestead rights. If they were worth more than $1,000, although the mortgage was at once operative for the surplus, yet it could not be enforced by ejectment until the homestead had been set off, as the court, in that action, could not determine how far the homestead right would extend."

In *Blue* v. *Blue et al.* 38 Ill. 18, it was said: "It is objected that there is no evidence to show that this tract was worth only one thousand dollars, or less. This cannot vary the result, as, if it was not worth more than that sum, the sale was prohibited by the statute, and if worth more, then none of the requirements of the statute were observed in making the levy and sale; so that, in either view, the sale was unauthorized."

The same was also again held in *Bliss* v. *Clark*, 39 Ill. 590, the court, among other things, saying: "That the statute designed the premises, to the extent of $1,000, to be free from the operation of the lien, is manifest from the fact that the excess over and above the value of that sum may be levied and sold in the mode pointed out by the act; and if not susceptible of division, then the entire premises may be sold, upon the creditor paying $1,000 to the debtor, which is declared to be exempt for one year. If the right to occupy, or the land itself, had been intended to be subject to the lien of the judgment, why not authorize a sale, subject to the right of the debtor to occupy it as a homestead?"

In *McDonald* v. *Crandall*, 43 Ill. 236, it was said: "It has, however, been held, that where the homestead property

exceeds $1,000 in value, a judgment, a mortgage, or deed of trust, becomes a lien that may be enforced against the surplus."

It would thus seem that, if the repeated assertion of a principle can be regarded as making it settled law, it is the settled law of this court that, while a judgment against a debtor, whose homestead exceeds in value one thousand dollars, is a lien on the excess over the one thousand dollars, that lien can only be enforced in the mode prescribed by the statute; and if the judgment creditor proceeds to sell the homestead and acquires a deed to it, disregarding the statutory requirements, his deed is not admissible in ejectment against the claim of homestead, either in attempting to recover possession, or in defending his possession.

Where a bill in chancery is filed to set aside a sale, on the ground that the property sold was the homestead of the complainant, the chancellor may, undoubtedly, in the exercise of the equitable powers with which he is invested, cause the property to be divided and set aside the sale only as to so much as shall be found, if the property be divisible, of the value of $1,000; or require the complainant, if the property be not susceptible of division, to accept the $1,000 for his homestead if the purchaser shall elect to retain it and pay the amount, as was held in *Loomis* v. *Gerson*, *supra;* but a court of law, in the trial of an ejectment, obviously can exercise no such powers.

We are therefore of opinion, that the deed of Abercrombie was no justification to the defendants, who held and attempted to justify under that title. The judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

ELIAS RICHARDSON *et al.*

v.

HIRAM D. OLMSTEAD.

1. CONTRACT — *whether of sale or bailment.* Where grain is received by a dealer, into his warehouse, under a contract to pay the owner the market price on any day he may choose to call for it, and such grain is mixed with other grain in bins, from which shipments are being made every day, the dealer becomes the owner of the grain and liable to pay for it whenever called on, and is not a mere bailee.

2. Where grain has been delivered to a dealer at his warehouse under a contract on his part to pay the market price for it when called for, and he mixes it with other grain in bins, from which he is constantly shipping, and after such grain has all been delivered, the party delivering it not needing the money, and believing the price will be higher, proposes to leave the grain in the warehouse of the dealer until a specified time, to which the dealer agrees for a consideration to be paid him, the title to the grain is in the dealer, and the effect of the last contract is simply to give the party delivering until the time specified to name the day on which he will take the market price.

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

Mr. CHARLES BLANCHARD, for the appellants.

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

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by Hiram D. Olmstead, in the circuit court of La Salle county, against Elias and William N. Richardson, to recover the value of a certain quantity of corn claimed to have been sold and delivered.

A trial of the cause was had before the court without the intervention of a jury, which resulted in a judgment in favor of appellee for $419.09. To reverse this judgment the defendants have prosecuted this appeal.

The only question presented by this record is, whether the

contract under which the grain in question was delivered and held by appellants was one of bailment or sale.

In order to obtain a clear understanding of the question, a brief statement of facts becomes necessary.

The appellants kept a warehouse in the city of Ottawa, and were engaged in buying and shipping grain; on the 27th day of May, 1870, appellee made a contract with them by which he was to deliver his grain at their warehouse, and they were to pay him for the same the market price of grain on any given day he might elect to call upon them for payment; under this arrangement appellee placed his entire crop in appellants' warehouse, a portion of which, as delivered, he elected to take the then market price for, and received payment under the contract. All grain delivered prior to August 5 was paid for. On the 6th of August appellee commenced delivering corn, and from that time to August 25, he delivered nine hundred and thirty-one bushels, which is the grain in controversy. All grain delivered by appellee, as delivered at the warehouse, was mixed with other grain, and appellants were constantly receiving grain from various parties which was placed in a common bin in the warehouse, and they were from time to time making shipments from the warehouse to market.

In the month of April, 1871, appellants' warehouse, with its contents, was destroyed by fire.

Thus far there is no dispute between the parties in regard to the facts. William Richardson, one of the appellants, testified that about the 1st of November, 1870, appellee came to their office and said he wanted to leave his corn over until spring; that his son would sell his corn as he needed the money, but he, appellee, did not need money and would not sell; I told him that we would have to charge him storage if he left it over the winter; he wanted to know what it would be. I told him we had agreed to store for other parties at three cents. The conclusion was, he was to pay three cents per bushel storage.

Elias Richardson, the other appellant, testifies, in substance, to the same.

This, however, appellee in his evidence flatly denies. He testifies that no arrangement or contract of any character was made except the one entered into on the 27th day of May before he commenced the delivery of grain.

Whether this last agreement to hold the grain until spring was actually made or not, in the view we take of the case, can make no difference in regard to the rights of the parties.

It was not contemplated or expected by either party to the record, that appellee was ever to receive back from appellants the identical corn delivered in the warehouse; the manner in which the grain was handled rendered this utterly impossible. Appellee's corn was not kept separate, but as fast as received was mixed with other grain, and, no doubt, long prior to the fire, had been shipped and sold in the market; but whether it had or not, appellants at no time after the grain was delivered would have been able to pick out and redeliver appellee the corn received of him. They, no doubt, at any time prior to the fire, had in hand and were able to furnish appellee corn of like quality and amount as that received, but that is a fact of no importance and could not change the rights of the parties as they became fixed by the contract and delivery of the corn.

If, then, it be true, as contended by appellants, that the corn was not actually sold, but held in store under the arrangement made in November, 1870, then they would be required to redeliver the identical corn on demand, or pay its value.

In the case of *Lonergan* v. *Stewart*, 55 Ill. 45, the same question arose as is presented by this record. It was there held by the court, when the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title to the property is not changed, but where there is no obligation to restore the specified article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed. See, also, 2 Kent, sec. 590; Story on Bailments,

secs. 283, 439; *Wilson* v. *Finney*, 13 Johns. 358; *Chase* v. *Washburn*, 1 Ohio St. 244.

The record before us presents a much stronger one, however, in favor of appellee, than would arise against a warehouseman who received grain on store, mixed it with other grain of like kind, and agreed to return like quantity and quality on demand. Here, under the contract made, neither was the identical corn, or corn of like quality, to be returned, but the market value of the grain was to be paid appellee on any day he should see proper to call for the same. This can be regarded in no other light than an actual sale. The amount to be received was the market price on a day thereafter to be named by appellee; neither did the arrangement, which appellants claim was made in November, materially change the contract. That arrangement must be construed in connection with the original contract. By the original contract appellee had the right to name the day he would receive the market price for his grain. Appellants say these contracts were usually settled up before navigation closed. Appellee was not satisfied to take the then market price of corn. He did not need the money—thought it would be higher; under these circumstances appellants agreed, in consideration of three cents per bushel, which they term storage, that appellee's right to name the day upon which he would take the market price for his corn might be extended over until spring. This is the only fair construction that can be placed upon the second arrangement made.

It left the original contract in force and merely extended the time in which appellee had a right to elect the day he would receive the market price for the grain.

Under the facts as they are claimed to exist, by either appellants or appellee, we are of opinion the judgment rendered by the circuit court was correct, and it will therefore be affirmed.

Judgment affirmed.

Syllabus.

Missouri River Telegraph Company

v.

First National Bank of Sioux City.

1. Conflict of laws — *power to enforce penal laws not of this State.* The courts of this State cannot enforce the criminal or penal laws of another State, or of the United States.

2. The courts of this State will not entertain jurisdiction in a suit by a corporation created and doing business in another State, against a National bank organized under the laws of the United States, for the recovery of a penalty under an act of congress for receiving interest over and above the rate allowed by the laws of the State where the bank is located and transacts its business.

3. Jurisdiction — *of State courts.* The courts of this State derive all their powers from the constitution and laws of this State, and do not, nor can they derive any power from the laws of the United States or other source.

4. Same — *power of congress to confer.* Under the constitution of the United States congress can not confer jurisdiction upon a State court, or any other court which it has not ordained and established.

5. Same — *State courts derive solely from State authority.* The courts of this State have jurisdiction, under the power conferred by our constitution, over all persons and things within its borders, and when persons or corporations, without reference to where or when the latter are created, come into this State, they are within the jurisdiction of our courts, which is then exercised by virtue of such power, and not by virtue of any congressional action or federal grant of power.

6. Our courts will exercise jurisdiction in suits by or against corporations, whether created by act of congress or by the laws of another State, and whether doing business in this or some other State, in all cases except where they will refuse to entertain jurisdiction in a suit between natural persons.

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

Messrs. Bennett, Kretzinger & Veeder, for the appellant.

Messrs. Tenneys, Flower & Abercrombie, for the appellee.

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

It appears that appellee is a corporation organized under the banking law enacted by the congress of the United States, and is located in the State of Iowa; and appellant, who sues for the use of Percy and Daggitt, is also a foreign corporation, organized and transacting business under the laws of Iowa. The first count of the declaration avers that appellee, in violation of the laws of congress, received from appellant interest over and above the rate allowed by the laws of Iowa, at divers times, the sum of five hundred dollars, whereby, under the act of congress appellee became and was liable to pay to appellant double that sum, amounting to one thousand dollars. The common counts were also added. To this declaration defendant filed a demurrer, which the court sustained, and rendered judgment for defendant, and this appeal is prosecuted.

It is urged in affirmance that the court below has no jurisdiction to try a cause of the character shown in the first count of the declaration; that it is for the recovery of a penalty imposed by the laws of another State, or of congress, or both, and inasmuch as courts never execute the criminal or penal laws of another State or government, that the rule would be violated to hold that this penal law may be executed by our courts. There can be no pretense that any law of this State has been violated, as it is averred that the transaction occurred beyond the limits of the jurisdiction of the courts in this State. And it is equally true that both the governments of the United States and Iowa are wholly independent of this State. They severally have all of the attributes of sovereignty essential to the enactment and enforcement of laws for the government of their citizens within the limits of their constitutions. And in accordance with long settled rules of law, this State cannot enforce their criminal or penal laws. See *Sherman* v. *Gassett*, 4 Gilm. 521. But the jurisdiction is claimed under the fifty

seventh section of the act of congress to provide a national currency, etc. (13 Statutes at Large, p. 117), which provides that all suits, actions and proceedings arising under that act, may be had in the United States courts or in "any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." It is manifest that this language confers no jurisdiction on any court in this State to try this case, for the obvious reason that the appellant's bank or association is not located in this State. The jurisdiction attempted to be conferred is only on the State courts, the county courts or municipal courts in the State in which the bank is situated. By the plain meaning of the language of this section, congress intended only to confer jurisdiction upon the State courts of Iowa, the county court of Woodbury county, and the municipal court of Sioux city, if they had jurisdiction of similar cases under the laws of that State. The effort to confer jurisdiction was not on such courts generally, but simply upon the courts in the jurisdiction in which the delinquent bank might be located. The language is so plain that it will not admit of construction. The clear and unequivocal meaning of the law would be violated to hold otherwise, and it is manifest that the Superior Court does not answer to the description of any one of the courts enumerated by the act, and hence congress neither intended to, nor did it confer jurisdiction in this case upon that court.

It is urged for reversal that our courts entertain jurisdiction in cases where these banks are parties either plaintiff or defendant, as we do with individuals, whether resident or non-resident. This is true, but the jurisdiction that our courts exercise in such cases results from the power conferred by our constitution and laws, and not by any means from acts of congress. All of their jurisdiction comes from that, and not from a foreign source. They are brought into being and exist alone by virtue of our organic law. And the same is true of the United States courts, as they derive all of their powers from the federal constitution. We presume no one has ever conceived the

novel idea that a State could, by legislative enactment, confer any power or jurisdiction on the federal courts or officers. Nor can it be imagined that any one would suppose that if such an effort were made, and the federal courts should refuse to exercise such jurisdiction, there is the least shadow of power by mandamus or otherwise to coerce obedience to the requirements of such a law.

If we could imagine that a law of that character could be passed, does any one believe that the federal courts would thus acquire the semblance even of authority to act thereby? Does any one doubt that all acts under such an enactment would be void? Does any one suppose that this State can rightfully confer judicial power on any other courts than those provided for and created under our fundamental law? Could our legislature confer judicial power on the courts of other States? Surely not, and if the effort were made and the law were acted under, all their proceedings in pursuance of such a requirement would be clearly void.

The first section of article four of our constitution provides that the judicial power of the State, except as otherwise therein provided, shall be vested in one Supreme Court, circuit courts, county courts, justices of the peace, police magistrates, and in such courts as may be created by law in cities and incorporated towns. This section has exhausted the judicial power of the people of the State. It is there fully disposed of, leaving no residuum. There is nothing in that article that can be tortured into authority to confer any of the judicial power of the State on courts of other States, or the federal courts, hence it would be palpably unconstitutional to enact such a law.

The first section, article three, of the federal constitution, provides that: "The judicial power of the United States shall be vested in one Supreme Court, and such other inferior courts as the congress may from time to time ordain and establish." This provision has disposed of the judicial power, and it is vested in such federal courts as have been ordained and established by congress; and under the express requirements of

that section of the federal constitution it must remain there as now distributed, until congress shall see proper to organize other courts to which a portion of that judicial power may be distributed. In the face of this clear and unmistakable disposition of all the judicial power of the general government, can it be reasonably insisted that congress may confer any of that power on courts they have not ordained or established? And it will, we apprehend, be contended by no one that the Superior Court of Cook county was ordained or established by an act of congress. Suppose the court below, on motion, had dismissed this suit,— to what federal court or officer would counsel have applied to compel it to take jurisdiction and proceed to hear the cause? It seems to us to be impossible to imagine where such federal power lies. If it exists it has, so far as we know, been unsuspected. The United States government, when created, was provided with all means necessary for the enactment of laws, their adjudication and enforcement, and it was supposed that the power would be exercised by its own agency, consisting of its own officers, created and maintained for that purpose, and that it would not require the officers of the State governments to enforce its laws. See *Prigg* v. *Penn.* 16 Pet. 539. That case holds that whilst State officers cannot be compelled to execute laws of congress, although such laws may empower them to do so, still, when such officers so act they are fully justified and their acts will be valid and binding. This may be true, but that fact by no means compels State officers or tribunals to enforce the laws of congress.

Our courts, under the powers conferred on them by our constitution, have jurisdiction over all persons and things within the borders of the State. And when persons or corporations, without reference to when or where the latter are created, come into this State, they are within the jurisdiction of our courts. And it is by virtue of this power thus conferred that our courts exercise their jurisdiction, and not by virtue of congressional action or federal grant of power. If either of these corporations were to sue in our courts for any matters, except such as those

in which the court would refuse to exercise its functions in favor of a natural person, our courts would take jurisdiction and proceed to trial and judgment. The law regards such bodies as persons, and extends to them the rights and privileges of natural persons, but no more or greater rights. It then follows that the court below decided correctly in sustaining the demurrer to the special count of the declaration.

But it was manifest error to sustain the demurrer to the common counts. They are in the most approved form. No objection to them has been suggested. It is true, that it is said that no account was filed under these counts. This court has held that such account is no part of the declaration, and we can hardly see how it ever became necessary to make such a decision, as any one at all conversant with the elementary principles of pleading must see that it can form no part of the declaration.

We have examined the seventeenth section of the practice act (Laws 1871–2), and fail to see in what manner it has the slightest bearing on the question. It is true, that it refers to attachment suits, and provides that in such cases the plaintiff may be required to file his declaration at the first term, and the defendant have a trial at such term. How this can have the remotest connection with the question as to sustaining a demurrer to a common count in proper form, is beyond our comprehension. We must conclude that there is a wrong reference as printed in appellee's brief.

For the error indicated, in sustaining the demurrer to the common counts, the judgment must be reversed and the cause remanded.

Judgment reversed.

Syllabus.

JULIUS BAUER *et al.*

v.

JOSEPH BELL.

1. EVIDENCE—*jury should determine from the entire testimony and not a part.* On a question whether a piano was sold or leased, one party introduced in evidence a printed form of a lease which he had partly filled, and which he testified was a copy, except as to numbers, which fact was denied in the testimony of the other party, he insisting that the printed form used was changed by striking out, and interlineations, before its execution. The court instructed the jury that they were not bound to take the copy of the agreement as conclusive upon the point whether a sale or lease was made of the piano, but in determining that question should consider the entire evidence in the case: *Held*, that the instruction was unobjectionable, as a mere copy made from recollection was not conclusive.

2. TRESPASS—*instruction as to finding all guilty.* Where the court had already instructed the jury, in an action of trespass against several, to find a verdict against only such of the defendants as they believed from the evidence were participators in the tort, an instruction that if the trespass was committed by either of two defendants, or both of them, by their servants or agents, they must find for the plaintiff, is not obnoxious to the criticism that it directs the jury to find against both, if either by his servants or agents committed the trespass.

3. SAME—*to make one liable for a trespass committed* by his direction, the place at which the direction was given is unimportant. It is not necessary it should be given at the place where the trespass was committed.

4. INSTRUCTIONS—*based upon a wrong theory of the case.* Where a trial in trespass against parties not present at the time and place where the wrongful acts were committed, is conducted by the plaintiff on the theory that the trespass was committed by the servants of the parties by their direction and procurement, instructions on the part of such parties defendant, based upon a subsequent ratification of the acts done, are incorrect.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

This was an action of trespass *quare clausum fregit*, brought by Joseph Bell against Julius Bauer, Herman Bauer, William

Swinburn and John B. Hatton. The opinion of the court states the substance of the material facts of the case. The two Bauers, alone, appealed.

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

Mr. S. K. Dow, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of trespass, for breaking and entering plaintiff's house, in the city of Chicago, by forcing open the outer door and breaking it to pieces, breaking some furniture in the house, and taking from one of the rooms a valuable piano, the property of the plaintiff, as alleged, and converting the same to the use of the defendants.

The plea was, not guilty. The cause was tried by a jury, who returned a verdict of guilty, and assessing the damages at nine hundred dollars. A motion for a new trial was overruled, and judgment rendered on the verdict, to reverse which a part of the defendants appeal.

The fact of breaking and entering into plaintiff's house by two of the defendants, and taking and carrying away a piano, is conclusively established, and was not questioned on the argument, but it is denied that Julius and Herman Bauer, the appellants, had any thing to do with it, or that the act was done by their contrivance, procurement or assent.

It seems appellants in 1864, and before and since, were large dealers in pianos in Chicago, and this controversy grows out of a dealing in that instrument.

On the trial of the issue several questions were presented upon which the jury were required to pass.

The first was, did appellee Bell buy this piano of appellants, or hire it of them, at a stipulated rent per month?

On this point, the testimony of the plaintiff Bell was in direct conflict with that of appellants. This conflict it was the peculiar province of the jury to settle, and we do not think

they erred in finding the piano was sold, not rented, to appellee. If sold, it is proved it was fully paid for according to the contract, and before the trespass was committed.

The next question for the jury was, the trespass having been committed, was it by direction of appellants?

On this point the testimony was also conflicting, and we cannot say the jury have found against its preponderance. The sworn statements of appellee and of one of the defendants, Swinburn, could, if credited by the jury, leave little or no doubt in their minds that appellants inaugurated the unlawful proceedings against appellee, and after the piano was taken from the dwelling-house, it was delivered at the store of appellants, and by them rented to one Engle, their friend and occasional clerk, for whose benefit, it would seem, the raid on appellee was set on foot and fully carried out. The active party in this raid testified he was instructed by appellants at their store on Washington street, to go to Bell's house and get the piano—they said they had a piano out on the west side—presented the lease—it was in the house of a pretty hard case, and he would have to use extra means to get it, and should not take no for an answer—he must bring the piano back with him—a dray in the employment of appellants went with him—appellants wanted a man of nerve to go and bring that piano to the store—a man who would take the piano "any how" and would not take no for an answer. That man of nerve was found in Swinburn, then an acting constable, who, armed with what was said to be a lease, obeyed his instructions to the letter.

Appellee testifies, after the deed was done, which was on Saturday, he went to see Mr. Bauer on the following Monday afternoon and told him he had lost the piano, and asked Julius Bauer if he had sent those men. He replied "yes," and on being asked by Bell what his instructions were to the men, Bauer replied he told them "to take it any which way they could get it." Of this, a written memorandum was made at the time by appellee.

Now, although this is denied by appellants, and they indignantly repudiate any participation in the matter, it was a clear case for the consideration of the jury, which party they should believe, and we are satisfied with their finding on this point.

The questions of fact being settled by the verdict, the remaining question is, were the jury properly instructed as to the law of the case?

It is urged by appellants that giving the fourth instruction for the plaintiff was error. That instruction was as follows:

"4. It is for the jury to determine, from all the evidence and circumstances proven in the case, whether the piano forte in question was the property of the plaintiff or that of the defendants, at the time the same is alleged to have been taken from the house of the plaintiff, and the jury should determine this from the evidence in the case, and the jury are not bound to take the copy of the agreement in respect to the piano, introduced in evidence, as conclusive upon this point, but should consider the entire evidence in the case; and if the jury believe, from all the evidence in the case, that the defendants, Julius Bauer and Herman Bauer, sold the piano forte to the plaintiff, at an agreed price of five hundred and ninety-five dollars, with a discount from that of forty dollars, to be paid for in monthly installments; and if the jury further believe, from the evidence and circumstances proven in the case, that the plaintiff had fully paid the agreed price to defendants, Bauers, at the time of the alleged taking by them of the piano; and if the jury further believe, from the evidence, that the dwelling-house of the plaintiff was broken into, against the will of the plaintiff, and the piano carried away by the direction or connivance of the defendants, the jury should find for the plaintiff, and against such of the defendants as is shown, by the evidence, participated, aided or encouraged in the commission of the acts complained of."

To make good the claim of appellants, that the piano was rented, not sold, to appellee, Julius Bauer, when on the wit-

ness stand, produced the form used by their house of a piano lease, and filled the blanks as he remembered they were filled, except, perhaps, the number of the instrument and the number of the house to which it had been sent, and claimed that the writing signed by appellee was of the same tenor. The original had been destroyed in the fire of October, 1871, making it necessary to prove the contents of the instrument. Bauer stated in one way and appellee another way, the latter insisting the contract made was a verbal contract and afterward reduced to writing, which he signed, and that it was a contract of sale, and the form then used by the firm was altered and interlined to agree with the verbal contract. The witness was using, not the original, but a paper he said was a copy. The pertinency and point of the instruction will be readily seen, and we think it is wholly unobjectionable. The witness spoke of the contract from his recollection, and it differed very essentially from appellee's recollection of it, and the copy was not conclusive upon the jury. They could say which was right.

As to the fifth instruction, we do not think it obnoxious to appellants' criticism. It does not tell the jury to find against both defendants, if either of them, by their servants or agents, committed the trespass. It instructs the jury, if the trespass was committed by either of them or both of them, by their servants or agents, they must find for the plaintiff, not against both, if the trespass was committed by one only. The jury had been previously instructed to find a verdict against such only of the defendants as they believed, from the evidence, were participators in the tort.

We perceive no objection to the refusal of appellants' tenth instruction, as it was unimportant that the direction should be given at "the house of said Bell." As we understand the instruction, it is liable to this construction. It is not very intelligible, and there was no error in refusing it.

It is also complained the court modified certain instructions of appellants, containing the element of a subsequent ratification by them of the acts done. We are of opinion, as the trial

did not proceed upon that theory, all instructions of that kind were irrelevant.

As to the point that the court admitted improper testimony on behalf of appellee in regard to the contract under which he claimed ownership in the piano, it is sufficient to say, the question was of the contents of a lost instrument. One party gave his recollection, and the opposite party gave his, and no objection was made on either side.

We have carefully considered this record and the points made by appellants, and do not think they are well taken, and must affirm the judgment.

Judgment affirmed.

JOHN LAWLOR

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. CRIMINAL LAW — *act when justified as self-defense.* To justify one in shooting at another in self-defense, it is essential that his apprehension of serious or great bodily injury be reasonable. It is not proper to say in an instruction, if he had *any* such apprehensions.

2. The use of the words "serious bodily injury," instead of the words "great bodily harm," employed in the statute, in instructing the jury as to the law of self-defense, will not render the instruction objectionable or erroneous.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. WILLIAM W. FARWELL, Judge, presiding.

Mr. EMERY A. STORRS, for the plaintiff in error.

Mr. CHARLES H. REED, State's Attorney, for the People.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

Plaintiff in error was tried and convicted in the Criminal Court of Cook county, upon an indictment in the usual form,

charging him with an assault upon one Devol with intent to murder him. Upon the trial, evidence was given tending to show that only a short time previously to the assault in question, and on the same day, Devol had committed an assault and battery upon plaintiff in error, by knocking him down in the street, and while the former was upon the body of the latter, inflicting personal injuries, some person in Devol's company kicked plaintiff in error; that at the time the assault occurred, for which plaintiff in error was convicted, the latter met Devol in a public street of Chicago, it being only about two hours after Devol's previous assault upon plaintiff; that upon the occasion of such second meeting, Devol had a cane in his hand, and, upon seeing plaintiff in error near by, he changed it from one hand to the other and raised it in a threatening manner. Devol was a gambler by profession, and was, at this time, accompanied by another gambler of the name of Garrity, who was shown to have been a desperate character, who had been in the penitentiary for manslaughter, and after his release therefrom had been arrested for violent assault and for larceny. The evidence tended to show that the assault of plaintiff in error upon Devol, in question, was made when the former was approached by Devol and Garrity, the former of the two having but a short time before committed violence upon plaintiff, as above stated, and now, with a cane in his hand and accompanied as before recited. The theory of the defense was that plaintiff in error was not the assailant, and acted upon a reasonable apprehension that great bodily injury was about to be inflicted upon him by Devol, supported, as he appeared to be, by this desperate character, Garrity.

The prisoner's counsel asked the court to give to the jury the following instructions:

"Before the jury can convict under the indictment in this case, they must be satisfied beyond a reasonable doubt, that the defendant intended to murder the prosecuting witness, that he had this intent at the time of the firing, and that he fired the shots with no other intent, and without any appre-

hension of receiving from the prosecuting witness a serious bodily injury."

"The jury are instructed, that if they believe from the evidence in the case, that there is a reasonable doubt as to whether the prisoner at the time of the shooting was under reasonable apprehensions that the prosecuting witness intended to inflict upon him serious bodily injury, and that he fired the shots in self-defense, then the jury must acquit."

These instructions were refused by the court, to which exception was taken.

It is not true nor is it claimed by the State's attorney, that the propositions embraced in these instructions, or their equivalent, were embodied in any that were given. The only point of objection to them urged by counsel for the people, to justify their refusal is, that the word "*serious*" is used in defining the degree of apprehended bodily harm, instead of "*great*," as employed in the statute. And the case of *Reins* v. *The People*, 30 Ill. 256, is cited by him as authority. That case is not an authority for the position. There, the court, on behalf of the people, instructed the jury, that to justify the killing the "threatened danger must be so great as to create a reasonable belief in the mind of the accused of imminent peril to life, or the most serious bodily harm." This court simply held that the instruction required a reasonable apprehension of a greater degree of bodily injury, than that contemplated by the statute, to constitute a justification. That "great bodily harm" falls far short of the most serious bodily harm; that the latter might endanger life, the other not.

The court did not there decide that the very words of the statute, "great bodily harm," must be used in instructions, but merely that it was improper to instruct for the people, that a bodily injury must have been reasonably apprehended by the accused of such a character as might endanger his life. So, on the other hand, we may say, that it is not competent for the prisoner to ask instructions, that he might be justified by a reasonable apprehension of any bodily harm or injury of

a less momentous character than that contemplated by the expression, "great bodily harm," used in the statute. But while this is so, it does not follow that the identical words of the statute must be followed. Equivalent or equipollent words will answer. It is quite usual to substitute "injury" for "harm," and nobody ever thought of questioning it. If the prisoner's counsel saw fit to say "*enormous* bodily injury," instead of "great bodily harm," that certainly would be no ground for refusing the instruction, if otherwise correct.

Suppose, in the *Reins case*, above cited, instead of the State's attorney asking the instruction there condemned, the prisoner's counsel had asked one whereby the statute was construed as meaning the most serious bodily harm; would the court have been justified in refusing it? We think not. Because, although not couched in the language of the statute, it implied a higher degree of apprehended bodily harm than the statute required, and would therefore be more favorable to the people's case and less to the prisoner's. This shows that it was not intended, and this court cannot hold that the use of the identical words of the statute is indispensable.

Now the word "serious," when used to define the degree of bodily harm or injury apprehended, requires or implies as high a degree as "great," and the latter word as used in the statute means high in degree, as contradistinguished from trifling.

Such, likewise, is the meaning of "serious" when used in the same connection. The definition given by lexicographers of the word "serious" is "important, weighty, momentous and not trifling."

In drawing these instructions the prisoner's counsel seems to have followed the language used by this court in *Hopkinson* v. *The People*, 18 Ill. 264, as respects the substitution of "*serious*" for great, in defining the degree of apprehended bodily harm. It is thus: "If the circumstances attending the assault were such as to justify a reasonable conclusion in the mind of Hopkinson of impending danger of *serious*

bodily injury from Cummings, and he acted from the instincts of self-preservation, etc., he could not be guilty of the crime charged, although, in fact, there was no actual danger."

We are inclined to hold, therefore, that the use of the word "serious" instead of "great" did not vitiate these instructions. The first of the two above set forth is faulty in omitting the word "reasonable" before apprehension; "*any* apprehension" is not sufficient. It must be a reasonable apprehension. The second one, however, is free from that objection and should have been given.

The refusal of the second of the above instructions being sufficient to justify a reversal of the judgment, the other questions raised, as they are not likely to arise upon another trial, will not be considered. The judgment of the court below will be reversed and the cause remanded.

Judgment reversed.

EDWIN E. KENDALL

v.

SAMUEL A. BROWN.

1. SURGEON — *liability for shortening of fractured limb.* Where a fractured limb is shortened by reason of the want of extension at the proper time, and the extension of the limb could not well and safely be effected, nor the means and appliances for that purpose be safely used before what is called the bony union commenced, and the defendant surgeon treating the case was discharged before such bony union, under proper treatment, would and did commence, and another surgeon was employed, it was *held* that the defendant was not liable in an action for the injury, there being no other charge of unskillful treatment on his part.

2. INSTRUCTION — *proper on a state of facts which the evidence tends to prove.* Where the evidence tends to prove a certain state of facts, the party in whose favor it is given has the right to have the jury instructed on the hypothesis of such state of facts, and leave it to the jury to find whether the evidence is sufficient to establish the facts supposed in the instruction

3. SAME—*in reference to care of surgeon.* There is no substantial difference in the use of the words "ordinary" and "reasonable" in defining the care and skill required of a surgeon or physician in his employment

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

This was an action on the case, brought by Samuel A. Brown against Edwin E. Kendall, to recover damages sustained by the unskilltul treatment of a fractured leg of the plaintiff by the defendant, as a surgeon. A trial was had in the court below, resulting in a verdict and judgment of $1,375.17½, from which judgment the defendant appealed.

Messrs. MILLER & FROST, for the appellant.

Messrs. DOUGLASS & HARVEY, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Appellant is a physician and surgeon, and as such was employed to treat appellee. There is no controversy as to his employment, and that he treated appellee for a period of twenty-nine or thirty days, visiting him every day with the exception of one or two days. The declaration counts upon such employment, that he so unskillfully and carelessly treated appellee's injury that his leg became shortened one and one-half inches, and thereby he suffered great pain. The gravamen of the action is, that through the unskillful treatment of the surgeon in charge, appellee's leg became so much shortened he lost the comparative use of it. The pain alleged to have ensued is set forth by way of aggravation of damages.

On this, the principal question, there is a marked conflict in the evidence, so much so, as to render it doubtful which party ought to succeed. There is no decided preponderance in favor of either party. Commonly, in such cases, we should regard the finding of the jury as settling the controverted facts. And without expressing any opinion as to which way is the weight

of the evidence, we should, perhaps, be inclined to do so now, had the jury been accurately instructed as to the law of the case.

Appellee, either through inevitable accident or the unskillfulness of the attending surgeons, or one of them, has sustained a severe, permanent injury. On the other hand, appellant's professional character is involved in the result. These considerations have induced a most careful and painstaking investigation of the case. We forbear, at this time, to remark upon the evidence, the sufficiency of which to sustain the verdict has been questioned by one assignment of error, for the reason the decision at this time will be placed on other grounds.

That the third instruction asked by appellant and refused by the court, states a correct principle of law, can hardly be doubted. It is, in substance, that if appellee's leg became shortened in consequence of the fracture or during the course of treatment subsequent to the fracture, then appellant is not liable in damages therefor, unless the shortening was due to the want of reasonable care and skill on his part, and if the extension of the limb could not well and safely be effected, nor the means and appliances for that purpose be safely used, before what is called the bony union commenced, and that bony union, under proper treatment, would not and did not commence before appellant was discharged and appellee placed under charge of another surgeon; and if the shortening could be prevented at all it could only be done by the use of proper extension applied when the bony union did commence, and continued until ossification had sufficiently progressed to hold the leg at its proper length, then appellant would not be chargeable.

The principle of this instruction was all important to the defense. No other given, contained so full and accurate a statement of the law on this branch of the case. Its materiality will be more readily appreciated by a reference to some of the principal facts.

Whatever defects there may have been in appellant's state-

ment prior to his discharge, there is some evidence that tends to show the shortening of appellee's limb was not necessarily the result, and this instruction was better calculated than any other given, to direct the attention of the jury to that theory of the case.

The medical testimony all shows that in the earlier stages of the treatment there are a great many difficulties to be encountered in keeping the fractured limb in proper position, and great difficulties were experienced in treating appellee's injury. It is not then the danger of shortening occurs, as we understand the testimony. It is in the later stages of the treatment that appliances to prevent shortening are used.

The injury to appellee's limb is described as a slightly oblique compound fracture of both bones of the leg, and under the most skillful treatment some shortening of the limb is to be anticipated — a half inch would not be considered, in the judgment of the witnesses, unusual, or evidence of unskillful surgery. The difficulty seems to be to prevent the overlapping, in consequence of which shortening ensues.

All the surgeons examined seemed to agree in the statement that what they called the bony union of the fractured bones, in cases of compound fracture, does not commence to take place much before thirty days after the injury. If there is much inflammation in the soft parts, and suppuration is continually going on, the period of bony union is often very much delayed. The proof shows there was great inflammation in the soft parts of appellee's leg, and suppuration was continually going on. While the wound was in that condition, the surgeons all say there could be expected but little, if any, tendency to union. The theory seems to be, the plastic matter necessary to the bony union would be carried off. It is in proof also, the patient was very much debilitated from bilious attacks. Some of the surgeons examined give it as their opinion it was impracticable, in the condition of the patient, and perhaps unnecessary, to apply extension to the limb at any time before appellant was discharged, basing their opinion

mainly upon the fact that what they called the bony union had not then commenced. The witness Doctor Cooper, the surgeon who had the care of appellee after appellant was discharged, says there was no bony union when he took charge of the case. His testimony is "from the receipt of an injury until the thirtieth day, the bony union is very slight; but from the thirtieth day to the fiftieth day, nature sets herself to work and the consolidation becomes thorough." Doctor Hamilton says: "I would not expect union of bones, under the best circumstances, short of the third week, but not generally so soon as that. I suppose it would range from the third to the sixth week."

There is testimony in the record that tends to show that prior to the time the bony union commences to take place extension is of very little practical use, and the omission to attach appliances for that purpose does not always indicate unskillful surgery. On this subject Doctor Hamilton says: "I would wait and attend to the patient's general condition and keep the limb as steady as I could, and when I thought the soft parts would bear extension I would try it, even if it were on the second or third week; and if I found the soft parts would not bear it, or if it produced a great deal of disquietude, I would desist and let it alone to such time as the swelling had gone down, and after the skin was in good condition, provided it did not go past thirty or thirty-five days, then I would put on some kind of extension and counter extension to reduce the shortening, for at that time you may expect the bony union to take place."

The professional opinions of a number of surgeons were taken as to the practicability, in the condition of appellee's wound and his general health, of applying extension to the limb at any time before appellant was discharged, and on this point Doctor Hamilton says: "My impression is, that it would not have been of much use to try extension until between three or four weeks after the injury had occurred; would not have put on extensions when he was bilious and prostrated on account of the bilious attack, unless there was great urgency;

I don't think there was in this case." Other testimony tends to prove the application of extension might have endangered the life of the patient, and the omission to apply it in his condition was not conclusive evidence of bad surgery or unskillful treatment. Perhaps the common sense of the matter would be, it would be better to risk the shortening of the limb than the life of the patient.

Whether the theory of practice advanced by the appellant is correct, must of course be ascertained from the testimony of persons skilled in that department of medical learning. It is enough, the evidence tends to prove it was not the duty of appellant to apply extension at any time prior to the date of his discharge, and to make it a question to be settled by the testimony of experts whether he could with safety have done any thing to prevent shortening of the limb prior to that time. The refused instruction embodies the whole theory of the defense on this branch of the case, and whether the hypothetical case stated was borne out by the evidence, ought to have been submitted to the jury. It presented one of the vital issues of the case.

There is no substantial objection to the instruction given for appellee. The words "ordinary" and "reasonable" used in defining the nature of the care and skill expected of a physician or surgeon in his employment, have been interchangeably used. *Richey* v. *West*, 23 Ill. 385. Perhaps the word "ordinary" would indicate more clearly to the common mind the degree of care and skill which he is bound to exercise in his professional engagements, or answer in damages for the want of it.

For the error of the court in refusing to give appellant's third instruction the judgment will be reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE CRAIG, having been of counsel for appellee, took no part in the consideration or decision of this case.

HANS L. HANSEN *et al.*

v.

RICHARD C. ROUNSAVELL.

1. PAYMENT — *direction as to application implied.* A direction as to the application of a payment may be implied from circumstances. An agreement before payment, or even the expression of a wish on the part of the debtor as to how payment shall be applied, will amount to a direction to that effect.

2. SAME — *instruction as to application.* Where there is evidence tending to show a previous agreement as to the application of payments, an instruction that if the debtor gave no direction as to the application of certain payments, then the creditor had the right to apply them on the oldest account due at the time, is not so faulty as to justify a reversal. It would be better to have used the word agreement than the word instruction.

3 SAME — *application when there is a surety.* Where an obligor makes a general payment to his obligee, to whom he is indebted not only on a bond upon which there is security, but otherwise, the surety of the obligor cannot require that the payment shall be applied to the bond, unless aided by circumstances which show that such application was intended by the obligor.

4. JUDGMENT — *whether sufficiently certain as to amount.* When the verdict in debt upon a penal bond is for the debt and $949.40 damages, and the plaintiff remits $54.50 of the damages, and a judgment for the debt, to be fully satisfied upon the payment of $894.90, the damages assessed by the jury, except amount remitted together with costs, is sufficiently certain, as the exception will be referred to the sum found by the jury and not to the sum of $894.90.

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

Hans L. Hansen and Anton J. Wulff, on the 5th day of February, 1872, entered into an agreement with Richard C. Rounsavell whereby, in consideration of Rounsavell's having granted to Hansen and Wulff the right to purchase from Rounsavell the Ætna sewing machines for the sale thereof within the county of Cook, in this State, Hansen and Wulff agreed to deal in said machines sold by Rounsavell, and Roun-

savell agreed to furnish machines, and Hansen and Wulff agreed, among other things, to pay Rounsavell for them in cash or approved notes received by them in payment of machines, and guaranteed by them, or their own notes, and to make payments on machines each month, and pay in full each month's purchase in eight months from time of purchase. At the same time, Hansen and Wulff as principals, together with C. A. Walter, George Hansen and S. M. Krognoss, as sureties, executed a bond to Rounsavell in the penalty of $6,000, conditioned for the faithful performance of the agreement on the part of Hansen and Wulff.

This was an action brought by Rounsavell against the principals and sureties in the bond, to recover for sewing machines sold and delivered to Hansen and Wulff, in pursuance of the agreement. The plaintiff recovered and the defendants appealed.

The bill of exceptions recites that plaintiff introduced evidence tending to show an indebtedness on the part of Hansen and Wulff, and that defendants introduced evidence tending to show the contrary; that there was evidence tending to show that divers payments were made by Hansen and Wulff, after the making of the bond and contract, and while the delivery of the machines was from time to time being made, which the defendants claimed the right to apply *pro tanto* to the discharge of the indebtedness for the goods delivered under the bond and contract, and introduced evidence tending to show that there was a special agreement that the payments so made should be applied first for the goods delivered under the contract and bond, and that the balance should go on a former indebtedness, which Hansen and Wulff owed the plaintiff; that this special agreement was denied by the plaintiff, who testified that no such agreement existed, and that such payments were applied to an old debt, then over due, at the time they were made; that plaintiff also offered evidence, tending to show that nothing was due him upon the contract sued upon in this case, at the time such payments were made.

The following instruction was given for the plaintiff:

The jury are instructed that if they believe, from the evidence, that Hansen and Wulff gave no direction as to the application of the money or property received from them by R. C. Rounsavell, then Rounsavell had a right to apply such payments to the oldest account at the time due from said Hansen and Wulff.

Messrs. HERBERT & QUICK, for the plaintiffs in error.

Mr. CHARLES B. WELLS, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The question made is, on the propriety of the instruction which was given for the plaintiff. It is objected to it, that it withdrew from the jury the question of the agreement; that it assumed that there was no agreement for the application of the payments, or if so, that it was of no importance; that there must have been a *direction*, to be of avail.

We are of opinion that appellant in his objection attaches undue force to the word "direction." We apprehend that the expression of a wish on the part of a debtor how a payment should be applied, would amount to a direction to that effect. A direction might be implied from circumstances. In the making of an agreement for the application of the payments, there would have been the expression of an intention and purpose on the part of Hansen & Wulff that the payments should be thus applied.

An agreement between creditor and debtor for a particular application of a payment must include an implied direction on the part of the debtor as to the application.

Had there been an agreement between the parties as to the application of the payments, we cannot think that the jury could have been misled by the instruction to think that such an agreement alone would not suffice, but that, in addition thereto, the debtors must have given an express direction how to make the application. We think they could not but have considered

an agreement as amounting to a direction. As there was nothing in regard to the subject but an agreement, the instruction would have been better if it had used the word agreement, instead of direction. But we cannot regard it so materially faulty as to require that the judgment should be reversed on account of such instruction. The case cited in support of the objection (*Taylor* v. *Sandford*, 7 Wheat. 20) is not in point.

There, the instruction was to find for the plaintiff, unless "the defendant at the *time* of paying the money had *expressly* directed" its application to another simple contract debt. The instruction was held wrong, as it would exclude an application of the money made by the creditor himself, with the assent of the debtor, to the simple contract debt. The requirement of an *express* direction at the *time* of payment makes a very different case.

In the absence of any appropriation by the debtor, the right of the creditor to appropriate the payment to the earlier debt, and the propriety of doing so, is undoubted. *Sprague, Warner & Co.* v. *Hazenwinkle*, 53 Ill. 419; *Mills* v. *Fowkes*, 5 Bing. N. C. 455.

But it is claimed that if there was no agreement for the appropriation, then the circumstance of there being sureties for one debt should control the application in protection of the sureties to that debt. But we understand the general rule to be otherwise, and that it is the creditor's right in such case to have the payment applied to the debt which is the most precarious, where there is nothing to control this application. 2 Pars. on Con. 631, 632. We recognize the rule as stated by that author, as follows: But where an obligor makes a general payment to his obligee, to whom he is indebted not only on the bond but otherwise, the surety of the obligor cannot require that the payment should be applied to the bond, unless aided by circumstances which show that such application was intended by the obligor. Ibid. 634.

There is nothing in the point made that the judgment is uncertain as to amount

Syllabus.

The verdict was, debt $6,000; damages assessed at the sum of $949.40. The judgment entry is, "And the plaintiff remits from the amount of damages assessed the sum of fifty-four dollars and fifty cents, and thereupon the court enters judgment against all the defendants for $6,000 debt, to be fully satisfied upon the payment of eight hundred and ninety-four dollars and ninety cents, his damages aforesaid by the jury assessed except amount remitted," together with costs. The exception plainly applies to the damages assessed by the jury and not to the sum $894.90

Finding no substantial error, the judgment is affirmed.

Judgment affirmed.

CYRUS F. MILLER *et al.*

v.

RICHARD D. KIRBY.

1. TRESPASS — *title and possession necessary to maintain.* In trespass to personal property, the plaintiff must show that when the injury was committed he had an actual or constructive possession of the goods, and also a general or qualified title therein; but it is well settled that actual possession, though without the consent of the real owner, or even adverse to him, will be sufficient, as against a wrong-doer, or one who can show no better title.

2. If one gives a deed of trust upon goods to secure the payment of money, and it is provided therein that he shall have full right to carry on the business of the store in his own name, make sales and receive the proceeds, and have the management of the business, such party, being in the actual possession, can maintain trespass for the taking of any of the property, although the trustee also may have had a constructive possession for the purpose of seeing that the proceeds of the sales were applied on the debt.

3. FRAUDULENT CONVEYANCE — *sale on credit, etc.* In case of an absolute and unconditional sale of goods, the fact that the vendor was indebted at the time, that the sale was on a credit, and that the notes taken for the unpaid price were to be used in the payment of his debts, will not establish fraud in the sale as to creditors.

Statement of the case.

4. SAME — *party indebted may sell.* A party, though in debt, may sell his property to whom he pleases, if no lien exists to prevent it, and if the transaction be an honest one, made in good faith, and for an adequate consideration, it matters not how many creditors may thereby be prevented from reaching the property.

5. SAME — *purchaser must be guilty of fraud.* It is not sufficient to vitiate a sale of property that it was made by the vendor to hinder, delay or defraud his creditors, but the purchaser must also have participated in the fraudulent intent or purpose.

6. INSTRUCTIONS — *assuming facts.* If an instruction assumes the existence of facts not controverted on the trial, and which, under the circumstances, if assumed, could not prejudice, there will be no error.

7. DAMAGES — *exemplary.* Vindictive or exemplary damages should not be awarded unless the injury complained of was done wantonly or willfully.

8. SAME — *trespass for levying on strangers' property.* In trespass by the purchaser of goods, for levying upon and selling a part thereof, under an execution against his vendor, when there was no violence used, and no unusual noise or demonstration made, and the levy was a reasonable one, and it appeared that the contest of the fairness of the sale was not made in bad faith, it was *held* that exemplary damages could not be allowed.

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

This was an action of trespass, by Richard D. Kirby against Cyrus F. Miller, A. Swick, Henry Sears, E. B. Sears, and E. W. Beattie. The trespass was the levy of an execution issued upon a judgment in favor of the two Sears and Beattie, partners under the name of Henry Sears & Co., and against Charles G. French, a former owner of a part of the goods. Swick was the constable who made the levy, and Miller the attorney of Henry Sears & Co., who directed the levy. The material facts of the case appear in the opinion.

Messrs. MILLER, WILLIAMSON & MILLER, and Mr. F. SACKETT, for the appellants.

Mr. G. A. FOLLANSBEE, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

About the 1st of June, 1873, Charles G. French, being engaged in the sale of jewelry, etc., in Chicago, sold his stock in trade to appellee for $7,500, for which appellee paid in cash, at the time, $1,500, and gave his twelve promissory notes for $500 each, payable, the first one month thereafter, and the others one for each consecutive month following, until the last note should become due, for the residue. To secure the payment of the notes he also executed, at the same time, a deed of trust to one Nichols. Appellee took possession of the stock, in conjunction with Nichols, the trustee, immediately after his purchase, and proceeded to sell the same as customers enabled him to do so, and also made some additional purchases to replenish and enlarge the stock.

On the 5th of July, 1873, the appellants, Henry Sears, Edmund B. Sears, and Edward W. Beattie, recovered a judgment before a justice of the peace of Cook county, against Charles G. French, for $76.00, and costs of suit taxed at $5.95. Execution was issued on this judgment on the 11th of July, 1873, and placed in the hands of appellant Swick, a constable, to execute. He, in company with appellant Miller, an attorney at law, acting for the plaintiffs in the execution, thereupon went to the place of business of appellee, and levied the execution upon certain watches and "watch movements," which were included in the sale by French to appellee, and also upon one watch which had been left with appellee for repairs, and one watch which belonged to Nichols, for both of which, however, appellee seems to have been under obligation to, and did, account to their respective owners.

The action is *trespass de bonis asportatis*, and the appellants justify under the judgment and execution.

The jury, by their verdict, found the appellants guilty and assessed appellee's damages at $514.44. The court thereupon gave notice that he would grant a new trial unless appellee would remit all but $200 of the amount found by the ver-

dict, which being done, judgment was then given for that amount.

Several errors have been assigned, which we will notice, in the order of their precedence on the record.

It is objected that appellee does not show sufficient possession, or right to possession, to enable him to maintain the action; that the possession is shown to have been in Nichols, under the deed of trust, and he alone, if any one, can bring trespass, under the proof.

The general doctrine is well settled, as claimed by counsel for appellants, that the plaintiff, in such cases, must show that, at the time when the injury was committed, he had an actual or constructive possession of the property, and also a general or qualified title therein; but it is equally well settled that actual possession, though without the consent, or even adverse to the real owner, will be sufficient as against a wrong-doer, or one who can show no better title.

Assuming the sale by French to appellee to have been valid, the question raised upon which we shall pass for the present, appellee, after executing the deed of trust, still retained an equitable interest in the property, which it was important to him should be protected. That he might do so, it is expressly provided in the deed: "It is understood and agreed by and between said parties, that said Kirby (appellee) is to have, during the time said Nichols shall be trustee as aforesaid, full right, power and authority to carry on the business of said store in his own name; to have his signs out as such owner; to sell the goods therein contained, and in said schedule mentioned; to receive the proceeds of sales of said goods, and to have the management of said business in the same manner as a retail jewelry business is generally carried on." It surely cannot be insisted that this provision is inconsistent with the actual possession of the property by appellee. It is plainly impossible that it could be practically carried out without an actual possession. Whatever possession, then, it was designed Nichols should have, must have been simply constructive, the sole pur-

pose of his appointment, and the extent of the authority vested in him, being to see that appellee faithfully carried on his business and applied the proceeds of his sales to the payment of the notes. The evidence, moreover, shows that, in fact, Nichols never had the actual possession of the goods, but that it was always held by appellee.

We think the evidence ample, in this respect, to sustain the plaintiff's right of action.

The next question to which our attention is directed is, was the sale by French to appellee made in fraud of the rights of the creditors of French, and therefore, as to them, void under the statute for the prevention of frauds and perjuries?

Appellants' counsel argue upon the assumed hypothesis that this was an assignment by French for the benefit of his creditors, and they cite authorities holding that where, in such an assignment, the trustee is authorized to sell upon a credit, the assignment will, in equity, be set aside at the instance of a dissatisfied creditor. But, as we understand the evidence, that is not this case, and these authorities, therefore, have no application.

French absolutely and unconditionally sold the property to appellee; and although, in providing for the payment of the balance over the $1,500 paid down, he provided that it should be appropriated to the payment of his debts, this did not in any degree affect the validity or the regularity of the sale. The fact that French was indebted at the time of the sale, that it was on a credit, and that the notes were to be used in the payment of his debts, do not establish fraud. *Nelson* v. *Smith*, 28 Ill. 500. A party, though in debt, may sell his property to whom he pleases, if no lien exists to prevent it; and if the transaction be an honest one, made in good faith and for an adequate consideration, it matters not how many creditors may be thereby prevented from reaching the property. *Hessing* v. *McCloskey*, 37 Ill. 352.

In the light of these well-settled principles, we are unable to discover from the evidence any thing whereby the sale is

successfully impeached. It is not even shown that French, at the time of the sale, was unable to pay his debts; nor is it shown that there was any thing designedly done by appellee for the purpose of enabling him to defraud any creditor.

It is objected that in one of the instructions, given at the instance of appellee, the jury were told, although they should find the conveyance by French was had, made, or contrived with the intent or purpose to delay his creditors, yet before they could find for the defendants, they must also believe "that the plaintiff also contrived the conveyance with malice, fraud, covin, collusion or guile."

We see no objection to this. It is in accordance with the principles laid down in *Ewing* v. *Runkle*, 20 Ill. 448, *Herkelrath et al.* v. *Stookey*, 63 id. 486, and *Hessing* v. *McCloskey, supra.*

Objection is also taken to the action of the court in giving the seventh and eighth instructions asked by appellee, and in refusing the second instruction asked by appellants.

The objection to the seventh and eighth instructions of appellee we conceive to be unimportant. The facts, the existence of which they assume, were not contested on the trial; and it is not possible that assuming their existence could, under the circumstances, have prejudiced appellants.

The same principle intended to be asserted in the appellants' second instruction, and which was refused, is declared in the fourth of their instructions, which was given; and it was entirely unnecessary to repeat it. The refusal to do so is, at least, no cause for reversal.

So far, we perceive no important error in the record. There remains, however, to be considered the question of damages. Notwithstanding the remittitur made at the instance of the court, the judgment still exceeds any actual damages proved. It is true, the question is for the jury to determine from the evidence whether there are such circumstances of aggravation as to justify vindictive damages; and where the evidence reasonably tends to sustain their finding in that respect, we

will not reverse for the mere difference of opinion we may entertain as to the weight of the evidence; but the jury are no more at liberty on this question than on any other to act without evidence, and when it is clear to our minds they have done so, we have no alternative but to set their finding aside.

The rule recognized by our previous decisions is, that vindictive or exemplary damages should not be awarded unless the injury complained of was done wantonly, or willfully. *Foote* v. *Nichols*, 28 Ill. 486; *Hawk et al.* v. *Ridgway*, 33 id. 475.

There is no evidence, not even that of appellee, that shows any thing to have been done by appellants which can be reasonably construed as wanton or willful. There was no violence, no unusual noise or unnecessary demonstration. The fact that more property was taken than was actually necessary to satisfy the execution was, under the circumstances, of no great significance. Appellee was requested to point out the property he had obtained from French, and to give the constable values. This he refused to do, as did also Nichols. Neither the constable nor the attorney with him was a jeweler, and the value of the property levied upon was, at the highest selling estimate fixed by any witness, not more than double the amount called for by the execution. By the estimate of some witnesses it was much less than that.

The fact that the constable proceeded with the levy, after appellee notified him the property was his, is not a conclusive circumstance as to his knowledge that the property belonged to appellee. Appellants contested, and we cannot say in bad faith, the validity of appellee's title; and this was one mode by which it could be tested.

For the reasons last stated the judgment is reversed and the cause remanded.

Judgment reversed

Chicago and Northwestern Railway Company

v.

William P. Dickinson *et al.*

1. Carrier — *burden of proof of loss or non-delivery.* In an action against a carrier, where the loss or non-delivery of goods is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character, but slight evidence will be sufficient.

2. Same — *plaintiff not required to show non-delivery by a preponderance of evidence.* In an action against a carrier for failing to deliver goods shipped, the plaintiff is not bound to show non-delivery by a preponderance of testimony. Slight evidence of that fact will be sufficient to shift the burden of proof upon the carrier.

3. Same — *measure of damages.* The measure of damages in case of the failure of a carrier to deliver goods according to contract, and which are lost, is their market value at the time when and the place where they should have been delivered, and such value is purely a question of fact for the jury.

Appeal from the Circuit Court of Cook county; the Hon. John G. Rogers, Judge, presiding.

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

Mr. John Woodbridge, for the appellees.

Mr. Justice Craig delivered the opinion of the Court:

This was an action of assumpsit, brought by appellees in the circuit court of Cook county, against the Chicago and Northwestern Railway Company, to recover the value of one car of broom-corn shipped at Cherry Valley, October 6th, 1871, consigned to appellees at the Empire Warehouse in Chicago.

A trial was had before a jury, which resulted in a verdict of $958.32 in favor of the plaintiffs. The court overruled a motion for a new trial and rendered judgment upon the verdict.

The railroad company has prosecuted an appeal, and relies upon three grounds to obtain a reversal of the judgment.

1st. The verdict is against the weight of evidence.

2d. The court erred in refusing appellant's fourth instruction.

3d. The court erred in giving appellees' fourth instruction in regard to the measure of damages.

There is no dispute but the railroad company received the broom-corn at Cherry Valley for transportation, and it is also a conceded fact that the contract under which it was shipped required the company to carry it to Chicago and deliver the car containing the corn upon the side track connected with appellees' warehouse.

The evidence does not agree as to the time the corn was shipped. Appellees claim it was shipped on Friday evening October 6, 1871, while appellant insists that it was shipped on the morning of October 6. That fact, however, is not very important.

The real controverted fact in the case was whether the company had delivered the corn at appellees' warehouse.

Upon this point appellant introduced evidence tending to show that the corn was shipped on the morning of the 6th, in a car of a certain number. Beecher, agent of Park station, testifies the car arrived at that station October 6, 1871, at ten minutes past two o'clock, P. M.; one Chadwick, an employee in the freight depot, testified he had a record showing that the car arrived at Galena in freight-house about four o'clock, P. M., of that day; that it was loaded with broom-corn, and that he marked the car "W. P. Dickinson, Empire Warehouse." That is the usual course of business. The car would be switched down to the warehouse at the earliest opportunity by Mr. Daily, switchman.

Thus far the appellant traced the car from the time it was filled with broom corn at Cherry Valley, but no witness testifies that the car was switched to the warehouse of appellees. Daily, the switchman, testifies, in a general way, that all cars

were delivered that came in; that no car was left unloaded at the Galena freight depot on Saturday night, October 7, but he does not testify that the car which appellant traced from Cherry Valley so accurately by number, was delivered.

On the other hand, Bogardus testified that the car of broom-corn did not leave Cherry Valley until Friday evening, October 6. Appellee Dickinson testified, on Friday they received two cars from Bogardus and one from Kendall, that had been shipped several days before; that on Saturday, late in the afternoon, they paid the freight on those three cars, and were notified that another car had arrived at the depot from Bogardus, and the freight was also paid on that car, but it was not delivered; that he was at the warehouse all day Saturday.

This testimony was corroborated by the evidence of other witnesses, which it is not necessary to refer to in detail.

In our judgment, from an examination of the evidence, it clearly preponderates in favor of appellees, that the broom-corn was not delivered; but were it otherwise, we could not, under the uniform decisions of this court, reverse. The most favorable light in which the evidence can be viewed for appellant, on the question of delivery, is, it is conflicting, and under such circumstances we will not disturb the verdict.

The fourth instruction of appellant, which the court refused, was as follows:

"Before the plaintiffs can recover in this case, they must prove, by a preponderance of testimony, that the broom-corn in question was not delivered to them by placing the car containing the broom-corn upon the track adjacent to plaintiffs' warehouse."

In an action of this character, against a common carrier, to recover for the loss of goods which the carrier has failed to deliver, the law undoubtedly requires some proof that the goods were not delivered; but slight evidence will be sufficient to shift the burden of proof upon the common carrier.

In section 213, second volume Greenleaf on Evidence, the rule is stated thus: "If the loss or non-delivery of the goods

is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character."

Angell on the Law of Carriers, section 470, says, "when nonfeasance or negligence is alleged in an action on contract, the burden of proof is unquestionably on the plaintiff, notwithstanding its negative character; that is, the party making the allegation of loss or non-delivery must *give some evidence* in support of the allegation, notwithstanding its negative character."

In *Woodbury* v. *Frink*, 14 Ill. 279, this court held the allegation of non-delivery was a material one, which the plaintiff was required to sustain by proof; but slight evidence was sufficient.

In view of the authorities, the instruction of appellant was properly refused.

The other point relied upon by appellant arises upon the instructions given for appellees as to the measure of damages, one of which is as follows:

"If the jury shall believe, from the evidence, that the broom-corn in question was shipped from Cherry Valley, consigned to plaintiffs, about October 6th, 1871, on a freight car of defendant, under a contract between plaintiffs and defendant to deliver the same at plaintiffs' warehouse in Chicago, for hire, and that defendant failed to deliver said corn at said warehouse, or in the yards adjacent thereto, and were common carriers, the jury must find for plaintiffs, and must assess their damages at the market value of the corn in Chicago when the same should have been delivered, unless defendant was prevented from making such delivery by the act of God or of the public enemy."

The broom-corn, for which this action was brought, was no doubt destroyed by the fire that occurred in Chicago on the 8th and 9th day of October, 1871.

This action is based upon the contract of appellant to transport and deliver the broom-corn. The measure of damages on the failure of appellant to deliver the article, was its market

value when it should have been delivered. *Leonard* v. *Dunton*, 51 Ill. 482.

This is the principle embodied in the instruction, which is clearly correct.

If there was a fire raging in Chicago at the time the corn should have been delivered, which materially affected its market value, appellant should have made proof of that fact before the jury.

The market value of the corn when it should have been delivered was purely a question of fact for the jury to determine from the evidence before them.

The case of *Parsons* v. *Pettingill*, 11 Allen, 507, cited by appellant, cannot be regarded as an authority in this case. There is no analogy between the facts disclosed by this record and those upon which the decision in the case cited was made. That was an action against a fire warden to recover the value of a building which he had caused to be blown up to check the spread of an extensive fire.

In this case there was no fire in existence at the time the corn should have been delivered.

We are satisfied the law involved in the case has been fairly given to the jury. The verdict of the jury is sustained by the evidence. The judgment will therefore be affirmed.

Judgment affirmed.

FRANK HULETT

v.

EUGENE E. AMES.

1. PRACTICE — *appeal from county to circuit court.* An appeal from the county to the circuit court can be tried alone on the record. The circuit court can not try the case *de novo*, either in whole or in part, but takes the record as presented.

2. SAME — *transcript of county court, matter of record in circuit court*

on appeal. When a record of the proceedings is filed in the circuit court, it becomes a matter of record in that court, and being a matter of record then no bill of exceptions is necessary to get it before this court, but only a certified transcript.

3. SAME — *bill of exceptions in circuit court on appeal from county court.* Affidavits, notices, etc., made in the county court are not a part of the record, unless made so by bill of exceptions, and cannot be considered in the circuit court, nor is it proper for the judge of the circuit court to make them a part of the record of that court by bill of exceptions.

4. PRACTICE IN SUPREME COURT — *assignment of errors.* The failure or refusal of a judge to sign a bill of exceptions, cannot be assigned for error, nor considered in the Supreme Court. The remedy, where a judge wrongfully refuses to sign a bill of exceptions, is by mandamus.

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

Messrs. BARBER & MUNN, for the appellant.

Messrs. GOODSPEED & SNAPP, for the appellee.

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

The practice in the circuit court on appeal from the county court, is required to be the same as in the Supreme Court. When a case is thus taken to the circuit court, it can be tried alone on the record of the county court. And the circuit court cannot try the case *de novo*, either in whole or in part, but takes the record as it is presented, and if manifest error is found the judgment is reversed, and the cause remanded, otherwise the judgment is affirmed.

It appears that in the circuit court it was assigned for error that the county court set the case for trial in the absence of defendant, and out of its order on the docket. There is no semblance of force in this objection. Defendant had been served with process and it was his duty to be present in person or by attorney in court, and see and know every step that was taken. It never has been the practice for the court to summons a party at every step that is taken in a cause.

Nor can we see or know that the case was taken up out of its order. There is no bill of exceptions appearing in the record of the county court. The presumption is, until overcome by the record, that all the steps taken by the court are regular and legal. All who are at all familiar with the practice know that when such a matter is irregular it must be shown by a bill of exceptions. For aught that appears in the record from the county court, this may have been the last and only case on the docket.

It was also assigned for error that the county court refused to change the venue of the cause. Appellant filed no bill of exceptions embodying his petition therefor, and the affidavit therewith, and thus make them a part of the record. This court has repeatedly held, that to make such matters a part of the record, so as to have them reviewed in the appellate court, they must be embraced in a bill of exceptions. And we decline to discuss the question or cite cases in support of the practice, but must presume that all practicing attorneys are familiar with it or can refer to our decisions previously made.

It was also assigned as error, that the court tried the cause. The record, so far as we can see, discloses nothing upon which to base this assignment of error. Nor has appellant shown any thing in support of this objection.

The next error assigned in the circuit court is, that the court erred in finding for the plaintiff. There was no exception taken to the declaration. An appearance was entered and no question could arise as to service, and a trial was had and evidence heard, and as it was not preserved in a bill of exceptions, we must presume that there was an abundance of testimony, not only to justify, but to require, the finding as it was. And the same may be said of the last error assigned, that the court erred in rendering judgment for plaintiff. From an inspection of the record of the county court, we are unable to see that the circuit court could have done otherwise than affirm the judgment.

It is next urged that the court below erred in not signing a

bill of exceptions in this case. Such an error cannot be assigned or considered. If a judge refuses to sign a bill of exceptions, presented in proper time and according to the rules of practice, the remedy of the party aggrieved is by mandamus. In this case, if we could consider the question, there was nothing in the paper presented to the judge that is proper to be contained in a bill of exceptions. It contains the transcript of the county court, and every thing which became and was a matter of record in that court, and when a transcript of the same, properly certified, was filed in the circuit court, became a matter of record in that court. And being a matter of record, appellant need only to have a certified transcript of the same made to file in this court. The summons from the county court and the sheriff's return, the declaration, the plea, and the judgment of the county court, were matters of record in the circuit court, and became a matter of record in the circuit court when a transcript of the same was filed. And being a matter of record, it would have been improper for the circuit judge to sign a bill of exceptions containing them.

This court has many times said that affidavits, notices, etc., in support of motions, although filed by the clerk, do not, unless made so by bill of exceptions, become a part of the record. None of such papers filed in the county court were so made a part of its record, and not being a part of the record, the circuit court could not consider them, nor could he, consistently with his duty or with truth, make them a part of the record in his court. The party, having neglected to embody them in a bill of exceptions in the county court, thereby waived all right to have them considered or reviewed in the circuit court, or in this court. Even if the clerk's entry on his record that a motion was entered, but overruled by the court, could be regarded as a part of the record, still the exception to the decision of the court must be preserved in a bill of exceptions as well as the motion itself, and the papers relating to it. And the legal presumption would be that the court decided correctly, as we could not look to affidavits, etc., in support of the

motion. The judge could only sign a bill of exceptions to make something a matter of record which could only be made such in that manner.

There was nothing before the circuit court to be considered but the record proper of the county court. Nor had appellant the right in the circuit court to introduce any evidence but what was strictly the record of the county court. In the appellate court he could not introduce as evidence, or for any purpose, his notice and sworn petition for a change of venue, which the clerk of the county court certified had been filed in his office. Nor did it acquire any more validity by being embraced in the transcript transmitted to the circuit court.

The judgment of the circuit court is affirmed.

Judgment affirmed.

ORAMEL S. HOUGH

v.

ASAHEL GAGE.

1. FAILURE OF CONSIDERATION—*plea of—its requisites.* A plea of total failure of consideration must show all the elements entering into the consideration, and a failure of each and every part of it distinctly averred with as much precision as the allegations of a declaration.

2. A plea that the consideration of a note was the sale of an interest in a certain patent right, which has wholly failed, the patent being void, because the result therein claimed to be accomplished could not be accomplished, is bad on demurrer as failing to show what the result claimed to be accomplished was, and wherein it had failed.

APPEAL from the Superior Court of Cook county.

Messrs. GOOKINS & ROBERTS, for the appellant.

Messrs. GOODWIN, OFFIELD & TOWLE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from the Superior Court of Cook county to reverse a judgment obtained therein by Asahel Gage against Oramel S. Hough, in an action of assumpsit on a promissory note alleged to have been executed by defendant to one Isaac N. Gregory or order, and indorsed before maturity to the plaintiff "without recourse."

The defense was embraced in three special pleas, on the two first of which issues were joined. The third plea averred that the consideration for the note was an interest in a patent for the making of "Warfield's soap," sold by payee to defendant, and that the consideration had wholly failed; that the letters patent were void, because the result therein claimed to be accomplished could not be accomplished, of which plaintiff had notice prior to the assignment.

There was a demurrer to this plea, which the court sustained, and it is on this the controversy arises.

The objection to this plea is obvious. It fails to show what the result claimed to be accomplished was, which the patented article would accomplish. It therefore fails to show how the consideration failed. These allegations must be set out with as much precision as allegations in a declaration are required to be set out. *Poole* v. *Vanlandingham*, Breese, 47; *Bradshaw* v. *Newman*, id. 133. The doctrine of these cases has been repeatedly reaffirmed by this court. *Evans* v. *School Commissioners of Greene Co.* 1 Gilm. 654, and subsequent cases; *Kinney* v. *Turner*, 15 Ill. 182. All the elements entering into the consideration must be set forth, and a failure of each and every part of it distinctly averred. So here, it should have been shown by the plea what was the result claimed, and wherein it failed to accomplish the result.

The demurrer was not taken, and the judgment must be affirmed.

Judgment affirmed.

Syllabus.

THOMAS GUFFIN *et al.*

v.

THE FIRST NATIONAL BANK OF MORRISON.

1. PARENT AND CHILD — *right of child to recover for services after majority.* No principle is better settled than that a son or daughter, after becoming of age, in the absence of a contract, can recover nothing for services rendered thereafter as a member of the family; and whatever the father may choose to give in after years is nothing more than a mere gift. He is under no legal obligation to make any recompense.

2. FRAUDULENT CONVEYANCE — *of father to daughter to defraud creditors.* Where a father transfers his property and notes to his daughter after incurring indebtedness, it is immaterial whether it is a voluntary settlement or founded on good consideration. In either case it will be void as to existing creditors.

3. Where a father, in consideration of the past services of his daughter, who remained with him many years after becoming of age, and kept house for him, and of her mere verbal promise to support and take care of him the rest of his days, transferred to her all his notes amounting to six or seven thousand dollars, it was *held* that the transaction could be regarded in no other light than a voluntary settlement, and fraudulent in law as to existing creditors, and that if a secret trust was reserved in favor of the donor, it could be assailed by subsequent as well as by then existing creditors.

4. And where the proof showed that the father, after such transfer, collected the interest and renewed notes as before, and really depended upon the property so transferred for his future support, and that the transfer was for his benefit to defraud creditors, it was *held* that the transaction was void, both as to existing and subsequent creditors.

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

This was a creditor's bill filed by the First National Bank of Morrison, against Thomas Guffin and Sarah Guffin. The opinion states the material facts of the case.

Messrs. MCCOY & SONS, and Mr. F. D. RAMSEY, for the appellants.

Messrs. WOODRUFF BROS., for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This is a creditor's bill, which seeks to discover assets alleged to be in the hands of Sarah Guffin, but charged to be in reality the property of Thomas Guffin, the other appellant, and to have so much as might be necessary for that purpose appropriated to the payment of a judgment recovered by appellee *versus* Thomas Guffin, impleaded with Charles C. Guffin and John N. Baird. The indebtedness on which the judgment was obtained was incurred originally for a loan to the firm of Guffin & Co. made to them on the 15th day of April, 1872, on whose note, to the bank, Thomas Guffin was security. The first and second notes given were taken up, and a third note given in renewal. The last note bears date the 1st day of December, 1872. It was upon this latter note the judgment was rendered.

It is alleged that prior to the commencement of the suit and the recovery of the judgment against him, Thomas Guffin was the owner and in possession of a number of promissory notes on divers persons, besides a large sum of money, amounting in the aggregate to $7,000 or $8,000; that his business had previously been that of loaning money; that just before the institution of legal proceedings against him on the note, for the purpose of cheating, hindering and delaying appellee in the collection of its claim, he made a pretended sale or gift of his notes to Sarah Guffin, his unmarried daughter, who was then and had been hitherto a member of his family, without any consideration whatever, and that she received them with a view to assist him in this unlawful purpose. By an amendment to the bill it is charged that at the time of the alleged transfer, he was largely indebted to persons other than appellee, for whom no provision was made in the transfer of notes and other property.

The answer admits the recovery of the judgment and the amount alleged to be due thereon. Appellants, however, deny that at the time of loaning the money to Guffin & Co., or at any other time since, Thomas Guffin was the owner and in

possession of any great number of promissory notes or any large sums of money, but on the contrary, state that he is a man eighty-one years of age, has been a widower thirteen years, that Sarah, his daughter, is unmarried, is of the age of forty-nine years, and for the last thirty years has had charge of her father's household affairs. It is also alleged, in view of his advanced age, and in consideration of past services rendered to him by his daughter and her agreement to render like services in the future, and to provide for and take care of him during the remainder of his life, it was agreed Thomas Guffin should transfer to Sarah all the notes he then had, and in pursuance of that agreement it is charged he did, on the 27th day of February, 1872, assign and transfer to her all his notes, which constituted his entire property, amounting to some $6,000 or $7,000.

The question raised has relation chiefly to the good faith of the transaction between the appellants. The theory of the bill is, the transfer of the notes, if in fact any transfer was ever made, was a colorable arrangement to avoid the payment of appellee's judgment, both the legal and equitable title still remaining in the judgment debtor. The defense maintains there was a *bona fide* sale and delivery of the notes for a good consideration, and that it is valid and binding in law.

We have given the case that careful attention its importance demands. If there was really no transfer of the property or notes before the indebtedness was incurred, it is immaterial whether it is a mere voluntary settlement, or founded on a good consideration. In either case it would be void as to existing creditors.

But the transaction has all the distinctive features of a voluntary settlement. No actual consideration was paid for the notes, although their aggregate value was not inconsiderable. The consideration insisted upon is, the past services of the daughter rendered in her father's family for the preceding thirty years, and her parol agreement to support him during the remainder of his life.

No principle is better settled, than where a son or a daughter remains in the father's family after becoming of age, in the absence of a contract, such person can recover nothing for services rendered, and whatever the father may choose to give in after years is nothing more than a mere gift. He is under no legal obligation to make any recompense. The son or daughter is presumed to have rendered such services gratuitously.

The alleged agreement on the part of the daughter to support her father in the future, was by parol. It was not evidenced by any writing nor was any security taken. There is really no valuable consideration shown to support the alleged sale of the notes to Sarah, and the transaction can be viewed in no other light than a voluntary settlement of the property upon her. No matter how praiseworthy the object may be, such a settlement is fraudulent in law as to existing creditors, and if a secret trust is reserved for the benefit of the donor, it may be assailed by future as well as by existing creditors.

The contract insisted upon as having been made between appellants is itself unreasonable. Such a contract should be proved by the most satisfactory evidence to induce the belief it was ever understandingly entered into in good faith. No folly is so great as where a father places his entire estate in the hands of another, whether a son or daughter, taking back an obligation for his future maintenance. In this instance, Mr. Guffin is represented as placing the earnings of an entire lifetime, amounting to a considerable sum, in the hands of his daughter, taking back no higher security than her parol promise to provide for him during the remainder of his life. It is inconceivable, a man in the full possession of his faculties, would make such a contract, however much confidence he might have in his trusted son or daughter. Appellant himself says, he was "depending exclusively on the $5,000" in Sarah's hands, and it is a far more rational solution of this transaction, that he was depending upon that fund rather than upon her mere promise for his future support.

Admitting the notes were transferred to the custody of Sarah in February, 1872, which was nearly two months before the indebtedness to appellee was contracted, there is evidence tending to prove, it was a secret arrangement for the benefit of Thomas Guffin. It is shown he continued to receive interest as it became due, renewed the former loans and made new loans as he had formerly done with his own money. It is said he did it as agent for Sarah, but it is clearly proven she knew but little in regard to the business, and it was controlled by her father as it had previously been. The conviction produced by the evidence is, that Sarah was the mere custodian of these notes under a colorable arrangement she should be the owner, while the property in the securities remained in Thomas Guffin. No other theory can be maintained consistently with the evidence. Disregarding all the testimony offered by appellee, that of the appellants alone makes this impression on our minds. It is incontestably proven, if the notes were transferred to Sarah at all, it was for the benefit of her father, and for no other purpose. Such a transaction is void both as to existing and future creditors. *Taylor* v. *Jones*, 2 Atk. 600; *Sands et al.* v. *Codwise et al.* 4 Johns. 536.

It does not admit of controversy that Thomas Guffin controlled these securities, after the alleged assignment, the same as he had done before. But the attempted explanation of his conduct in this regard, that he was acting as the agent of his daughter, has more the appearance of an artifice, adopted for the purpose of concealing the true character of the transaction, than a real agency.

We see no reason for reversing the decree of the circuit court, and it is accordingly affirmed.

Decree affirmed.

IGNATZ BOSKOWITZ *et al.*

v.

ISAAC G. BAKER *et al.*

1. CONTRACT—*for sale of buffalo robes, construed as to quality.* A contract for the sale and delivery of a lot or collection of buffalo robes, which provides for the payment of half price for fifteen hundred, and that no more than two hundred headless and mismatched robes shall be contained in the collection, and that the assortment shall be of good quality, does not mean that the quality shall be determined merely by comparison with other collections of the place where the vendors and vendees expected the robes were to be obtained, but that it shall be an average good collection as known to the trade, in the market.

2. Where a contract for the sale and delivery of an entire collection of buffalo robes by an Indian trader provides for the payment of $6 for each robe on delivery, except fifteen hundred, for which $3 each is to be paid, they "being supposed to be of an inferior quality," and further provides that the "assortment" shall be of good quality, those of inferior quality will be limited to fifteen hundred, and a tender of a greater number of inferior ones will not be a compliance with the undertaking of the vendors.

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

J. & A. Boskowitz, the appellants, sued I. G. Baker & Bro., the appellees, upon the following contract, to wit:

"We, J. & A. Boskowitz, of Chicago, Illinois, have this day purchased of I. G. Baker & Brother, of Fort Benton, Montana Ter., their entire collection of buffalo robes, amounting to 18,000 skins, and for which we agree to make a payment of $5,000 upon the signing of this contract, and upon delivery of the buffalo robes, to complete the payment, the said delivery to be completed on or before September 1st, 1871.

"We, J. & A. Boskowitz, agree to pay for these buffalo robes, delivered to them at Chicago, $6 each, except for 1500 robes of this collection, which are to be deducted from the total

number, and for said 1500 robes we agree to pay $3 each, these being supposed to be of an inferior quality; and for buffalo robes known as black calf, we agree to pay $3 each; and it is mutually agreed that no more than 200 headless and mismatched robes shall be contained in the collection.

"I. G. Baker & Brother agree the assortment of Buffalo robes shall be of good quality.

"We, J. & A. Boskowitz, agree to pay $3 each for all sound wolf skins, excluding stagy skins, delivered in Chicago, on or before September 1st, 1871. The quantity to be delivered by I. G. Baker & Brother, to be not less than 3000 skins, and not to exceed 5000 skins. Signed and sealed at St. Louis, April 9th, 1871." (Signed by the parties.)

I. G. Baker & Bro.'s entire collection of buffalo robes for the season of 1871 was shipped from Fort Benton as follows: On May 18, 1871, one thousand bales; on May 31, 1871, twelve hundred and eighty-five bales; and on July 2, 1871, one hundred and ninety-five bales; the bales averaging about ten robes each. They forwarded the two thousand two hundred and eighty-five bales shipped on the 18th and 31st of May to Chicago, for delivery to J. & A. Boskowitz. The remaining one hundred and ninety-five bales were shipped from Sioux City to St. Louis, and did not arrive there until Sept. 1, 1871. These last, comprising about eighteen hundred robes, were collected by Baker & Bro. of the Crow Indians, and were in quality superior to those shipped to Chicago and tendered to J. & A. Boskowitz.

On the 10th day of July, 1871, I. G. Baker, out of the shipments of May 18 and 31, made a tender to J. A. Boskowitz, at Chicago, of twenty thousand four hundred and odd buffalo robes, and insisted upon their taking the whole lot thus tendered or none, and declined to let them have any buffalo robes or wolf skins, unless they would receive the entire lot so tendered. Out of the robes tendered, J. & A. Boskowitz offered to receive, and tendered pay for, eleven thousand six hundred

and eighty-five as of good quality; two hundred headless and mismatched, otherwise of good quality; four hundred and sixty-nine black calf, as of good quality; and fifteen hundred of inferior quality; in all thirteen thousand eight hundred and fifty-four robes. They also tendered pay for all the wolf skins, as to the quality of which there was no disagreement. Subsequent to the execution of the contract the following correspondence was had between the parties.

On the 16th of May, 1871, I. G. Baker wrote from St. Louis to J. & A. Boskowitz as follows:

"In the letter from my brother at Fort Benton, he says: 'I am satisfied we will have 20,000 robes, and the probability is it will be 21,000, and that there will be 6,000 wolves; our contract says 18,000; do you want them all, both robes and wolves?' He says there will be kit, fox, elk and antelope, and but very little beaver. Will you please give us figures on the last mentioned."

The reply is:

"May 17, 1871.

"We will consult our firm in New York on the points mentioned, and write you again when we hear from them, say about 21st or 22d inst. In all probability we will take the entire collection; will write you prices for the other skins in our next. Will you please inform us, whenever you receive advice to the effect from your brother, on what boat the robes are coming down, and when they may be expected, so that we can make our arrangements accordingly?"

And on the 22d of May, 1871, they again wrote further in answer as follows:

"We wrote you last on the 17th, which letter we presume you have received; your collection of robes turn out much larger than you anticipated, and we hope their quality and assortment will not be indiscriminate; on this presumption

we will take the additional 2,000 or 3,000 robes, and also the 1,000 wolf skins."

To this last letter Baker & Bro. did not reply.

The declaration alleged a breach of the contract by the defendants, and a part performance and a tender as to the balance by the plaintiffs. The plea was the general issue. The verdict and judgment were for the defendants, and the plaintiffs appealed.

The appellants allege error in the court below in these particulars:

First. Error was committed in the construction placed upon the contract.

Second. The offer to perform by the defendants was not in conformity to the contract.

Messrs. GOODRICH & SMITH, for the appellants.

Messrs. GOUDY & CHANDLER, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The chief question here arises upon the construction of the contract of April 19, 1871, with reference to the quality of the buffalo robes.

The appellants insist that by this contract all except fifteen hundred of the eighteen thousand robes were to be of good quality, as known to the trade generally, and without reference to the place where collected; that the number of robes of inferior quality by the agreement is definitely limited to fifteen hundred, as much so as the headless and mismatched robes are to two hundred.

On the contrary, it is claimed by the appellees that this contract only called for an original unassorted Fort Benton collection of robes, which, as an entire collection, would average as good in quality as Fort Benton collections generally; and that, tested by this standard, whatever the number of inferior robes, J. & A. Boskowitz were bound to receive them, paying

half price for fifteen hundred, and full price of good robes for the residue.

In refusing the first, second, third and fourth instructions asked by the plaintiffs, and in giving the fourth instruction asked by the defendants, the court below rejected the construction claimed by the appellants and followed that claimed by appellees. The fourth instruction given for the defendants was as follows:

"4. If the jury believe, from the evidence, that the defend ants' collection of buffalo robes, referred to in the contract, were gathered or collected at Fort Benton, Montana Territory, and that the defendants were ready and willing, and offered to deliver to the plaintiffs, their entire collection, not less than 18,000 in number, in July, 1871, and that such entire collection or assortment was of good quality (having reference to entire collections from Fort Benton in determining the question of quality); provided that at the time of the execution of the contract in evidence the plaintiffs knew that the collection was to be made at that place, and that no more than two hundred headless and mismatched robes were included among such collection of not less than 18,000, and that at the same time the defendants were ready and willing and offered to deliver to plaintiffs sound wolf skins to the number required by the contract (admitted by plaintiffs to be according to the contract), then the plaintiffs cannot recover in this case, and the jury must find for the defendants."

For the purpose of a better understanding of the phraseology of the contract, it may be proper to advert to certain facts and circumstances relating to the subject matter which appear in evidence.

The buffaloes are killed by the Indians, who dress and sell the skins to Indian traders. These Indian traders are the original collectors, and the lots obtained by them in any one season are called original collections. The Indian trader sells to the wholesale dealers, the latter to the jobbers, and the jobber sells to the retail dealer. The defendants devoted them-

selves to the first branch of the trade, and confined themselves to the making of original collections and selling them to the wholesale dealers, and the plaintiffs limited their operations to the second branch of the trade, as wholesale dealers.

The defendants had a house at Fort Benton, on the upper Missouri, where they made their collections by purchases from the Indians. The plaintiffs had a house in Chicago, and another in New York, most of their sales being made in New York.

Original collections of robes and skins are made on the upper Missouri, the lower Missouri, on the plains and on the Arkansas. Those collected on the plains are superior in quality. The Missouri river Indians "cut their robes in half previous to dressing, while those of the plains leave their robes whole." In original unassorted collections from Fort Benton there is usually a greater percentage of inferior robes than in original collections from the plains or the lower Missouri. In purchasing from the Indians, no difference is made in price for quality of robes, "their ideas of trade (in the language of the witness) not going to the extent of different prices for different qualities, and the price of robes is fixed without reference to quality, at so many cupsful of sugar or coffee, or so many arms-lengths of cloth, etc., for each robe." An original collection has all kinds of robes and is unassorted. Before the robes are ready for the wholesale and retail dealers, the collection must be assorted into various grades, according to kinds, size and quality. The robes are first assorted with four grades, according to value, and known as Nos. 1, 2, 3, 4. These are classified in various sub-grades, numbering as high as forty. Grades Nos. 1, 2 and 3 are, as a whole, considered by the trade as of good quality. Those robes falling below grade No. 3, and into grade No. 4, are considered by the trade as robes of inferior quality. Nos. 1, 2 and 3 are robes fit for sleigh and carriage purposes, and No. 4 are those unfit for carriage purposes, and principally used for making into overshoes, and called sometimes shoe-robes.

In making these assortments of original Indian collections, no different standard is adopted, and no distinction is made, between Fort Benton collections and collections from other regions; a robe of good quality would be the same from any section, and so of an inferior robe.

We find no testimony in the record tending to show that in dealing in robes either Indian traders, wholesale dealers or jobbers buy or sell or fix prices in the market with reference to the locality where the skins are originally collected; but the skins must stand upon their merits under a uniform standard as to quality.

Assuming appellees' construction to be correct, that Baker & Bro.'s stipulation that the assortment of buffalo robes shall be of good quality, means simply, that this collection, as a whole, shall be of good quality, we cannot accede to the view that its quality should be determined merely by comparison with other Fort Benton collections. There is no such qualification to be found in the words of the contract; and we cannot think there is any such implied qualification from this being a Fort Benton collection, and it being understood and expected that Baker & Bro. would, in fact, collect all their robes for that season at that place. We are very clearly of the opinion that in that case the requirement would be that it should be an average good collection as known to the trade and in the market, without reference to the particular point where these skins may have in fact been collected. The witness Boughton, in speaking of original collections generally, says that "in an entire unassorted lot of buffalo robes, assuming that the entire collection is of good quality, there should be eighty-five per cent of Nos. 1, 2 and 3, and fifteen per cent of poor robes."

The witness Gage also says: "I would include in an entire unassorted lot of buffalo robes of 18,000 supposed tc be of good quality, all grades, except No. 4, in these proportions: Ninety-five per cent of Nos. 1, 2 and 3, and five per cent of No. 4."

These two witnesses appear to be the only ones who testify on this point as to the percentage of inferior robes which an average good original collection should contain.

And their testimony shows clearly that these robes were not up to such a standard. Of the robes tendered, about one-third would appear to have been robes of inferior quality, of grade No. 4.

In this respect at least we regard the defendants' fourth instruction and the finding of the jury as wrong.

This would cause a reversal, and is sufficient for the present disposition of the case, but for the future guidance of the parties, perhaps, we should not stop short of settling the whole question which is raised on the construction of this contract.

The further question is more doubtful, whether, according to the terms of this contract, the number of robes of inferior quality was not to exceed 1,500, and that 16,500 robes were to be all of good quality; or whether the entire collection was to be of good quality, and appellees had the right to put more than 1,500 robes of inferior quality in the collection, if that did not thereby change the quality of the entire collection from good to bad. The second paragraph in the contract is the one that fixes the price of the robes; and looking at this by itself, the first clause would rather seem to be a contract to pay for all the buffalo robes sold six dollars each, except 1,500 of them for which three dollars each was to be paid. Yet there is used in immediate connection with the number 1,500, the language "these being supposed to be of an inferior quality." This tends to indicate the intention to pay only three dollars each for robes of an inferior quality. Then comes the succeeding paragraph: "I. G. Baker & Brother agree the assortment of buffalo robes shall be of good quality." The two paragraphs are to be construed in connection with each other.

What was here agreed to be of good quality, the entire collection, as compared with other collections, or the portion of the robes appellants were to pay six dollars each for?

The terms "good quality" and "inferior quality" appear to have been well known to the trade as designating two well-defined separate classes of robes. The difference between the prices for robes of inferior quality and the other robes is recognized by the parties as one-half, three dollars each for the former, and six for the latter; and this appears to be about the average relative difference of value between the two classes. The parties, from their familiarity with the trade, knew that the actual number of the robes of inferior quality could not be fixed, that it was uncertain, and not capable of ascertainment there, at St. Louis; and they must have known that there would be a larger number of them than 1,500 in the collection. Boskowitz testified that the actual number of the inferior robes in this case was 6,774; and the testimony concurs that this lot as a whole was a fair, average good Fort Benton collection.

It is quite unreasonable to suppose that it was intended that J. & A. Boskowitz should pay the full price of good robes for an indefinite and, in all probability, much larger number of inferior robes in addition to the specified 1,500. It was agreed that there should be no more than 200 headless and mismatched robes which, otherwise, would grade with robes of good quality. And we would be slow to believe that appellants, while stipulating to exclude quantities of headless and mismatched robes, were still willing to include a large number of robes much inferior at a price they were unwilling to pay for these headless and mismatched ones. Such considerations, of course, do not control, but they may help in solving an ambiguity.

The agreement then is, that the assortment of buffalo robes shall be of good quality. Before, in the writing, whenever speaking of this lot of robes, it is called a "collection." That word is so used three times before. But here, it is dropped, and "assortment" is used. It is not likely the change of term was accidental with these men, conversant with the terms used in their trade, one of whom, Boskowitz, drafted the in-

strument. The difference between an assortment and an original Indian collection, as has been shown, is marked. The entire collection evidently was not to be taken; the number to be taken was eighteen thousand skins, and the parties in their subsequent correspondence recognize this limitation; and the stipulation that there were not to be more than two hundred headless and mismatched robes, shows the entire collection was not to be taken. There were actually in this case two thousand one hundred and seventy of these headless mismatched robes. The contract calls for a fixed number of robes, to be selected or assorted, from Baker & Bro.'s original Indian collection. We cannot yield to appellees' construction that "assortment" is used as synonymous with "collection;" but we consider the agreement that the assortment should be of good quality, one, that the robes of the *assortment* should all be of good quality, which, taken together with the preceding paragraph, would mean that they all should be of good quality, except one thousand five hundred, which might be of inferior quality. And perhaps this is no more than what should be the implication from the preceding paragraph. By specifying one thousand five hundred only, as being of inferior quality, and valuing them at half price in consequence, it might be implied that all the other skins not specified as inferior, and valued at the full price of good skins, were to be of good quality. So that upon the construction of the whole instrument taken together, in the light of the surrounding circumstances, we are inclined to hold that the contract placed a limitation of one thousand five hundred on buffalo robes of inferior quality. It must be confessed the parties have expressed such meaning quite awkwardly; but we must accept the language they have seen gt to employ, and construe it as we best can.

Under this view, there was further error in refusing the first, second, third and fourth instructions asked by the plaintiffs, or some one of them, as they put that construction upon

the contract which we adopt. The judgment is reversed and the cause remanded.

Judgment reversed.

Mr. CHIEF JUSTICE WALKER: I am unable to concur in the construction given to the contract in this case, and hold the judgment should be affirmed.

Mr. JUSTICE CRAIG: I do not concur with a majority of the court in the decision of this cause.

Mr. JUSTICE SCHOLFIELD: I dissent from the views expressed in the foregoing opinion.

HARBARD SENICHKA

v.

HERVEY LOWE.

1. TAXES — *of the notice and certificate of publication.* A certificate of the publisher printed at the conclusion of the list of delinquent lands, and as a continuation of the same advertisement, without any separate certificate made since the publication, is insufficient to give the court jurisdiction to render judgment against lands for taxes.

2. JURISDICTION — *effect of finding as to due publication.* The finding of a court in favor of its jurisdiction is not conclusive, especially when the record discloses the evidence of jurisdiction upon which the court acted.

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

This was an action of ejectment, by the appellant against the appellee, for the recovery of two lots in the city of Joliet, in Will county. The cause was tried by the court without a jury. The plaintiff claimed title under a sale of the lots in 1866 for the taxes of 1865. The court found for the defendant.

Mr. THOMAS H. HUTCHINS, for the appellant.

Mr. GEORGE S. HOUSE, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The only evidence of the publication of the notice by the collector that he would apply for judgment for the delinquent taxes against the property in controversy, is what purports to be the certificate of the publisher of the paper, printed at the conclusion of the list of delinquent property, and as a continuation of the same advertisement. This appears only in the same number of the paper containing the advertisement, and there is no certificate made by the publisher since that publication was made. This was clearly insufficient to give the court jurisdiction in the case.

In *Fortman et al.* v. *Ruggles et al.* 58 Ill. 207, in speaking of the question of notice in a like case, it was said: "Such a notice is required by the statute, and it is indispensable to confer jurisdiction in this proceeding, unless an appearance is entered. It is statutory and summary in its character, and the requirements of the law must be strictly pursued. The notice takes the place of process, and it is only by its publication, as required by the statute, that the court obtains jurisdiction to hear and adjudicate upon the case."

In *Fox* v. *Turtle*, 55 Ill. 378, the certificate of publication was signed "John Wentworth, publisher, by Reed," and it was held insufficient to sustain the judgment upon delinquent taxes.

It is contended, however, in the present case, appellee is concluded on this question, by the finding of the county court as recited in the judgment. If this be true, it is difficult to say why the appellant was not also concluded by a like finding in the case just referred to, for the judgment there pursued the statutory form prescribed by the 35th section of the act of February 12, 1853 (Gross' Stats. 1869, p. 605), reciting that due notice had been given.

But the statute required that the collector should obtain a copy of the advertisement of the delinquent lands and lots, together with a certificate of the due publication thereof from the printer or publisher of the newspaper in which the same was published, and file the same with the county clerk on or before the first day of the term at which judgment was prayed. Gross' Stats. 1869, p. 608, § 188. The advertisement and certificate in evidence are the only advertisement and certificate relating to this judgment and sale, filed by the collector in the office of the county clerk; and it is proven by the evidence of the county clerk that it is the same which was inspected by the court, and the evidence upon which the court acted in entering judgment. It has never been held, where the record itself showed that the evidence of jurisdiction upon which the court acted was insufficient, that its finding, in favor of its jurisdiction, was conclusive. In *Goudy et al.* v. *Hall*, 30 Ill. 116, it was expressly said that the finding in such case was not obligatory. The chief justice, in delivering the opinion, observed: "Take the case where the law requires six weeks' notice, and the record itself shows but three weeks' notice was given; or where a process has been returned not served, and the court should find that the requisite notice was given, or that the process was duly served; it would be absurd to say that such finding was conclusive, when the very record would show that this finding was void for want of jurisdiction to find any thing whatever in the case." Other and more recent decisions recognize the same doctrine.

The evidence being clear and full to the point that the pretended certificate of publication before us is the one upon which the court acted in rendering judgment; and it being equally clear that it was not made after the pretended publication, it was insufficient evidence of the facts recited in it. It would be just as reasonable to receive in evidence the deposition of a witness taken about a matter in litigation before the facts deposed to had occurred, as to receive a certificate of this kind as a compliance with the law.

Syllabus.

The objection urged, that appellee should not have been allowed to make defense until he showed a payment or tender of the taxes, etc., for which the property had been sold, is fully met by *Reed et al.* v. *Tyler et al.* 56 Ill. 288, where it was held that the law requiring that this should be done is unconstitutional.

The judgment is affirmed.

Judgment affirmed.

The Chicago and Iowa Railroad Company *et al.* *v.* Daniel J. Pinckney *et al.*

1. Constitution — *clause relating to municipal subscriptions and donations construed.* The object of the proviso to the section of the new constitution relating to municipal subscriptions, was, to save such subscriptions and donations voted in aid of railroads and private corporations prior to its adoption. The saving clause, by a reasonable construction, embraces donations as well as subscriptions, and places them upon the same footing.

2. Municipal donation — *sufficiency of notice of election.* Where the petition filed with the town clerk for an election upon the question of the town donating its bonds in aid of a railroad, stated the time the bonds were to run and the interest they were to bear, as required by law, it was *held*, that an omission in the notice of the election to state these facts, when the notice recited that the petition was filed in the clerk's office, would not vitiate the election, as the petition was subject to inspection of any voter desiring to learn the facts.

Appeal from the Circuit Court of Ogle county; the Hon. William W. Heaton, Judge, presiding.

Mr. E. Walker, Mr. J. H. Cartwright, Mr. H. Crawford, and Mr. S. P. McConnell, for the appellants.

Mr. James K. Edsall, and Mr. T. Lyle Dickey, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill filed in the circuit court of Ogle county, by Daniel J. Pinckney and others against the Chicago and Iowa Railroad Company, the town of Mount Morris and others, to enjoin the town and its officers from issuing bonds to the Chicago and Iowa Railroad Company in the sum of $75,000.

The cause was heard upon bill, answer, replication and proofs, and a decree rendered in favor of complainants, according to the prayer of the bill. The defendants excepted to the decree and prosecuted an appeal to this court.

The principal points relied upon by appellees to prevent the town from issuing the bonds are:

First. The constitution of 1870 prohibits a donation by a town to a railroad corporation.

Second. The pretended vote in favor of such donation was void, because the notice of the election, and the petition, were defective.

The clause of the constitution relied upon reads as follows: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to loan its credit in aid of such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make any such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

The election in the town of Mount Morris, by which the voters of that town decided to donate $75,000 to the Chicago and Iowa Railroad Company, occurred on the thirtieth day of June, 1870. The constitution was adopted on the second day of July following.

At the time the section of the constitution referred to was framed, large sums of money in different parts of the State had been voted by municipalities to be subscribed and donated to railroad companies, on condition that railroads then being

constructed should be completed within a given time, and the country, whether wisely and judiciously or not, seemed to demand that in cases where the people in these municipalities had, under then existing legislation, voted to aid railroads by subscription or donation prior to the adoption of the constitution, that such subscription or donation should not be affected by the formation of the constitution.

And we have no doubt it was in view of this demand of a large portion of the State that the proviso was engrafted in the foregoing section.

It is conceded by appellees that the proviso saves subscription to stock previously voted, but they insist it does not save donations voted. We cannot adopt a construction so narrow and technical. A reasonable construction of the whole section will embrace donations as well as subscriptions. In one sense of the term a donation is a subscription to the capital stock of a company.

We have no doubt at the time the section was framed there were then in the State quite as many donations voted as there were subscriptions to stock in any other manner, and if a necessity or reason existed to protect a subscription there was also the same reason and demand to protect a donation, and we entertain no doubt it was the intention of the framers of the constitution, by adding the proviso to the section cited *supra*, to place subscriptions and donations on the same footing.

The notice of the election under which the vote was taken to make the donation reads as follows:

SPECIAL TOWN MEETING.

OFFICE OF THE TOWN CLERK OF THE TOWN OF MOUNT MORRIS, IN THE COUNTY OF OGLE AND STATE OF ILLINOIS.

To the voters of said Town:

WHEREAS, twenty legal voters of the town of Mount Morris, in the county of Ogle and State of Illinois, have presented and filed in my office their written application requesting that an election and special town meeting be held in said town, to

determine whether said town shall, in its corporate capacity, make a donation to the Chicago and Iowa Railroad Company to the amount of seventy-five thousand ($75,000) dollars, in the bonds of said town, to aid in the construction of said railroad, said bonds not to be issued until said railroad company shall have located their said railroad from a connection with the Chicago, Burlington and Quincy Railroad at the city of Aurora, Kane county, Illinois, into and through said town, and shall have located a depot on the line of said railroad, within three-fourths (¾) of one mile of Rock River Seminary building, nor until the said company shall have constructed said railroad through said town, and laid the track for the same with a T rail, to weigh not less than fifty-six pounds to the yard, the same to be completed on or before the 31st day of December, A. D. 1871.

Now, therefore, I, F. B. Brayton, town clerk of said town of Mount Morris, in pursuance of an act of the General Assembly of the State of Illinois, entitled "An act to incorporate the Chicago and Iowa Railroad Company," approved March 30th, A. D. 1869, do hereby notify the legal voters of said town that a special town meeting and an election will be held at A. W. Little's shop, in said town, on the 30th day of June, A. D. 1870, to vote for or against said donation, and that the polls will be opened between the hours of nine and ten o'clock in the forenoon of said day, and remain open until six o'clock in the afternoon, unless otherwise ordered.

Dated this 9th day of June, A. D. 1870.

F. B. BRAYTON,
Town Clerk of said town.

The objection made to this notice is, that it fails to state the rate of interest the bonds were to bear, or the time when they became due.

While it is true those things are not stated in the notice, yet the law under which this election was held required a petition to be presented to and filed with the town clerk,

signed by twenty legal voters of the town, in which the rate of interest the bonds are to draw, and the time they are to run, is required to be stated. Private Laws of 1869, vol. 2, § 12.

The voters of the town of Mount Morris are told by this notice that a petition has been filed in the town clerk's office, signed by twenty legal voters of the town. If there was a bare possibility of any voter not knowing by the notice how long these bonds were to run or their rate of interest, he is informed by the notice that the information is in the office of a public officer of the town, and all he has to do in order to obtain the required information is, to call on that officer.

The petition filed with the town clerk, upon this point, reads: "Said bonds to be made payable within ten years from the date of their issue, and to bear interest from the date of their issue at the rate of ten per cent per annum, payable annually."

We do not think there can be a pretense for a single voter being misled by the notice. The petition is referred to as being on file, and was thus subject to inspection by all the voters of the town. We are of opinion that the notice, in connection with the petition, is sufficient.

The election seems to have been free from fraud and undue influence, and was conducted honestly and fairly, the result of which was, two hundred and sixty-nine votes were cast for donation of $75,000; one hundred and sixty-three votes against donation.

The railroad company seem to have complied fully with each and every condition required of them in the construction of the road before they would be entitled to the bonds, and in conformity to the former decisions of this court, we can see no ground upon which the bill in this case can be sustained.

The decree will be reversed and the bill dismissed.

Decree reversed.

Mr. Chief Justice Walker and Mr. Justice McAllister, dissenting: The first branch of the section of the constitution

referred to, prohibits subscriptions or donations, or loans, by municipalities, to private corporations. The proviso drops donations and loans of credit, and merely authorizes subscriptions to capital stock where the same had been before voted. This is a donation, and had not been voted as a subscription. It is not, therefore, within the proviso but within the prohibition. The constitution clearly makes a distinction between a subscription and donation, and this court is powerless to annihilate it.

PERRY FRAZER

v.

THE BOARD OF SUPERVISORS OF PEORIA COUNTY.

1. CONVEYANCE — *to one and heirs of her body.* A conveyance of land to an unmarried woman, to have and to hold unto her and the heirs of her body forever, vests in her an estate for life only, and creates a contingent remainder in favor of the heirs of her body who, when born, will take the absolute fee.

2. SAME — *tenant for life cannot defeat estate of remainderman.* A grantor who conveys to an unmarried woman real estate, to have and to hold to her and to the heirs of her body forever, thereby deprives himself of all estate but a contingent reversion, dependent upon the grantee dying without having had issue, and it is not in the power of the grantee, by a reconveyance before issue born, to defeat the contingent remainder in favor of such issue.

3. COVENANTS FOR TITLE. Where the owner of land conveys it to another and the heirs of her body forever, and the grantee, before having issue, reconveys to the grantor, he only acquires a life estate during the life of the grantee in the first deed, and if he again conveys the land with covenants that he is seized of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law, in fee simple, his covenant is broken when made, and his grantee may sue and recover upon such breach, notwithstanding he may have been put into possession of the land under his deed.

4. MEASURE OF DAMAGES — *for breach of covenant of warranty.* Where there is a covenant in a deed of conveyance of real estate, that the grantor,

at the time of making the deed, was seized of a good, sure, perfect and absolute and indefeasible estate of inheritance in the law in fee simple, and the grantor has in fact only a life estate and a contingent reversion in the land, the grantee may, upon reconveying or tendering a reconveyance, sue and recover for breach of covenant, and in such case the measure of damages is the amount of the consideration named in the deed, together with taxes paid on the land, and interest, less the value of rents received or which could have been received by the grantee from the land.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. JOSEPH W. COCHRAN, Judge, presiding.

Messrs. MCCULLOCH, STEVENS & WILSON, for the plaintiff in error.

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

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

Plaintiff in error brought an action of covenant against defendants in error. The evidence shows that William S. Moss was seized in fee of two lots in Peoria, and conveyed the same to defendants in error. An agreement as to the facts was made by the parties and the case submitted to the court, by consent, without a jury. It is agreed in substance that in December, 1854, Moss conveyed the lots to his unmarried daughter, Harriet W. Moss. The deed recites a consideration of one dollar and natural love and affection, and "to have and to hold the said premises, with the appurtenances, unto the said party of the second part, her heirs of her body, forever." She afterwards intermarried with Arthur H. Griffith.

Afterwards, in June, 1865, Griffith and wife reconveyed the premises to Moss, the father. The deed recites a consideration of one dollar. It recites that "the conveyance of the above and foregoing premises is hereby made in consideration of the said William S. Moss having heretofore, to wit, on the 30th day of December, A. D. 1854, conveyed, in consideration of one dollar together with natural love and affection, to the said Harriet

W. Moss, now Griffith, and before her said marriage, the above described premises, and subsequent arrangements having been made by which it is desirable to change said intended gift (the said conveyance of said William S. Moss to the said Harriet W. Moss, now Griffith, having been intended as a deed of gift) from said premises to other property, therefore this deed is made to revest the title to said premises in the said William S. Moss, in consideration of other property received in exchange, and to and for the same uses and purposes, the receipt of which said property is hereby acknowledged." This deed contained no covenants. The daughter at the time the stipulation was entered into had no children, and is still the wife of Griffith.

On the 5th day of March, A. D. 1867, Moss conveyed the premises to the county of Peoria. This deed contained full covenants. On the 20th day of April, 1867, the county of Peoria conveyed the premises to plaintiff in error, for the consideration of $5,700, and covenanted that the county was seized of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law in fee simple; that it had good right, full power and lawful authority to grant, bargain, sell and convey the same; that the same was free and clear of and from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances. The plaintiff took possession under the deed and inclosed the same with a fence, but the same had been otherwise unoccupied during the time, and plaintiff had derived no profit therefrom and has paid taxes to the amount of $392.88, and still has possession. He paid the full value of the property except $1,250, for which he gave his note and a mortgage on the premises, and the note has been assigned to one Jack.

At a session of the board of supervisors, plaintiff tendered to the county a deed for the premises, and caused a notice to be served on them that inasmuch as the county had no title when they conveyed to him, and had afterwards acquired no title, he tendered the deed and offered to surrender

possession, and demanding a re-payment to him of the purchase money, with interest, taxes and costs of conveyance, but the board of supervisors refused to comply with the request.

Upon this agreement of facts the circuit court found for defendants, and rendered a judgment against plaintiff, to reverse which he prosecutes this writ of error.

It is conceded by all parties that Harriet took an unconditional life estate. But as to what became of the remainder of the estate the parties are not agreed. Defendants in error insist that Moss, the grantor, retained the fee to support the particular estate, liable to be defeated by the contingent remainder, on the birth of children of her body. And that until the birth of a child the grantor and the grantee, by uniting in a conveyance, could pass the entire absolute fee. Or where the grantee so conveyed to the grantor he became invested with an absolute fee and could convey it to whom he might choose. And hence the county took and conveyed a fee simple title, free from the contingent remainder.

On the other hand, it is contended that by virtue of the sixth section of our conveyance act the strict rules that obtained at the common law and under the statute *de donis* have been modified, and that under a deed of the character of that made by Moss to his daughter the grantee only takes an unconditional life estate, and the remainder, by force of the statute, vests in fee in the heirs already in being, or if there are no children of the body at the time, then the fee is in abeyance until a child is born of her body, when the remainder vests in the heir, subject to be defeated in part by the birth of other children, who at birth become invested with the fee to their share. And that under the 14th section of the same act, the fee having been limited in remainder to the children of her body, they would take at birth, whether they were in being at the time the conveyance was made or were born afterwards.

To see the force of these sections more clearly, and to appre-

ciate more fully their practical operation, it is perhaps necessary to review to some extent the law on this subject as it stood prior to the adoption of these statutory provisions. At the common law, a conveyance to a person and the heirs of his body, whether generally or specially, created a conditional fee, which was held to be performed and the fee vested upon the birth of issue. It was held that there was an implied condition that if the donee should die without such heirs, the land should revert to the donor. This was a condition annexed to all grants, by operation of law, that on the failure of the heirs specified in the grant, the grant should be at an end and the land return to the ancient proprietor. 2 Bl. Com. 110. The condition annexed to these fees by the common law, was held, where it was to a man and the heirs of his body, to be a gift on condition that it should revert to the donor if the donee had no heirs of his body; but if he had, that it should remain to the grantee. Hence it was called a fee simple, on condition that he had issue. And when the condition was performed by the birth of issue, the estate in the grantee became absolute and unconditional. And when the condition was thus performed, the estate became absolute for at least three purposes. First, to enable the grantee to alien the land, and thus to bar both his own issue and the donor; second, to subject him to forfeit it for treason; and third, to empower him to charge the land with rents, commons and certain other incumbrances. 2 Bl. Com. 111. If after such performance of the condition the grantee did not alien the land, and the heir died and then the grantee died, the estate reverted to the donor. To obviate this reversion it was customary for the grantee, on the birth of issue, to alien and then repurchase, so that he might become vested with a fee simple absolute that would descend to his heirs generally. Ib. This was the state of the law when parliament adopted the statute *de donis conditionalibus.*

The effect of that statute was, to prevent the grantee from aliening, after birth of issue, so as to cut off or bar this estate, which descended in like manner from generation to generation

to the class of heirs described in the deed to the first donee. But on failure of issue the land reverted to the donor. It was held that by this act the estate was divided into two parts, leaving in the donee a new kind of particular estate called a fee tail, and investing in the donor the ultimate fee simple in the land expectant on the failure of issue, which expectant estate is what is called a reversion. And it was obviously the purpose of the General Assembly, in adopting the sixth section, to prevent the tying up of titles in perpetuity by entails. This was manifestly the first purpose, and another was, to carry out the intention of the grantor in making the conveyance, that the land should go in remainder to the particular persons designated in the deed. The artificial and highly technical rules of the ancient common law are not known or understood by the people generally or by the great majority of persons who are called upon to prepare conveyances, and hence it was also the purpose of this statute to more effectually carry out the intention of the parties. But few understand the rule in *Shelly's Case*, which is defined to be, "In any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee tail; if to his heirs, a fee simple." 1 Preston on Estates, 263.

The sixth section of our conveyance act provides that where any person, under the common law, might become seized of land, etc., by any devise, gift, grant or conveyance, etc., in fee tail, such person, instead of becoming seized in fee tail, shall be deemed and adjudged to be and become seized thereof for his or her natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would, on the death of the grantee, etc., in tail first pass, according to the course of the common law, by virtue of such devise, gift, grant or conveyance. The General Assembly must have intended to refer to estates tail created by the statute *de donis*. They speak of persons becoming seized of such estates by the

common law, when we have seen that estates tail grew out of the statute *de donis*, and not out of the common law. The object of our statute was, to convert the estate tail in the donee into an estate for life, and in the person who would first take under the grant into an estate in fee simple absolute, and thus cut off the reversion to the donor expectant on the failure of issue of the donee, of this class designated in the instrument conveying the land, and to vest the fee in the first taker.

It seems to us that this was the obvious purpose of the enactment. If, as is contended by defendants in error, the General Assembly intended to restore the common law as it stood before the adoption of the statute *de donis*, they would simply have repealed that statute, and left the donee with power, on the birth of issue, to alien the estate, and re-purchase, and thus cut off both the remainder and reversion. But this statute has accomplished the same end, effectually declaring that the person who would first take from the tenant in tail shall take a fee simple absolute, and expressly provided that the donee, in such a case, shall only have a life estate. We are at a loss to see in what manner the donee could possibly cut off the remainder, in the face of the statute, when it has unequivocally stated that the remainder-man shall become invested with an absolute fee, by operation of the deed or instrument creating the estate. To so hold would be in manifest violation of the express will of the General Assembly. This provision, we think, repels, in the most unmistakable manner, any and all inference that the donee might dock the remainder, or that the donor should ever have the reversion, except on failure of the issue, but that the estate in the heir of the body of the donee should take the fee untrammeled and free from all conditions whatever.

The last clause of the section, in declaring that the fee should pass according to the course of the common law, by virtue of the instrument creating the estate, is manifestly intended in the same manner as the reference to the common law in the first clause of the section. It could not have been intended to

so limit or qualify the provision as to the manner the heir should take, else other and very different language would have been employed. Had such been the intention, the General Assembly would no doubt have said that the heir, or person first taking from the donee, should take as at the common law, and before the statute *de donis*, and not that he should take an estate in fee simple absolute. In this mode and this alone can we harmonize the language of the statute and carry out its provisions.

Before the statute *de donis* the donee only took a conditional fee, subject to be defeated, and to revert to the donor in case of failure of issue of his body. These conditions our statute has effectually wiped out, as well as the tenure by fee tail, leaving no doubt or possibility of a reversion. And it is immaterial, as affects the estate thus created, whether we say that the statute has totally abolished estates tail, or whether we say they are abolished only after the first degree, as the operation of the statute is the same, and vests the absolute fee in the heir. *Butler* v. *Huestis*, 68 Ill. 594; *Voris* v. *Sloan*, ibid. 588; and *Blair* v. *Vanblarcum*, 71 Ill. 290. These cases hold that under such conveyances the heir, at birth, takes a fee simple.

If any thing further was necessary to show that such was the intention, although the fee might be in abeyance until the birth of the child, we think it is done by the fourteenth section of the conveyance act. It provides that "when an estate hath been, or shall be, by any conveyance, limited in remainder to the son or daughter, or to the use of the son or daughter of any person, to be begotten, such son or daughter, born after the decease of his or her father, shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death." Thus it is seen that the estate may, under this statute, be in abeyance, with no particular estate to support the remainder nor any person in being to take the inheritance until he comes into

being so that it can vest. From these enactments we are clearly of opinion that children born after the execution of the conveyance will take the remainder in fee, precisely in the same condition as though they were at the time in being. See *Blair* v. *Vanblarcum*, *supra*.

It then follows that Harriet took only a life estate by the deed from her father, and that by the deed a contingent remainder was created in favor of the "heirs of her body," who, when born, will, under the statute, take the absolute fee. And by force of the same statute, Moss deprived himself of all estate but a contingent reversion, and when he conveyed to the county nothing passed but the life estate of Harriet which he had acquired, and this right to the expectant reversion. He had and could not have the fee, and hence could not convey it to his grantee. He could, of course, convey no greater estate than he held. Should Mrs. Griffith die without having had issue, then the title would no doubt revert to Moss, if living, or, if dead, to his heirs, and if there are proper covenants in his deed to the county, the fee would then inure to the benefit of the county, and he or his heirs would be estopped to claim the property. But that event has not occurred, and hence the county did not have the fee.

It then follows that there was a breach of the covenant that the county was seized of a good, sure, perfect, absolute and indefeasible estate of inheritance, in the law, in fee simple, and of the covenant that the premises were free and clear from all former grants, bargains and sales. We have seen that he did not own the premises in fee, but had, by a former sale, divested himself of the fee simple title, and had not regained it. And these covenants, being in the present tense, have been always held to be broken, if at all, on the delivery of the deed. They are unlike the covenant for peaceable enjoyment or of general warranty, which are covenants to be performed in the future, and are only to be broken by eviction. Nor is the covenant answered by placing the grantee in possession. That

is a seizin in fact, while the covenant is that the county was seized, in law, of the fee.

The plaintiff in error did not intend to purchase any thing less than the fee, nor did the defendant covenant that it had sold any thing less. He did not purchase a mere possession or right of possession. Nor did he intend to purchase a mere life estate. And shall he be told that, although he intended to purchase, and the county intended to sell him the fee, and covenanted that they had, he must be content with a life estate? That although he paid the full price of the land with perfect title, he must be satisfied with only a life estate worth perhaps not one-tenth of the sum he paid? Shall it be said that, being let into possession under a mere life estate, the covenant of lawful seizin in fee is answered? We think not, though some courts seem to so hold. In the cases of *Brady* v. *Spurck*, 27 Ill. 482, *King* v. *Gilson*, 32 ib. 348, and *Baker* v. *Hunt*, 40 ib. 264, it was held that if there is a breach of the covenant of seizin it is at the delivery of the deed. This, then, is repugnant to the notion that a mere seizin in fact answers the covenant of seizin, as the breach occurs at or before possession is or can be delivered.

It remains to determine what is the measure of damages. We can see no reason why plaintiff in error should not recover the purchase money he has paid, with interest; also, all taxes he has paid on the premises. The covenant being broken, and failing to obtain the title he purchased, he had only to tender a deed reconveying all the interest he had acquired from the county, and then recover what he had paid for and on account of the purchase of the lots. If the county has negotiated any of his notes for the purchase money, it must, of course, either take up and surrender the security or pay plaintiff in error to take it up, so as to become released from liability thereon. The title purchased did not pass, and on a recovery both parties should be placed *in statu quo*. The county should have restored to it all the title it conveyed, and plaintiff in error all money paid, with interest, and all taxes paid, and

with a deduction therefrom for all rents and profits which have been or could have been received from the property. This is reasonable, just and proper as the measure of damages. And whether he may recover for notes negotiated by the county must depend upon whether the county shall release and discharge him from liability on the same.

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

Judgment reversed.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

URBAN D. MEACHAM.

1. SCIRE FACIAS — *sufficiency of proof on plea of nul tiel record.* On plea of *nul tiel record* to a *scire facias* upon a forfeited recognizance, if the recognizance, with the certificate of the magistrate attached and the indorsements on it, together with the indictment, and the record of its return into court, and the judgment declaring a forfeiture, are read without any specific objections, this will sustain the issue on the part of the people.

2. RECOGNIZANCE — *validity of, does not depend upon the original charge being the one for which the indictment is found.* It matters not whether the principal in a recognizance was examined on the charge for which he is indicted or some other, provided it was for a bailable offense. If examined for any offense which is bailable, the recognizance will be good.

3. SAME — *certificate of justice.* The certificate of a justice of the peace to a recognizance that it was taken, entered into and acknowledged before him is sufficient.

4. SCIRE FACIAS — *plea denying official character of justice.* In a *scire facias* upon a recognizance, a plea that the committing magistrate was not a justice of the peace amounts to nothing. By entering into the recognizance, the cognizor admits the official character of the person making the commitment, which cannot be inquired into collaterally.

5. BURDEN OF PROOF — *death of principal in recognizance.* On a plea of the death of the principal in a recognizance, the burden of proof rests upon the defendant.

Statement of the case.

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

This was a *scire facias* upon a recognizance entered into by one Thomas H. Needham, as principal, and Urban D. Meacham as surety, before Abraham T. Green, a justice of the peace, for the appearance of Needham before the circuit court to answer a charge for an assault with intent to commit a bodily injury, without stating upon whom or with what instrument. The certificate of the justice was as follows:

"Taken, entered into and acknowledged before me this 26th day of August, 1865.

"A. T. GREEN, *J. P.*"

The recognizance was marked "filed Sept. 4, 1865, E. P. Hodges, clerk."

The record showed the finding and return by the grand jury of an indictment against Needham for an assault upon Isaac Zortman, with a deadly weapon, to wit, a pistol, with intent to inflict upon Zortman a bodily injury, without any considerable provocation therefor.

The defendant Meacham, alone, was served, and pleaded *nul tiel record*, and several other pleas, the second and fourth of which were, that Needham was not examined before Green upon the charge of unlawfully making an assault upon Zortman with a deadly weapon, etc., as stated in the *scire facias*. The fifth denied that Green was a justice of the peace of the county. The sixth denied that Green made a certificate that the recognizance was taken and approved by him, and alleged that he did not certify the same to the clerk of the circuit court on or before the next term. The other facts of the case are found in the opinion of the court.

Mr. JAMES K. EDSALL, Attorney General, for the People.

Mr. U. D. MEACHAM, *pro se*.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a proceeding by *scire facias*, in the circuit court of Stephenson county, on a forfeited recognizance entered into by Urban D. Meacham, as surety, for the appearance of Thomas H. Needham, to answer a charge of an assault with intent to commit a bodily injury.

Meacham was duly served, and appeared and pleaded several pleas, on which issues were made up and tried by the court, by consent, without a jury. The court found the issues for the defendant and rendered judgment that the defendant be discharged from his recognizance herein.

Proper exceptions were taken on behalf of the people, and the record brought here by writ of error.

The first point made is on the plea of *nul tiel record*. We are satisfied this plea was not sustained by the evidence. The recognizance, with the certificate of the magistrate attached, and the indorsements upon it, together with the finding of the indictment, and of its return into court, and the judgment of the court declaring the forfeiture, were all read in evidence without any specific objection by the defendant, and sustained the issue on this plea in favor of the people.

Pleas numbered two and four presented immaterial issues, on which the court should have found for the people, if they were considered by the court.

It was held by this court in *O'Brien* v. *People*, 41 Ill. 456, that it mattered not whether the principal was examined or not before the justice who committed him, upon that charge or some other, provided it was a bailable offense. It was of no importance what the offense charged against the principal may have been, if it was bailable. The only important question is, did the cognizor undertake his principal would appear and answer to the charge.

The plea that the committing magistrate was not a justice of the peace, amounts to nothing. The cognizors admitted by their undertaking that he was a justice of the peace, and the

inference is, from the recitals in the recognizance, that the officer was acting as a justice of the peace — he was *de facto* a justice of the peace, whether rightfully or not cannot be inquired into in a collateral proceeding.

As to the seventh plea, we see no objection to the certificate of the justice of the peace; it is all the law requires, (*Lawrence* v. *The People*, 17 Ill. 172,) and the clerk's indorsement of filing is all sufficient.

As to the eighth plea, which avers the death of the principal, no proof was offered on this fact — the *onus* was on the defendant, and he should have maintained it by sufficient proof.

The court erred in rendering judgment for the defendant Meacham, and it should be reversed and the cause remanded.

Judgment reversed.

MR. JUSTICE MCALLISTER: I do not concur. The offense with which the principal was charged was not bailable. It was one of which the justice had exclusive jurisdiction. Hence he had no authority to take bail. It was for a simple assault, and the justice should have tried the accused instead of taking bail, he being the only officer or court authorized to take jurisdiction. In my opinion the recognizance was void, and the court below decided correctly in so holding.

MR. JUSTICE SHELDON took no part in the decision, having decided the case below.

THE VILLAGE OF DWIGHT
v.
CHARLES L. PALMER.

1. CONTRACT — *of village officer with the trustees, prohibited.* An officer of a village incorporated under the act July, 1872, in relation to cities and villages, is prohibited from making any contract with the trustees to do

work for the village, to be paid for out of the treasury, and any such contract is void, and such officer will be entitled to no compensation for any thing he may do under such contract.

2. Where a clerk of the board of trustees of an incorporated village contracted to publish certain ordinances for $300, which was rescinded before any work was done under it, and such officer then resigned his office, but the contract was never renewed after acceptance of his resignation: *Held*, that he was not entitled to compensation for any ordinances he may have published afterward, as it was done without authority.

APPEAL from the Circuit Court of Livingston county; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding.

This was an action of assumpsit, by the village of Dwight against Charles L. Palmer. The declaration contained only the common counts for money had and received, etc. On a trial there was a verdict and judgment in favor of the defendant. The opinion of the court states the material facts of the case.

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

Mr. S. S. LAWRENCE, and Mr. L. G. PEARRE, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The declaration in this case contains only the common counts. The pleas are: first, non-assumpsit; and second, *nul tiel corporation*.

The facts in this case are briefly as follows: On the 11th day of August, 1873, the village of Dwight entered into a contract with appellee, who was at that time the proprietor of the only newspaper published in the village, to publish the ordinances enacted by the board, which the appellee undertook to do for the consideration of $300. The same evening on which the resolution was passed, appellee, who was himself clerk of the board of trustees, and acting as such, presented to the president of the board three blank orders for his signature, which he signed, to be filled up as he supposed with the amounts of a like number of bills previously audited. That

night or the next morning, appellee filled up one of the blank orders with the sum of $300, the amount of his contract, and on presentation to the treasurer it was promptly paid. No part of the work had then been done, nor had his bill been audited, nor was there any agreement to pay for the work in advance.

The members of the board became dissatisfied with the conduct of appellee in drawing the money before any part of the work had been done. A meeting of the board was immediately called by the president, at which appellee was present. At that meeting it was proposed appellee should return the money which it is alleged he had wrongfully obtained, but this he declined to do. A resolution was then passed requiring him to give bond with sufficient security for the faithful performance of his contract. Appellee agreed to this proposition and had such bond prepared, but no one ever called for it, and consequently it was never delivered or accepted.

On the 15th of August the board of trustees held another meeting, at which the resolution authorizing appellee to print and publish the village ordinances passed on the 11th of August was rescinded, as was also the resolution of the board requiring security for the performance of the contract. Appellee at this meeting tendered his resignation as clerk, the consideration of which was laid over to the next regular session, which would be held on the 19th of the same month. At the next session of the board the resignation of appellee was accepted, to take effect on the 19th of August. Only a portion of the work had been done when the trustees undertook to rescind the alleged contract, and there had then been no number of the paper issued in which the ordinances could be published.

This action was brought by the village to recover of appellee the $300 obtained under the alleged contract. The right of action is predicated upon the ground the contract with appellee, he being an officer of the village, was prohibited by law, and hence void.

The village of Dwight was organized under the general law in force July, 1872, in relation to the incorporation of cities and villages, which provides, "No officer shall be directly or indirectly interested in any contract, work or business of the city, or in the sale of any article, the expense, price or consideration of which is to be paid from the treasury, or by any assessment levied by any act or ordinance." This provision is made to apply to villages as well as to cities organized under that law.

The appellee, being himself a village officer, could make no contract with the trustees to do work for the corporation to be paid for out of the treasury, and hence the alleged contract for printing the ordinances was absolutely void. It was a work of supererogation on the part of the trustees to attempt to rescind it. It had no binding force at all, and whatever was done by appellee under it was done without any authority from the village.

The money was, therefore, unlawfully obtained. Appellee had no right to it. He was entitled to no compensation whatever from the village for any thing he may have done under the alleged contract while he was one of its officers. There is no pretense the board ever authorized him to do any work by way of publishing the ordinances, after his resignation was accepted on the 19th day of August. What the individual members of the board may have said to him on the street in relation to the matter, if they said anything, is of no consequence.

The contract was formally rescinded while appellee was an officer of the village, and was never renewed by the trustees after his resignation was accepted. If, therefore, appellee published the ordinances, he did it without authority, and cannot enforce payment from the village.

It seems to be insisted, that because the law requires the ordinances to be published in a newspaper, if one be printed in the village, and because appellee was the proprietor of the only newspaper then published in the village, this fact would in

some way render the contract valid. We cannot concur in this view. Appellee, if he desired to enter into any contract with the village authorities to do work for which payment was to be made out of the treasury, should first have tendered his resignation as a village officer. His contract would then have been valid; but while he continued to exercise the functions of an office he could make no lawful contract to do work that was to be paid for out of the treasury, or by an assessment under any act or ordinance of the village.

Appellee has received money out of the village treasury under an illegal contract, and under such circumstances as render it against the policy of the law for him to retain it.

The court should have given appellant's instructions without modification. Those given for appellee are in conflict with the views expressed in this opinion, and ought not to have been given.

For the reasons indicated the judgment will be reversed, and the cause remanded.

Judgment reversed.

CHARLES BLAZEY *et al.*

v.

WILLIAM DELIUS *et al.*

1. FORECLOSURE — *sale for part of debt not due.* On foreclosure of mortgage the court may direct the whole mortgaged premises to be sold, if most conducive to the ends of justice in reference to the equitable rights of all parties, although a part only of the mortgage debt has become due; but the fact that the premises are a meager and scant security, and are going to ruin and decay, does not justify their sale for a debt not due.

2. On bill to foreclose two mortgages, one of which embraces land not included in the other, and where the whole debt is not due, the decree found that the mortgagor was insolvent and the premises could not be sold in parcels without prejudice to the parties, when there was no allegation in the bill to admit such proof, and authorized a sale *en masse* for the whole debt due and to become due: *Held*, that the decree was erroneous.

Statement of the case.

3. SAME — *of the decree for sale for debt not all due.* If a sale of mortgaged premises is ordered for the entire debt, a part of which is not due, the decree should protect the rights of the mortgagor, so that in redeeming he will not be compelled to pay money before it is due under the contract.

4. SAME — *sale of lands not embraced in.* Where two mortgages are partly upon the same premises, but one including land not in the other, it is error to decree the sale of the land not embraced in one mortgage for its satisfaction, and thereby increase the burden upon the premises in the other mortgage.

WRIT OF ERROR to the Common Pleas Court of the city of Aurora; the Hon. RICHARD G. MONTONY, Judge, presiding.

On the 15th day of November, 1873, William Delius and Detmar Delius, defendants in error, filed their bill in chancery against Charles Blazey and Margareth, his wife, to foreclose a mortgage executed by the two latter on the 3d day of January, 1872, to secure the payment of a promissory note of that date, made by said Charles, payable on July 8, 1876, with ten per cent interest payable annually. The bill states that $340 of interest is due; that the premises are a scant security therefor; that the property had been sold for the taxes of 1870 and 1871; that complainants had been compelled, to save the property, to pay $200 to redeem it from the tax sale; that there was situated upon the premises a brewery with large cellars, together with out houses, barns, stables, ice-houses and a dwelling-house, and vats, kettles, boilers, etc., fixtures attached to the realty; that the premises are going to ruin and decay; and the bill prays a decree of sale for the payment of the amount due for principal and interest, and the amount paid to redeem from the tax sale. On the 8th day of January, 1874, the complainants filed their supplemental bill, stating that since the filing of the original bill the further sum of $340 interest had become due; and that also, on the 5th day of January, 1874, the complainants, by purchase and assignment, acquired the ownership of certain promissory notes and a mortgage to secure their payment made, the notes by Charles Blazey, and the mortgage by himself and his wife, Margareth, on the first

day of June, 1862, the notes, amounting in the aggregate to $5,500, and payable two, four, six, eight and ten years from date, with six per cent interest, on which was due the sum of $4,400, with interest from April 23, 1871; that the mortgaged premises are a meagre and scant security, and praying a sale for the payment of the amount due for principal and interest on the said notes and mortgages. The property described in the two mortgages is in part the same, the last mortgage for $3,400 including all that described in the first mortgage, and some additional land.

The said Charles and Margareth Blazey having entered their appearance and failed to answer, a rule to answer instanter having been taken, the original and supplemental bills were taken for confessed against them, and after the hearing of proofs the decree found that there was due in all $6,138.25, besides $3,400 not yet due, and ordered that, in default of payment of the sum due within ten days, the premises be sold in parcels, or so much thereof as would be sufficient to pay the amount of $6,138.25 with interest and costs, and if there should be no bidders when offered in parcels, then the premises might be sold in whole to make the whole amount of the indebtedness due and yet to become due, to wit, the sum of $9,538.25, together with interest and costs. The defendants sued out this writ of error.

Messrs. WHEATON, SMITH & MCDOLE, for the plaintiffs in error.

Messrs. BROWN & SOUTHWORTH, for the defendants in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

It is impossible to uphold this decree in its present form. It provides that in case there shall be no bidders for the premises when offered in parcels, then the premises may be sold in whole, to make the whole amount of the indebtedness due and

to become due, of which $3,400 would not become due until July 3, 1876.

This was erroneous. Not that the court might not direct the whole mortgaged premises to be sold if that should be most conducive to the ends of justice in reference to the equitable rights of all parties, although a part only of the mortgage money had become due. *Bank of Ogdensburgh* v. *Arnold*, 5 Paige, 38. The decree, it is true, finds that Charles Blazey is insolvent; that the premises cannot be sold in parcels without great prejudice to both complainants and defendants. But there is no allegation in the bill to admit such proof, the only allegation in that regard being that there are situated upon the premises a brewery, dwelling-house, etc. The premises embrace a block of ground and several lots in another block, besides other land. All the improvements might have been on any one lot, or parcel, for aught that appears by the bill. There is no allegation that the premises were not capable of being sold in parcels, or of being divided, without manifest injury to all the parties concerned, nor of facts showing the same. There is an allegation and a finding in the decree that the premises are going to ruin and decay, and that they are a meager and scant security; but those circumstances would not give the complainants any right in equity to have the premises sold for a debt not due. *Campbell* v. *Macomb*, 4 Johns. Ch. 533. And had it been necessary, in order to raise what was due, to sell the whole of the mortgaged premises because consisting of one entire subject, care should have been taken to protect the rights of the mortgagors as far as might be. The mortgagors would have had a period of time after sale for redemption. In case of a sale of the whole premises, in order to the exercise of such right to redeem, they would have been obliged to pay $3,400 before the time when it was due from them by their contract. Their rights in this respect should have been saved by the decree.

The $3,400 mortgage embraces land not included in the $5,500 mortgage. In case there could not be a sale in parcels,

the whole mortgaged premises in both mortgages were to be sold for the satisfaction of both mortgage debts.

The improvements, for any thing that appears, and what constituted the chief value of the whole property, might have been situated upon that part of the premises in the $3,400 mortgage which was not covered by the other mortgage; and thus, under the decree, the $5,500 mortgage debt might have been largely satisfied out of land described in the $3,400 mortgage, and not covered by the mortgage to secure the $5,500 debt, whereas that debt was not entitled to be satisfied out of any other land than that embraced in the mortgage given to secure its payment.

The decree must be reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

ELIZABETH NISPEL

v.

ISAAC WOLFF.

1. APPEAL — *setting aside dismissal, discretionary.* Where an appeal is dismissed for want of prosecution, it is discretionary with the court to allow or deny a motion to vacate the order of dismissal, and this court will not interfere with the exercise of that discretion, except in case of its flagrant abuse.

2. SAME — *negligence ground for refusal.* On motion to set aside an order dismissing an appeal, when the affidavit in support of the motion fails to show diligence in prosecuting the appeal, as, that the attorney was absent when the cause was called in its order, trying a case before a justice of the peace, on the information of one of the clerks that there was a trial pending, which would be likely to last the whole day, there will be no error in refusing to vacate the order and reinstate the case.

3. NEGLIGENCE — *in prosecuting appeal.* Where an appeal suit is set for trial on a particular day, it is negligence for the appellant's counsel to leave the court because there is a trial pending likely to occupy the whole day, and no relief can be granted against the consequence of such neglect.

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

Mr. B. WALSH, for the appellant.

Mr. PHILIP STEIN, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellee brought suit against appellant and John C. Nispel, before a justice of the peace of Cook county. Service of summons was had on appellant only, and judgment was rendered by the justice in favor of appellee and against her for $95.68 and costs of suit. From this judgment she appealed to the Superior Court of Cook county, where, at the July term, 1874, of that court, her appeal was dismissed for want of prosecution, and a *procedendo* was awarded to the justice of the peace. She subsequently made a motion, supported by affidavits, to vacate this order and reinstate the appeal, which the court overruled.

In this action of the Superior Court there was no error.

It was discretionary with the court to allow or deny the motion, and, except in cases where it is clearly shown there has been a flagrant abuse of such discretion, we will not interfere.

The affidavits failed to show diligence in prosecuting the appeal. It was not pretended that the case had been called out of its order, and it was admitted that counsel knew that the case was set for trial on the day it was called and dismissed. The only excuse for the absence of counsel which is shown is, that he was engaged at the time in a trial before a justice of the peace; and that he had been informed by one of the clerks of the court that there was a trial pending before the court which would likely last the whole of the day on which the case was set for trial.

Attorneys are not justified in taking the opinions of clerks and other subordinate officers of the court with regard to what length of time cases on trial will probably occupy, or whether

cases set for trial on a particular day will be reached on the call of the docket on that day or not. When a case stands for call or trial at a particular time, they are bound to know that it may be reached; and it is their duty then to be ready and answer to the case. It is within the experience of most attorneys that it cannot be anticipated with absolute certainty how much time the trial of any case will occupy. In all cases unanticipated circumstances may intervene, necessitating the instant termination of the trial. Applications for delay or indulgence to cover necessary or convenient absence of counsel, parties or witness should, unless under exceptional circumstances, be addressed to the court; and whoever ordinarily chooses to be absent, when the case in which he is interested is liable to be called, without making such application, acts at his own peril, and has no legal claim to relief from its consequences.

We cannot look into the character of the defense disclosed by these affidavits, because, however meritorious it might have been if interposed on trial, the right to interpose it was forfeited by the negligence of appellant and her counsel.

It appears that after the appeal was taken from the justice of the peace, and before its dismissal in the Superior Court, on appellee's motion summons was issued, and served on John C. Nispel, to make him a party to the judgment, and he entered his appearance in the Superior Court.

It is evident that this circumstance in nowise affected the regularity of the dismissal of the appeal, because he was not a party to the judgment appealed from, nor was there any authority in the law to make him a party thereto in this way. Appellant was not injured by this irregularity, and no one else complains of it.

Judgment affirmed.

Syllabus.

ELIZABETH NISPEL *et al.*

v.

WILLIAM B. LAPARLE *et al.*

1. MARRIED WOMEN—*power to contract.* The right of a married woman to engage in business in her own name with her separate property, necessarily implies the right to purchase goods with which to carry it on, and to bind herself by contract to pay for such purchases, and the law that authorizes this will compel her to abide by and perform such contracts.

2. SAME—*notes by, when binding.* If a married woman gives her promissory notes with her husband for goods bought by her as her own property, for her own use, in her own business as a saloon keeper, carried on by her in her own name, with her own means, and which were used by her in such business for her own benefit, without the interference of her husband, she will be liable to an action on the notes, notwithstanding her coverture.

3. DEMURRER—*admission of facts in pleading.* By demurring to a pleading, such as a replication, the party admits the substantial facts alleged in the pleading demurred to, and no proof of them is necessary on a trial upon other issues.

4. JUDGMENT—*on demurrer binding as an estoppel.* A judgment on a demurrer is equally conclusive, by way of estoppel, of the facts confessed by the demurrer, as a verdict finding the same facts, and facts thus established can never afterward be contested between the same parties, or those in privity with them.

5. CONTRACT—*to extend time of payment.* A contract to extend the time of payment of notes upon giving other notes secured by mortgage on good real estate, is not a defense to a suit on the original notes when the mortgage is objected to as upon land of no value and for want of title in the mortgagor, where these objections are not obviated or shown to be unfounded.

APPEAL from the Superior Court of Cook county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Mr. B. WALSH, for the appellants.

Mr. JAMES LANE ALLEN, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by appellees, in the Superior Court of Cook county, against appellants, upon three promissory notes.

The defendants filed five pleas to the declaration: 1st. The general issue. 2d. That the plaintiffs, in consideration of defendants agreeing to pay ten per cent interest, agreed to extend the time of payment of the notes. 3d. That the plaintiffs agreed to extend the time of payment of the notes upon the understanding that defendants would give new notes and a mortgage upon real estate to secure the same. 4th. Substantially like the third. 5th. Coverture of defendant Elizabeth Nispel.

Issue was formed on all the pleas except the fifth; to this plea the plaintiffs replied that the appellant Elizabeth Nispel bought the goods for which the promissory notes were given as her own property, for her own use, in her own business as a saloon keeper, then carried on by her, in her own name, with her own means, and were used by her for her own benefit without the interference of her husband.

To this replication a demurrer was interposed, which the court overruled, and defendants electing to abide by the demurrer, judgment was therefore entered upon it. A jury having been waived, a trial was had before the court, which resulted in a judgment in favor of appellees for $299.80, to reverse which the defendants have prosecuted this appeal, and assigned two errors upon the record.

1st. The court erred in overruling the demurrer to the replication.

2d. The court erred in finding in favor of the plaintiffs and entering judgment against the defendants.

The question presented by the first error assigned is, admitting that appellant purchased the goods for which she executed the promissory notes, with her own means, as her own property, for her use, in a business carried on in her own name,

without the interference of her husband, for her exclusive benefit, is she liable? This is not an open question in this court. We regard the law as well settled that her liability is the same as if she were sole and unmarried.

The case of *Cookson* v. *Toole*, 59 Ill. 515, was an action against a married woman to recover for work and labor, a plea of coverture having been interposed, to which the plaintiff replied the work and labor was performed in the improvement and cultivation of defendant's farm and taking care of her stock, which were her own separate property. In disposing of the validity of the replication, it is there held: In the case at bar, the separate estate, as is alleged in the replication, was derived from persons other than defendant's husband; it consisted of a farm under cultivation, with implements and stock, subject to her sole control and management, for her sole use and benefit. The measure of her right to hold, own, possess and enjoy this property, is that which an unmarried woman would have. This right must, by necessary implication, carry with it all the incidents to such a degree of enjoyment of property, and one of those incidents is a legal capacity to contract for servants and laborers.

The same principle there announced applies with equal force to the replication in this case.

The right of appellant to engage in business in her own name with her separate property necessarily implies the right to purchase goods, to bind herself by contract for the payment of such purchases, and it necessarily follows that the same law that authorizes her to engage in business and contract will compel her to abide by and perform these contracts. *Martin* v. *Robson*, 65 Ill. 129; *Haight* v. *McVeagh*, 69 id. 624.

We are, therefore, of opinion that the facts alleged in the replication were sufficient in avoidance of the plea of coverture, and the court properly overruled the demurrer.

This brings us to the second error assigned, and under this head it is claimed by appellants that no proof was introduced

to establish the fact that the notes sued upon were made by Elizabeth Nispel in respect to or regard of her separate property. No proof was necessary upon this point other than that appearing upon the record. The facts alleged in the replication, one of which was that the notes sued upon were given for goods purchased by appellant with her own separate money, and used and enjoyed by her as her own separate property, were admitted of record by the judgment of the court upon the demurrer.

A judgment rendered upon a demurrer is equally conclusive (by way of estoppel) of the facts confessed by the demurrer as a verdict finding the same facts would have been, since they are established as well in the former case as in the latter, by matter of record; and facts thus established can never afterwards be contested between the same parties or those in privity with them. Gould's Pleadings, 4th ed. 444, §§ 43 and 44.

This, then, left the issues raised by the other four pleas, only, to be determined by the court upon the evidence introduced.

The testimony relied upon by appellants the court held was no defense to the action, and in this we concur entirely with the decision rendered.

It was claimed by appellants that an agreement was made to extend the time of payment of the notes in suit; that the agreement was they were to give other notes secured by mortgage on good real estate owned by Elizabeth Nispel; that the notes and mortgage were made out and tendered, but appellees refused to accept them.

It appears, however, that objection was made that the real estate was worthless and the title was not in appellant.

When these objections were made and pointed out by appellees to appellants, it does not appear that any efforts were made to remove them.

Neither does the record before us show that the objections were unfounded. One of the appellants testifies, it is true, that

the real estate contained in the mortgage was unincumbered, but whether it had any real value or who owned the title does not appear.

We are of opinion that the appellants entirely failed to establish a defense under the issues, and the judgment of the court below was correct; it will, therefore, be affirmed.

Judgment affirmed.

THE DAVID M. FORCE MANUFACTURING COMPANY *v.* OLIVER H. HORTON *et al.*

1. EXCEPTIONS — *when necessary.* When a cause is, by consent, tried by the court, without the intervention of a jury, and no exception is taken to the finding of the court and the judgment thereon, error cannot be assigned on such finding and judgment, in the Supreme Court.

2. It is not sufficient for the order allowing an appeal to the Supreme Court from a judgment of the circuit court, to state that exceptions were taken to the judgment appealed from. Such exceptions should appear in the bill of exceptions.

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

Messrs. GOOKINS & ROBERTS, for the appellants.

Mr. JAMES E. MUNROE, for the appellee.

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

Appellees brought an action of assumpsit, in the Superior Court of Cook county, against appellants, to recover a sum of money claimed to have been advanced by them at their request to procure a large amount of insurance on their

property. A trial was had before the court, by consent, a jury having been waived. The court found the issues for the plaintiffs, and assessed their damages at $1,492.65, for which amount a judgment was rendered. Defendants prayed an appeal, which was granted, and the record is brought to this court to obtain a reversal.

The errors assigned are, that the court erred in finding the issue, upon the evidence submitted, for appellees when the finding should have been in favor of appellants, and in rendering judgment in favor of appellees when it should have been in favor of appellants. No exceptions were taken to the finding of the issues by the court, or the final judgment rendered.

The case of *Mahony* v. *Davis*, 44 Ill. 288, holds that it is not necessary to ask the court to review the evidence which had already been maturely considered. It nowhere intimates that an exception to the finding is not necessary. Again, the statute (sec. 22, Practice act, R. S. 1845) expressly requires an exception before the evidence can be reviewed, when the trial is had by the court. That section provides that "Exceptions taken to opinions and decisions of the circuit courts upon the trial of causes in which the parties agree that both matters of law and fact may be tried by the court * * * without the intervention of a jury, shall be deemed and held to have been properly taken and allowed, and the party excepting may assign for error, before the Supreme Court, any decision or opinion so excepted to, whether such exception relates to receiving improper or rejecting proper testimony, or to the final judgment of the court upon the law and evidence."

The statute is explicit in the requirement, and we are powerless to dispense with or disregard its directions. The cases of *Dickhut* v. *Durrell*, 11 Ill. 72, and *Parsons* v. *Evans*, 17 id. 238, are in point on this question. The case of *Jones* v. *Buffum*, 50 Ill. 277, makes the distinction, that a motion for a new trial in a case like this need not be overruled, excepted to and preserved in a bill of exceptions, where there is an excep-

tion preserved to the final decision. See also *Metcalf* v. *Fouts*, 27 Ill. 110. The record as presented does not authorize us to examine and pass upon the errors assigned.

If it should be said that the order allowing the appeal states that exceptions were taken, the answer is, that the exceptions do not appear in the bill of exceptions. See *Boyle* v. *Levings*, 28 Ill. 314; *Drew* v. *Beall*, 62 ib. 164. So that, in any view of the case presented by the record, the questions sought to be discussed are not properly before us for decision. But we have examined the evidence, and will say that it does not, we think, violate the principles of justice, even if some technical rule may have been disregarded.

The judgment of the court below is affirmed.

Judgment affirmed.

AMHERST HAYES *et al.*

v.

MARIA B. HAYES *et al.*

1. DOMICILE — *defined.* In a strict legal sense, the domicile of a person is where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Actual residence is not indispensable to retain a domicile after it is once acquired, but is retained by the mere intention not to change it and adopt another.

2. SAME — *what necessary to a change.* To effect a change of domicile there must be an actual abandonment of the first, coupled with an intention not to return to it, and there must be a new one acquired, with actual residence in another jurisdiction, coupled with the intention of making the last acquired residence a permanent home.

3 A domicile in this State, within the meaning of the statute respecting the descent and distribution of personal property, is not lost or changed by the party residing in another State owing to domestic troubles, and by his voting in such other State when its laws authorize him to vote on a residence of six months, or by his purchasing property on speculation in such State, when there is no intention of making a final home there.

WRIT OF ERROR to the Circuit Court of Rock Island county; the Hon. G. W. PLEASANTS, Judge, presiding.

Mr. WILLIAM H. GEST, for the plaintiffs in error.

Messrs. CONNELLY & MCNEAL, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is a writ of error to the Rock Island circuit court, to reverse a decree entered therein on the chancery side of that court, in a proceeding commenced by bill on behalf of Amherst Hayes and others, claiming to be the heirs at law of the Rev. Harvey H. Hayes, deceased, and against his widow, Maria B. Hayes, who, with one Carlos L. Bascom, had taken out letters of administration on the estate of the decedent.

It appears by the bill that Dr. Hayes died on the 20th July, 1867, at Rock Island, leaving Maria B. Hayes, his widow, and no child or children, nor descendant of any child, and no parents. Letters of administration were granted by the county court of Rock Island county August 5, 1867. The bill alleges that deceased was a resident of the State of Iowa at the time of his death, within the view of the law of that State as to distribution of the personal estate of an intestate; that the appraisers have certified to the widow the sum of eighteen hundred and thirty-two dollars as the "widow's award," and complains that she claims the whole of the personal estate. The prayer of the bill is, that this award be set aside, and the whole surplus, after the debts are paid, may be distributed according to the law of Iowa.

An issue was made up on the question, where was the deceased domiciled at the time of his death, within the meaning of the law as to the distribution of the personalty. This issue was tried by the court, by consent, without a jury, and the court found that this State was the domicile of the deceased, so far as the succession to his personalty was concerned.

The plaintiffs in error insist that this finding is against the evidence.

We have given the testimony, voluminous as it is, a careful reading and full consideration, and have reached the conclusion it supports the decree.

It is said by authoritative text-writers, that the term "domicile," in its ordinary acceptation, means the place where a person lives or has his home. In a strict legal sense, that is properly the domicile of a person, where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Story's Confl. of Laws, 39, § 41. It is further said, actual residence is not indispensable to retain a domicile after it is once acquired; but it is retained, *animo solo*, by the mere intention not to change it and adopt another. Ib. 42, § 44.

Testing this case by these rules, the finding was clearly right. It is not denied that the domicile of Dr. Hayes, from 1852 to May, 1860, was Rock Island, at which time, there being some disagreement with his wife, she went from their home in Rock Island on a visit of uncertain duration to her relatives in Washington city, and he himself went to Bentonsport, in the State of Iowa, to supply a pulpit there for one year. Before he left Rock Island he rented the homestead and a part of the furniture, storing the balance on the premises. When the year expired he engaged for another year, which terminated in the spring of 1862, when he left, spending the spring and summer in visiting his wife in Washington and his friends in the East. In the fall of 1862 he returned to this State, visiting some of his relatives, and spent the winter with a brother, Gordon Hayes, living at Brighton, Iowa. In the spring of 1863 he accepted an invitation to supply a pulpit at Kossuth, Iowa, for one year, and after its expiration he renewed the engagement for another year, but neither at Bentonsport nor at Kossuth was he installed as pastor. Having some spare funds, he bought in Kossuth a house and lot, on speculation, in which he slept, taking his meals at a hotel. He

voted at the election in 1863, and at the presidential election in 1864, the laws of Iowa conferring the elective franchise on a resident for six months. That the house was not purchased as a residence is clear from the testimony, it was an investment merely.

When his engagement at Kossuth closed, in the summer of 1865, he left that place and returned to Rock Island, staying there but a short time, and then proceeding to Washington city, where his wife remained engaged in keeping a boarding-house. With the exception of about two months in 1866, which he spent at Rock Island, engaged in making repairs on his property there, he remained at Washington with his wife, until the last of June or first of July, 1867, when he returned to Rock Island, and staying but a short time, proceeded to Kossuth, collected the last payment due on the property he had there sold, and returned to Rock Island with his library and some other articles of property, and while there, on the twentieth of July, 1867, he made a sudden exit from this world.

At the time of his death he was the owner of several houses and lots in the city of Rock Island, and other real estate in other parts of the State. His wife, the defendant in this suit, was at no time in Iowa, whilst her husband resided there; and after his death, closing up her affairs in Washington, she returned to the old homestead, where she has since remained.

There is a strong current running through all the mass of testimony tending to show it was never the intention of Dr. Hayes to make Iowa his home. It is inferable he would have done so had his wife joined him there and been pleased with the place and prospects. All his letters, and much of the testimony, go to show Iowa was not regarded by him as his home. Nothing can be inferred from the fact of his having voted there; that act was consistent with his domicile in this State, the law of Iowa giving the right to a resident of six months. He was such resident, undoubtedly, and as such had a right to vote. This could, by no possibility, effect a change

of domicile. To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. Nothing of this is discernible in the testimony in this record. The case of *Smith* v. *The People*, 44 Ill. 16, may be referred to in support of this doctrine, and other cases cited. *Smith et al.* v. *Croom et al.* 7 Fla. 200; *Shaw* v. *Shaw*, 98 Mass. 158. But the doctrine does not need the citation of authorities in its support.

There can be no doubt that the unsettled condition of the deceased was in a great degree owing to domestic disturbances. The great bulk of his property was in Rock Island, and to that place his inclinations would naturally tend. To that his thoughts would revert, for it was his home, which he had never abandoned;

> "He still had hopes — his long vexations past —
> There to return, and die at home at last;"

and his hope was accomplished.

It is conceded, domicile is a question of fact and intention. This is the proposition we have argued, and from the evidence we are satisfied Dr. Hayes had no fixed, permanent home in Iowa, nor any other home than Rock Island, and the circuit court in so finding found the truth, as we understand it. And the decree of that court must be affirmed. The domicile of succession to the estate of Dr. Hayes was in the State of Illinois at the time of his death.

Decree affirmed.

THE CATHOLIC BISHOP OF CHICAGO

v.

CHARLES CHINIQUY *et al.*

1. CHANCERY JURISDICTION — *enjoining ejectment suit.* A court of equity has no jurisdiction to enjoin the prosecution of an action of ejectment on the ground that the conveyance relied on by the plaintiff is absolutely void for want of delivery and acceptance, or if delivered, it was procured through threats and duress, the defense being complete at law.

2. SAME — *grounds for enjoining suit at law.* The indispensable basis upon which a defendant to an action at law may resort to a court of equity to restrain the prosecution of such action is, that he has some equitable defense, of which a court of law cannot take cognizance, either by reason of want of jurisdiction, or from the infirmity of legal process.

3. INJUNCTION — *of action at law.* An application to enjoin a suit at law concedes the plaintiff's strict legal right to recover, but is based upon the fact that the defendant has equities calling for the interference of the court, as clear as the legal right it seeks to control.

4. Where an action of ejectment is sought to be enjoined on the ground that the plaintiff's deed was never delivered and accepted so as to pass the legal title, a court of equity cannot be invested with jurisdiction to so declare by an allegation that the deed was subject to a trust which the plaintiff is attempting to pervert.

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

Messrs. MOORE & CAULFIELD, for the appellant.

Mr. MELVILLE W. FULLER, for the appellees.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This is an appeal from the decree of the circuit court of Kankakee county, perpetually enjoining an action of ejectment pending in that court, which had been brought by appellant, as a corporation sole, having the legal title, against appellees, the defendants therein, to recover the land described in appellees' bill of complaint herein.

The bill, so far as we can discover through its abounding redundancies, really and substantially goes upon the ground that appellant had no legal title to the premises, that the conveyance relied upon by the latter was absolutely void, and the court has so found by the decree appealed from.

We might properly rest the case upon the sole ground of want of jurisdiction in equity. If the conveyance was absolutely void, as the court has found, for want of delivery and acceptance of the deed, to the Bishop of Chicago, through which deed the latter claimed title, that would have constituted a complete legal defense to appellant's action of ejectment. The indispensable basis upon which a defendant to an action at law may resort to a court of equity to restrain the prosecution of such action, is, that he has some equitable defense which a court of law cannot take cognizance of, either by reason of want of jurisdiction, or from the infirmity of legal process. The application to equity necessarily concedes the legal right, and it is upon the ground that such legal right which is sought to be enforced by the action at law is subservient to an equitable claim, which the defendant at law cannot set up there, that the court takes jurisdiction. Because it would be against conscience and good faith that the plaintiff at law should use the advantage of which he is thus possessed at law, when the legal right he is seeking to enforce is subservient to equities which the defendant at law is powerless to assert there. It is not upon the ground of want of legal right in the plaintiff at law, that equity interferes, but upon the principle of preventing a legal right from being enforced in an inequitable manner or for an inequitable purpose. Equities calling for its interference, as clear as the legal right which it seeks to control, must be shown before a court of chancery should interfere with an action at law. These principles are recognized by all the authorities. Kerr on Inj. pp. 13, 14, and cases in notes. They arise out of the very nature of the jurisdiction at law and in equity, and where properly applied harmonize the powers of equity, with the constitutional right a

party plaintiff has of having his case at law tried before a jury according to the course of the common law. Where the application is properly made, the defendant at law virtually says to the plaintiff: "I do not controvert your legal right, but I have a claim in respect of that right which in conscience and good faith ought to control you in the exercise of it; and inasmuch as you have brought me into a forum where you can establish and enforce that right, while by the rules of that forum I am precluded from establishing my claim, I will therefore transfer the controversy to another forum, where, admitting your legal right, I shall seek, and be allowed, if I can, to establish my claim, and by doing so, control the exercise of your legal right." This is a very different position from that of such defendant saying: "I deny your legal right *in toto*, and inasmuch as I have no confidence in juries, will withdraw the controversy from a court of common law into a court of chancery, where the facts may be settled and the law applied by a single judge and without a jury." That position amounts to an arbitrary deprivation by a court of chancery of the right of a plaintiff at law to have his case tried according to the course of the common law, a right secured by constitutional guarantee. Now, in what respect does the position of appellees differ from that just supposed? The appellant brought ejectment against them. They admit themselves in possession of the land in controversy, holding adversely to him. They admit the deed under which he claims is prior in time and was of record, but they say that deed was never delivered and accepted so as to become operative, or, if it were, it was obtained by threats and duress, and in either case it is absolutely void. Was not this a denial of his legal right, and were not these fit questions to be determined in a court of law? Most clearly they were. If appellant had no title, for the reason that the deed relied on as vesting him with the legal title was absolutely void, that would seem to be conclusive of the whole case. That defense was clearly available at law, where plaintiff at law had a right to

have it tried. The ground, the whole gist of the case made by the bill, was, that the conveyance under which appellant claimed was utterly void from the beginning. That proposition, decided in appellees' favor, effectually cuts off all connection of appellant with the land in controversy. The decree in this case does determine that proposition in their favor. The court finds, as fact, that the deed referred to in the bill and made the subject of the controversy, was never delivered or accepted, and, as matter of law, that it is void. This is far reaching enough, it would seem, to make a finality of the matter; but the decree goes farther. The deed was to the bishop of Chicago and his successors in office, "in trust for the use and benefit of the *Catholic population* of the *parish* of St. Anne, in the county of Iroquois." The deed containing this trust is by the decree declared void, for want of delivery and acceptance, but it assumes to construe that trust, and declares the intention of the grantors to have been *for the use of the* whole population who had then settled at the *colony* of St. Anne; and also finds that the Catholic bishop of Chicago has attempted to divert the property from the use of the whole population of St. Anne to the use of a small portion thereof. The counsel for appellees concede that the legal effect of the decree is only to determine that the Catholic bishop cannot assert legal title and the right of possession thereunder. That is true, but because the only object of the bill was to determine the question of legal title, and the question upon which it was to be determined was cognizable by the court of law, in the action of ejectment, the court of chancery had no power or authority to deprive the plaintiff in ejectment of his constitutional right of a trial by jury, by the mere withdrawal of that question to itself by means of the preventive power of injunction against proceeding at law. And we apprehend the other matters covered by the decree, which render it not only illogical but absurd, were prepared for the purpose of showing a color of jurisdiction. If the deed purporting to convey subject to a trust never had any legal existence, what need could there

be of attempting to construe that trust, and then declaring that the bishop had been attempting to pervert it?

As before said, we might rest the decision of this case upon the want of jurisdiction in the court to withdraw from the court of law, the proper forum, the decision of the mere question as to appellant's legal title; but we go farther. The decision of the court below, that the deed in question was never delivered to or accepted by the grantee, is not only unsupported by the evidence, but directly against the testimony of the only witness upon the question. The deed bears date December 20, 1851. The grantors were Antoine Allain and wife. The grantee was the Right Rev. James Oliver Vandeveld, bishop of Chicago. The land covered by it was situate in the parish of St. Anne, which was a parish of the Catholic church, in the diocese of which the grantee was the bishop. Charles Chiniquy was a Catholic priest, and as such had been appointed to the charge of that parish by Bishop Vandeveld, under whose jurisdiction were both the priest and parish. Allain, the owner of the land, was a member of the Catholic church and of said parish. Chiniquy had contracted for the purchase of the land in question at the consideration of twenty-five dollars, for the purpose of putting upon it a building for the religious and secular purposes of the parish in his charge. There are some indications, from his testimony, that he even then had ideas of seceding from the Catholic church, as he a few years after openly did. At all events, he desired to get the title of this land into himself, for such uses for the parish as he chose to declare. According to the usages of the church, he was required to have it conveyed to the bishop of Chicago, for the use of the church. He resisted this requirement for some time, destroying deeds which the bishop had caused to be prepared for the purpose. Allain, on his part, had no other purpose in conveying the property than that it should go for the use of the congregation of the church of Rome at St. Anne. After the bishop had refused to accept a deed with the trust expressed, like that in

question, this deed was executed, placed upon record, and then taken by Chiniquy to the bishop, who at first, according to Chiniquy's testimony, declined to accept it, but, after an appeal made to him, which is described by the witness with much dramatic effect, Chiniquy says: "And he was startled by my prayers and tears, and he showed tears, then he shook hands and accepted it; he told me it was received." The case, in this regard, rested wholly upon Chiniquy's testimony. The bishop was dead. But the evidence is abundantly sufficient to show both delivery and acceptance.

We are of opinion, also, that the decree is erroneous in respect to the construction of the language creating the trust. When the words are considered in the light of surrounding circumstances, there is no doubt as to the purpose of the conveyance. It was for the use of the Catholic population of the parish of St. Anne. When we consider that there was a Roman Catholic society there, over which Chiniquy was priest, Allain a member, and the grantee, bishop over all, who can doubt that the conveyance was intended for the use of that society? The decree of the circuit court must be reversed, and the bill dismissed.

Decree reversed.

PHILO MOREHOUSE

v.

THOMAS MOULDING *et al.*

1. MECHANIC'S LIEN — *payments after notice by sub-contractors.* After notice to the owner, of the claims of sub-contractors, the owner cannot rightfully pay the original contractor so as to defeat the demands of the sub-contractors, nor can he pay one sub-contractor in full and another nothing, as his caprice or partiality may determine.

2. SAME — *when balance due must be paid pro rata.* When there is not enough to pay all sub-contractors and materialmen after deducting all

payments rightfully made, the balance is to be divided between the several claimants entitled to liens, in proportion to their respective interests.

3. SAME—*right to retain payment to complete work.* The owner of a building has not the right to retain the balance due on the original contract remaining in his hands, with which to enable the contractor to complete the work, after notice of the claims of sub-contractors.

4. SAME—*liability of owner to sub-contractors on failure to complete contract.* If the contractor for any cause fails to complete his contract, the owner will be liable to the persons entitled to a lien under the act of 1869 for so much as the work and materials are reasonably worth according to the contract price, first deducting all payments rightfully made, and damages, if any, occasioned by the non-performance of the contract, giving to each his ratable share, and the balance he can retain with which to finish the work.

5. INSTRUCTIONS—*assuming facts.* There is no error in refusing an instruction which assumes the existence of a material fact which should be left to the jury to find, or when its substance is contained in others given.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE D. MURPHY, Judge, presiding.

The nature and facts of this case necessary to an understanding of the points decided appear in the opinion of the court. The jury found there was due the petitioners, Kelley, Wood & Co., $330.18, and Moulding & Harlan, $860.50. The defendant, Morehouse, moved for a new trial, which was refused and an exception taken.

Messrs. DENT & BLACK, for the appellant.

Messrs. SCATES & WHITNEY, for the appellees Moulding and Harlan; Mr. G. P. WHITCOMB, for the appellees Kelly, Wood & Co.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This is a case arising under the mechanic's lien law, as contained in the act of 1869. The facts necessary to an understanding of the merits of the case may be shortly stated. In June, 1870, appellant contracted with W. H. H. Miller to

erect for him a double dwelling-house on the premises described in the petition. The contract was in writing, and by its terms Miller was to furnish all the materials and labor necessary to fully complete the buildings according to the plans and specifications, at a total cost of $20,900, which was to be paid, as the work progressed, on the certificate of the architect, less fifteen per cent, which was to be reserved for the security of the owner until the completion of the work.

Appellees furnished materials which were used by the builder in the erection of the buildings under his original contract with appellant, and now seek to establish a lien on the premises for the amount respectively due them. There is no dispute, there was due Moulding and Harlan for brick furnished to Miller, and which were used in the construction of the building, $1,442, and to Kelly, Wood & Co., for lumber furnished and used for the same purpose, $555.85. Each of these firms commenced separate actions, but, by stipulation, the two suits were consolidated in the court below, and have since progressed as one cause.

Proof was made that within twenty days after payment should have been made, these parties gave appellant notice of their claims, and that they would insist upon the lien given by the statute.

The building, when completed, cost something over $30,000, but a large portion of the cost over the contract price, indeed nearly all of it, Miller insists was made up of extra work not indicated on the original plans.

This case has been elaborately argued, and should we discuss all the points made, it would require us to give a construction to almost every clause of the mechanic's lien law. But this will not be necessary. We are of opinion the decree can be maintained on principles about which there can be no controversy.

Great stress is laid on that clause of the first section of the mechanic's lien law, which provides: "In no case shall the "owner or lessee be compelled to pay a greater sum for, or on

"account of such house or building or other improvements, "than the price or sum stipulated in said original contract or "agreement." That depends on the fact whether the payments made to the contractor, or on his order, shall be regarded as having been rightfully made. If made in violation of the rights and interests of the persons intended to be benefited by the act, the owner is not to be credited with them, and in that way it may happen he will be compelled to pay more than the original contract price. All payments made, after notice, are of this character. The result will be attributable to his own folly and improvident conduct. He cannot pay one sub-contractor in full, and another, nothing, as his partiality or caprice may determine. When there is not enough to pay all sub-contractors or materialmen, after deducting all payments rightfully made, the balance is to be divided between the several claimants entitled to liens, in proportion to their respective interests.

About the time of service of notice of appellees' claims, it was ascertained Miller would not be able to complete the work on account of the cost, and it is claimed appellant had the right, in consequence of that fact, to use the balance due on the original contract, remaining in his hands, to pay such persons as should thereafter perform labor for, or furnish materials to Miller with which to complete the buildings. This view of the law is untenable. It is not in the power of the owner, as we have said, to elect that he will pay certain persons performing labor, or furnishing materials to the contractor, and not others. The law will permit no such discrimination. Had Miller, for any cause, failed to complete his contract, all the owner would be liable for, to persons entitled to a lien under the provisions of this act, would be for so much as the work and materials shall be shown to be reasonably worth, according to the contract price, first deducting such payments as shall have been rightfully made, and damages, if any, occasioned by the non-fulfillment of the contract, giving

to each his ratable share, and the balance he can retain with which to furnish the work.

There is nothing in the action of the court in giving or refusing instructions, that would justify a reversal of the decree. The first clause of the ninth instruction is objectionable, because it assumes the existence of a material fact, which it was the province of the jury to find. Whatever else it contained that was material, was given in other instructions.

The other causes of error suggested are not regarded as affecting the merits of the case. The decree is warranted by both the law and the evidence. Miller never abandoned the work, but completed the buildings according to the contract, except as varied by mutual agreement, and in addition did a large amount of extra work. Payments properly due him under the contract, were made to Miller or on his order, after appellant had notice of appellees' claims, that were in violation of their rights. If there was not enough money in the hands of appellant with which to pay appellees in full, they were, nevertheless, entitled to their *pro rata* share with the other sub-contractors or persons performing labor or furnishing materials under Miller's contract. This is all the court by its decree allowed appellees. There is, therefore, no reason for disturbing the decree of the court, and it will accordingly be affirmed.

Decree affirmed.

EDGAR T. PIERCE *et al.*

v.

RALPH PLUMB.

1. CONTRACT — *to pay certain indebtedness of another — construction — when a right of action accrues.* Where a party enters into a bond conditioned to pay certain indebtedness of the obligee therein, and save and keep him harmless from such indebtedness, the obligee is not bound to pay

off such indebtedness in case the obligor fails to do so in order to maintain a suit on the bond, but he may sue upon the bond and recover the amount of such indebtedness as soon as it has matured, if not paid by the obligor in the bond.

2. SPECIFIC PERFORMANCE — *of contract respecting personalty.* The general rule is that equity will not entertain jurisdiction for the specific performance of contracts respecting personalty.

3. SAME — *for mere payment of money.* Equity will not decree specific performance unless something more is to be done by it than mere payment of money, or any thing which ends in the mere payment of money, be cause the law is adequate to this.

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

Messrs. BICKFORD, BOWEN & MALONY, for the appellants.

Mr. SAMUEL RICHOLSON, and Messrs. ELDRIDGE & LEWIS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in equity filed by appellants against the appellee.

The bill alleges, in brief, that the complainants, being railroad contractors for building the Chicago, Pekin and Southwestern Railroad, were indebted to divers persons for materials and labor, etc., and becoming embarrassed entered into an agreement with Plumb, the defendant, whereby they turned over to him their contract with the railroad company, and all their property used in and about the construction of the road; that in consideration of this transfer Plumb agreed to pay all of their indebtedness to their creditors as the same matured, and transfer to the complainants $15,000 of stock of said railroad company. That it was further agreed, that the creditors of complainants should have no right to sue defendant, and that he should not be liable to pay over $60,000 in satisfaction of said indebtedness. That Plumb entered into a bond in the penalty of $80,000, conditioned to pay the said creditors, and

further agreed to indemnify complainants against their said indebtedness. That Plumb had not paid the indebtedness nor delivered the railroad stock; that some of the creditors, instead of paying, he had compromised with, paying less than the face of their demands; that in consequence of the surrender of their property to Plumb, complainants were unable, themselves, to pay their creditors, and the bill asked for a decree that Plumb should pay them and deliver the railroad stock. The bill set forth the bond, bearing date May 3, 1871, also a further written agreement made at the same time, the condition of the bond, and the agreement, being as follows:

"The condition of the above obligation is such, that whereas the above bounden Ralph Plumb has purchased the entire interest of said Pierce, Clark and Sharp in a contract or agreement they made with the Chicago, Pekin and Southwestern Railroad Company to construct and complete a road from Pekin to Chicago, and has received an assignment and delivery of the same to him, and has also purchased their, and each of their capital stock in said road, and has received an assignment and delivery of the certificates thereof, and has also purchased all of the personal property of said firm obtained by them in and about and for the purpose of constructing said road, and all rights and interests they have therein; and as a part consideration therefor has agreed to pay all of the indebtedness created by them, as the same matures, to divers parties, whether for labor and materials purchased, or money borrowed, or for whatever purpose, providing such indebtedness or obligations were created for the use of said firm in constructing said road;

"Now, if the above bounden Ralph Plumb shall well and faithfully perform his obligations, and shall pay and satisfy all of the indebtedness and obligations, then the above obligation to be void; otherwise, of force; — it being specially agreed that Ralph Plumb should not in any event be liable to pay indebtedness exceeding the sum of sixty thousand dollars, and shall not authorize the creditors of said firm to sue said

Plumb — a schedule or schedules of said debts to be made as soon as practicable, and in all cases the amounts of the different items of indebtedness to be fixed by said Pierce, Clark and Sharp."

"Rec'd, Chicago, Ills., May 3, 1871, of the firm of Pierce, Clark & Sharp, the sum of five thousand dollars, in full for all liabilities they may be put to in consequence of any suits in relation to their affairs as contractors of the C., P. & S. W. R. R. Co., and I agree to indemnify them from all costs, damages and expenses whatever in relation to the same.

"RALPH PLUMB."

The bill was demurred to. The court below sustained the demurrer, and dismissed the bill, and the complainants appealed to this court.

The transaction between the parties, as evidenced by the writings entered into at the time, was a sale of the interest and property of the complainants, for which Plumb gave his bond conditioned to pay debts of complainants to the amount of $60,000.

Plumb was not a trustee, and for aught we see, the complainants have a complete remedy at law in an action on the bond, and no sufficient reason for coming into a court of equity.

It is urged on the part of the appellants, that the contract of the defendant is an agreement to indemnify appellants, and save them harmless against their liability to their creditors; that upon a contract of indemnity, the party indemnified cannot maintain his action at law until damnified; that appellants, on account of the transfer of their property to the defendant, are unable to pay off their debts themselves, so as to have recourse upon the indemnity, and that equity will decree a specific performance of a general covenant to indemnify. Appellee insists that the separate indemnity agreement has reference only to the liability of the contractors under their railroad contract with the railroad company. Without

stopping to consider how this may be, but assuming appellants' construction to be the true one, that the agreement extends to the debts of the contractors referred to in the bond, we differ from appellants as to the force and effect to be given to the whole contract. Taking the agreement and bond together, we look upon it as more than a mere contract of indemnity; as an agreement to pay the debts of appellants as they matured, as the purchase price of the property sold to appellee, and that after the maturity of the debts, appellants would not have to wait until they had paid them, or suffered damage in respect thereto, before they could have recourse upon appellee; but that upon appellee's failure to pay the indebtedness when it matured, he would then be liable to an action upon the bond, not only for nominal damages, but where the recovery might be the amount of the indebtedness. Something more must be held to have been intended than that appellants should merely be saved harmless from their debts. Suppose that after the execution of this bond, appellants' creditors, moved by an impulse of generosity, had seen fit to forgive them all their debts, would it be said that appellee was relieved from all liability, and entitled to enjoy the property sold to him without paying any purchase price therefor?

In *Ramlaugh* v. *Hayes*, 1 Vernon, 189 (cited in *Champion* v. *Brown*, 6 Johns. Ch. R. 405), where specific performance of an agreement to indemnify was decreed, Lord Keeper NORTH compared the case to that of a surety in a bond, who, though not molested for debt, yet, after the money is payable, the court will decree the principal to discharge it, it being unreasonable that a surety should always have such a cloud hanging over him. But according to the view we take of the contract, such a reason does not exist in the present case, and there is no necessity of coming into equity to get rid of appellants' cloud of indebtedness. They have their remedy at law in an action on the bond, after the indebtedness matures, and without the necessity of first paying it themselves, to recover the amount thereof in damages, with which the indebtedness may

be discharged. The decree in equity would be but to pay the money, and a judgment at law for it would seem to be of equal avail. It may be stated as one of the rules on this subject, that equity will not decree specific performance, unless something more is to be done by it than mere payment of money, or any thing which ends in the mere payment, because the law is adequate to this. 2 Pars. on Cont. 523.

Whatever question may arise in respect of the compromise of debts, paying them in part instead of their full face may be availed of as well at law as in equity. So far as respects the debts mentioned in the bond, we are of opinion there was a complete remedy at law, and that on that ground the demurrer was properly sustained.

With respect to the railway shares to be transferred by appellee, the question is somewhat varied. The doctrine seems well settled that a contract for the delivery of government stocks, will not be specifically enforced in a court of equity, on the ground that there can be no difference between one man's stock and another's; that with the damages recoverable at law for breach of the agreement, the party may, if he please, buy the quantity of stock agreed to be transferred to him, so that the damages at law, calculated on the market price of the stock, are as complete a remedy for the purchaser as the delivery of the stock contracted for. 2 Story's Eq. Jur., §§ 717, 717a, 724; 2 Pars. on Cont. 528, 529; *Cud* v. *Rutter*, 1 P. Wms. 570. There is a certain class of railroad stocks which are the subject of every-day sale in the market, and their prices of sale of daily quotation in the public prints published at the chief commercial centers, to which we see no reason why the same rule should not apply as to government stocks.

This railroad stock, we presume, does not belong to that class. Still the contract is one respecting personalty, and the general rule is, that equity will not entertain jurisdiction for a specific performance of such contracts, a compensation in damages being supposed, in such cases, to furnish an adequate

remedy. There is no showing whatever of any peculiar circumstances as regards this stock; that it possesses any peculiar value; that appellants want it *in specie*, and that they cannot otherwise be fully compensated. No ground of equitable cognizance is shown, beyond the statement of the agreement to assign and transfer, and its non-fulfillment; not even an injunction being asked.

In fine, we are of opinion that the bill does not show that there is not an adequate and complete remedy at law, and that the court properly sustained the demurrer and dismissed the bill. The decree will be affirmed.

Decree affirmed.

CHARLES BOETTCHER

v.

HENRY BOCK *et al.*

1. CONFESSION OF JUDGMENT — *what constitutes.* Where the docket of a justice of the peace shows that the defendant agreed that plaintiff should have judgment for a given sum, and that the plaintiff accepted the judgment tendered, this will be sufficient to show a confession of judgment by the defendant, and no appeal will lie from the judgment.

2. SAME — *waiver of technical objections.* A defendant, by confessing judgment in a suit before a justice of the peace, waives all formal objections, such as, that the docket, or transcript thereof, does not show the nature of the plaintiff's demand.

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

Messrs. M. MARX & SON, for the appellant.

Mr. JOHN W. KREAMER, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The question in the present case is, did the court below err in dismissing the appeal on the ground that the judgment before the justice of the peace was, in the language of the statute, "a judgment confessed?" This is the entry of the judgment on the justice's docket, which must be taken as conclusive evidence of the facts therein recited:

"In justice court, before R. C. Hammill, justice of the peace, on change of venue from Francis Rolle, J. P., November 15, 1873. Case continued to November 17, 1873, at 2 o'clock, P. M. November 17, 1873, at time set for trial, case called. Five witnesses sworn, three witnesses examined on the part of the plaintiffs, and, by agreement, and consent of parties, case continued to November 18, 1873, at 7 o'clock, A. M., at which time case called. Parties in court. After consultation between parties and counsel, defendant agrees that plaintiff have judgment for one hundred and sixty-three dollars and ninety-four cents. Plaintiffs, by their attorney, accept the judgment tendered by defendant. One witness sworn in behalf of defendant, and, after hearing his evidence, judgment is rendered according to agreement of parties, in favor of plaintiff and against the defendant, for one hundred and sixty-three dollars and ninety-four cents and costs of suit."

In *Campbell* v. *Randolph*, 13 Ill. 314, the entry of judgment recited: "The parties appeared, and the defendant filed his set-off, but no proof being before the court, and the defendant, by his counsel, admitting the plaintiff's account, judgment is therefore rendered," etc. It was held that this was not a confession of judgment, the court saying: "There was no judgment by confession. The defendant admitted the plaintiff's account. He dispensed with proof of its correctness. But he did not thereby conclude himself from insisting that the claim had been paid, or that he had just demands against the plaintiff. The admission left him at full liberty to make proof of his set-off; and, failing to establish it to the satisfaction of the

justice, to remove the case into the circuit court. If a party goes before a justice and consents that judgment may be entered against him for a particular amount, he is not permitted to prosecute an appeal from the judgment. He thereby solemnly admits that he is justly indebted to the plaintiff to that extent, and the law, for wise reasons, estops him from afterward controverting it."

In *Elliott* v. *Daiber*, 42 Ill. 468, the entry shows the defendant said he could not deny the plaintiff's demand, and this was held not to be a confession of judgment. It was there said: "To say, by a party sued, that he cannot deny the demand, is in no sense a confession of judgment." * * * "It does not follow, because a defendant says he cannot deny the plaintiff's demand, that he is the plaintiff's debtor. The defendant may have claims to set off which he may not choose to litigate before the justice, but be willing the justice should find against him, so that he may take an appeal to another court and there litigate."

These are the only authorities cited by appellant on the question, and it will be observed they fall far short of the present case. Here, the defendant does not, as in those cases, admit merely the plaintiff's demand; he entirely excludes the idea that he has any defense, by agreeing that the plaintiff shall have judgment against him for $163.94, which plaintiff accepts, and judgment is given accordingly. This is literally within the language of the court used in *Campbell* v. *Randolph*, *supra*, in illustrating and showing what would be a "judgment confessed," within the meaning of the statute.

No technical formality is required, under our statute, in the practice in justices' courts, and when a party there formally consents that judgment shall be given against him for a designated amount, and the judgment is thereupon so given, it is a "judgment confessed." What possible difference in sense, or in the result, can there be whether a party shall say, "I confess judgment for $163.94," or "I agree that judgment shall be given against me for $163.94?" In either case, all idea of

defense is excluded, and the judgment is rendered because the party consents it shall be.

The fact that a witness was heard for the defendant, after this admission, would seem to show that there was something then to be litigated; nevertheless, the record shows beyond doubt that there was nothing to be litigated at that time, because the judgment agreed to by the defendant was accepted by the plaintiff; and it was upon that mutual consent and agreement of the parties that the judgment was rendered. We are, therefore, compelled to believe that this statement should have preceded the statement of the agreement, and that it was placed after it through inadvertence.

The objection that the justice's transcript does not show the nature of the plaintiff's demand is not tenable. By confessing judgment, defendant waived all objections of this character.

Judgment affirmed.

Samuel Biggs *et al.*

v.

William A. Clapp *et al.*

1. Statutes — *rule of construction.* If any part of a statute be intricate, obscure or doubtful, the proper way to discover the intention is to consider the other parts of the act, for the meaning of one part of a statute frequently leads to the sense of another; so that in the construction of one part of a statute every other part ought to be taken into consideration.

2. Mechanic's lien — *right of sub-contractors to payment when work is abandoned.* The mechanic's lien law does not require that the owner shall pay any thing to a sub-contractor, when he is compelled to exhaust the original contract price, taking into account what he has rightfully paid the contractor, to complete the building, in case of abandonment by the contractor.

3. Same — *payment made by consent of sub-contractor.* Where a sub-contractor, after serving notice of his lien upon the owner of a building, signs a writing, authorizing such owner to pay a certain other

installment, referring to it as due when certain work is done, this will not be held conditional, but as indicating a particular installment, and the owner may rightfully make such payment before it is due, without becoming liable to the sub-contractor.

4. INSTRUCTION — *assuming a paper to be conditional.* An instruction which assumes that a paper or writing in evidence is conditional, when it is not, is properly refused.

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

Messrs. FULLER & SMITH, for the appellants.

Mr. STEPHEN F. BROWN, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a petition filed by appellants, in the Superior Court of Cook county, as sub-contractors, against appellees to enforce a mechanic's lien under the act of 1869.

A trial was had before a jury, which resulted in a verdict against appellants. The court overruled a motion for a new trial, and rendered judgment upon the verdict.

To reverse this judgment appellants have prosecuted this appeal, relying mainly upon the ground that the court erred in giving appellees' third instruction, and refusing the first, second and fourth asked by them.

It appears from the evidence contained in the record, that on the 12th day of July, 1872, appellees entered into a contract with J. B. Smith & Son, by which the latter were to furnish the material and erect a certain building for appellees, for $13,300. The building was to be completed on or before the 1st day of September, 1872. By the contract appellees were to pay Smith & Son $1,000 when the walls of the basement were all up and the joists in; $1,500 when the walls of the principal story were up, the iron work set and the joists all in; $1,800 when the walls of the second and third stories were all up and joists all in; $2,000 when the walls were all up, joists all in, partitions set, cornices set and roof on; $2,000

when the floors were all laid and plastering completed; and the balance upon the completion and acceptance of the entire building.

The appellants contracted with J. B. Smith & Son to furnish certain cut stone for the building; appellants furnished the stone as they agreed to do, and there is a balance due them from J. B. Smith & Son, of $1,675. On the 12th of September, 1872, appellants served appellees with notice, under the statute, of a mechanic's lien as sub-contractors; at the time the notice was served, appellees had paid to J. B. Smith & Son, on the contract, $6,300; on the 3d day of October, 1872, by written permission of appellants, appellees paid J. B. Smith & Son, the further sum of $2,000; upon receiving this payment J. B. Smith & Son abandoned the work and appellees were compelled to complete it at an additional cost of $5,500, which made a sum exceeding $500 paid by appellants to complete the building over and above the original contract price.

At the request of appellees, the court gave to the jury an instruction as follows:

"3. The jury are further instructed that the mechanics' lien law is not intended to compel an owner to pay more than the original contract price for constructing a building. If, therefore, the jury find from the evidence that on the 3d day of October, A. D. 1872, William A. Clapp, the defendant, had rightfully paid the sum of $8,300, on an original contract for constructing the building 159 Fifth avenue, Chicago, and that the original contract price for constructing said building was $13,300; that the original contractors abandoned their contract on said building on the 3d day of October, 1872, and that, after said abandonment by the original contractors, the defendant was compelled to finish said building, and that in finishing the same in the manner provided for in the original contract, he has actually, and reasonably, and rightfully paid out more than $5,000 over and above the amount previously paid on the original contract, then in this action the plaintiffs are not entitled to recover."

It is insisted that the seventh section of the mechanics' lien act of 1869 was entirely ignored by the court by this instruction to the jury.

In other words, as we understand the position of appellants, they claim that under the seventh section, when the original contractor abandons the work and the rights of sub-contractors are involved, the owner is required to pay the full value of the work actually done, deducting only what has been paid, regardless of what it may cost to complete the building under the contract.

By the seventh section of the act of 1869, Public Laws of 1869, page 257, it is declared, should the original contractor, for any cause, fail to complete his contract, any person entitled to a lien as aforesaid may file his petition, etc., etc., and decree shall be entered against the owner, etc., for so much as the work and material shall be shown to be reasonably worth according to the original contract price, first deducting so much as shall have been rightfully paid on said original contract by the owner.

In placing a construction upon this section it will not do to consider it alone; it must be considered in connection with other sections of the same act, to collect the legislative intention.

If any part of a statute be intricate, obscure or doubtful, the proper way to discover the intent is to consider the other parts of the act, for the words and meaning of one part of a statute frequently lead to the sense of another, and in the construction of one part of a statute, every other part ought to be taken into consideration. Potter's Dwarris on Statutes, 188.

By reference to the first section of the act of 1869, and this is the section which gives a sub-contractor a lien, the following emphatic language will be found in the last clause of the section: "But the aggregate of all the liens hereby authorized shall not exceed the price stipulated in the original contract between such owner or lessee and the original contractor for such improvements; in no case shall the owner or lessee be

compelled to pay a greater sum for or on account of such house, building or other improvement, than the price or sum stipulated in said original contract or agreement."

When, therefore, section seven is considered in connection with section one of the same act, we think it evident the framers of the act never contemplated that the owner should be required to pay a single dollar to a sub-contractor when he had exhausted the original contract price in the completion of the building.

The language of the statute is obvious. In no case shall the owner be required to pay for or on account of such building a greater sum than the original contract price.

In this case appellees have been compelled, in the completion of their building, to pay between five hundred and one thousand dollars more than the original contract price, and yet appellants insist they shall still pay more.

The position assumed is not just, neither can it be sustained under a fair construction of the statute. The instruction given, in our judgment, placed the law fairly before the jury.

This disposes of the question raised as to the refusal of the court to give appellants' first instruction, as well as the giving of the third one for appellees.

The next question presented is, the refusal of the court to give the second and fourth instructions. The record does not show any instruction No. 2; the instruction referred to as No. 2 seems to be a part of the first instruction, which was properly refused. The fourth instruction reads as follows:

"If the jury believe, from the evidence, that the $2,000 paid October 3, 1872, was paid before the conditions of its payment as to laying floors and completing plastering were complied with, such payment cannot affect the rights of the plaintiffs in this case."

It is shown by the evidence that on the 1st day of October, 1872, appellants executed and delivered to Smith & Son a paper as follows:

"Mr. William A. Clapp: You are hereby relieved from the effect of the lien notice heretofore served upon you, so far as to be permitted to make payment of the installments due Smith & Son, of $2,000 or thereabouts, upon completing the plastering and laying the floors of your building No. 159 Fifth avenue, without prejudice to you for so doing, and as to such installments our lien upon said building is released.

"Provided, this is no waiver of our lien as to other future payments. Dated Chicago, Illinois, October 1, 1872.

"J. B. CLARKE & Co."

Upon the presentation of this instrument by Smith & Son, appellees paid the $2,000 therein specified. It is now claimed by appellants that the document did not authorize the payment of the amount therein named unless the plastering was completed and the floors laid. Even if the position taken was correct, the instruction was properly refused, for the reason it assumed the paper was conditional.

But aside from this, the paper read in evidence could not, by any fair or reasonable construction, be construed to only authorize the payment of the money upon condition that the plastering was completed and the floors laid. The language used would seem to be words of description, indicating the particular installment that was to be paid. We are, therefore, of opinion the instruction was properly refused.

Upon examination of the whole record we perceive no substantial error. The judgment will therefore be affirmed.

Judgment affirmed.

Syllabus.

Pittsburg, Fort Wayne and Chicago Railway Co.

v.

Pierce Powers.

1. Measure of damages — *injury to servant from negligence of the master.* In a suit by a servant of a railway company against the company to recover damages for a personal injury received while in the company's service, it is error to admit evidence that the plaintiff had a family and was unable to support them by his labor since the injury. To admit such evidence is virtually to impose upon the company the duty of supporting the plaintiff's family, which the law does not require in the case of a servant injured in its employ even by the negligence of the company.

2. Contract *to labor on railroad track — construction.* Where a person is employed to labor on the track of a railroad, generally, it will be presumed that it shall be at any place the company may designate within a reasonable distance from the place of employment, and the company should not, for that reason, be liable for an injury received whilst at work at a place different from that at which he had been accustomed to work.

3. Master and servant — *duty to adopt reasonable rules and regulations to protect employees.* It is the duty of a railway company to make all reasonable and proper regulations for the safety of its employees. And this being an affirmative fact, it devolves on the company to show an observance of the duty when sued by a servant for an injury received while in its service, and negligence is shown. On such a showing the presumption will be that the negligent act was done in violation of its rules, and the company will not be liable for the act of its servants, disobeying such regulations, unless the servant inflicting the injury was incompetent and the company knew it, or had reasonable and proper means of knowing it.

4. Same — *liability to servant for acts of co-servant.* It has been repeatedly held by this court that a servant of a railway company may recover of the company for an injury occasioned by the negligence of a fellow-servant, where the two are not employed in the same line of business, or their employment is wholly separated and disconnected.

5. Same — *whether servants are in same line of employment.* Where a servant of a railway company employed to work on the track, was run over and injured by an engine through the carelessness of the engineer of the company, it was *held* that the servant injured was not engaged in the same line of employment as the engineer, and might recover of the company for the injury the same as any other person not in its service, if he acted with prudence on his part.

6. INSTRUCTIONS — *must be based on evidence.* Where there is no evidence on which to base an instruction, it is not error to refuse the same, but a judgment will not be reversed for giving an instruction containing an abstract proposition of law, which this court can see did not mislead the jury.

APPEAL from the Superior Court of Cook county; the Hon. JOHN BURNS, Judge, presiding.

This was an action on the case, brought by Pierce Powers against the Pittsburg, Fort Wayne and Chicago Railway Company, to recover damages for a personal injury received while ditching the track in the defendant's yard. It appears that this yard was filled with tracks, and trains were moving in all directions on them. While the plaintiff was thus engaged, with others, an engine was driven upon him without any warning or signal of its approach. A trial was had which resulted in a verdict and judgment in favor of the plaintiff for $3,500.

Mr. F. H. WINSTON, and Mr. GEORGE WILLARD, for the appellants.

Messrs. DICKEY & CAULFIELD, for the appellee.

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

In the month of October, 1866, appellee, whilst in the employment of appellants, and at work by order of his superior, on the track of their road, was run over and injured by a locomotive of the company. The locomotive was being operated at the time by one Davis, employed as an extra engineer, or a person whose duty it was to take engines, on their arrival, to the round-house, and to bring others therefrom to be used on the road. The injury was received at the town of Valparaiso, in the State of Indiana. Appellee brought suit against the company to recover for his injuries. A trial was had by the court and a jury, resulting in a verdict, and after overruling a mo-

tion for a new trial, a judgment was rendered against defendants, from which they appeal to this court.

It is urged as ground of reversal that the court below erred in admitting evidence that the defendant had a family and was unable to support them by his labor since his injury. In the case of the *City of Chicago* v. *O'Brennan*, 65 Ill. 160, it was held error to admit such evidence; that the evidence must be confined to the plaintiff, his injuries, capacity for business and the probabilities of his recovery from the injuries received. Such evidence is well calculated to unduly enhance the damages, and to influence the jury to give damages beyond what is a compensation for the injury received. Appellants can in no case be required to support the family of one of their employees who may be injured even by the negligence of the servants of the company. Such a rule would be carrying the liability of such bodies beyond the liability of other persons, and would not accord with the analogies or principles of the law. And to permit such evidence would be virtually to impose that duty upon the defendant. It is impossible for us to know what portion of the verdict in this case was allowed because appellee had a family. The evidence was before the jury for the purpose of enhancing the damages, and we have no doubt it produced that result. This was manifest error.

It is next urged that the court below erred in giving and refusing instructions. The fifth of plaintiff's instructions was wrong, inasmuch as it authorized the jury to consider all of the circumstances of his case, as shown by the evidence. This authorized them to consider the fact that he had a family, which we have seen they should not have been permitted to take into consideration. Had that evidence not been admitted the instruction would have been proper. His second instruction was erroneous, as there was no evidence that appellee was employed to work at any particular place, but it shows that the section foreman has no power to so employ men, and that it is customary to remove them from point to point as

their labor may be needed in repairing the track. And this must be so from necessity. If employed to work at a specified point, they could not, in case of an emergency, be required to labor at any other point, which would compel the employment of large bodies of men on some occasions when the force already employed would be all that was required. Where a person is employed to labor on the track of a road, generally, the presumption would be that it should be at any place they might designate within a reasonable distance of the place of employment, and the company should not, for that reason, be liable for an injury received by the servant whilst at work at a place different from that at which he had been accustomed to work.

It is urged that the third of appellee's instructions is wrong. It no doubt contains an unnecessary statement as to the duty of the company to provide reasonably safe machinery for the protection of the hands. There was no question before the jury as to the character of the machinery, and the proposition was abstract and inapplicable to the case, but could not have misled the jury. As to the remainder of the instruction, we perceive no objection, as it is unquestionably the duty of the company to make all reasonable and proper regulations for the safety of their hands. Without such regulations, their employees would be at the mercy of others whom they had no election in employing, or over whose actions they have no control. Human life and safety demand at least this degree of care, and it must be exacted. And it should devolve on the company to show that they had so observed the duty. It is an affirmative fact that the company can readily show, whilst usually the plaintiff could not prove its negative. The plaintiff must no doubt prove negligence, and to exonerate themselves the company should show that proper regulations, to prevent it, had been adopted, and having shown them, the presumption would be that the act was in violation of the rule, and the company not liable, unless the servant inflicting the injury was incompetent, and the company knew it, or they

had reasonable and proper means of knowing it. When the rules are shown, it is for the court to say whether they are reasonable.

We perceive no valid objection to the sixth of appellee's instructions. We are of opinion that it is not liable to the criticism suggested by appellants. It was not probably understood by the jury as they seem to suppose. It would have been more accurate had it said, if the jury find the injury was the result of such recklessness. In cases of this character, instructions should be entirely accurate, and this would be better with the amendment suggested.

It is urged that the court should have given defendants' fifteenth and sixteenth instructions. On examination we find no evidence in the record on which to base them. They were, therefore, properly refused.

We have not been enabled, by a careful examination of the other instructions of appellants, to find that the court erred in modifying them before they were given.

Inasmuch as the case must be submitted to another jury, we regard it proper to discuss the question whether appellee was in the same line of employment with the engine-driver, and whether his relation to the company was such as to necessarily preclude his recovery for the injury sustained. The determination of this question is, we think, governed by our former decisions. We have repeatedly held, that where an employee of the company is hurt in an employment wholly separated and disconnected from the servant who causes the injury, a recovery may be had, where there is negligence, as in other cases; that a clerk at the depot, a carpenter employed in constructing or repairing cars in the shop, or other person disconnected with the management of the train and its officers, may recover, where by carelessness of those running it he is injured. The rule only applies, that a fellow-servant cannot recover for the injury occasioned by the negligence of another servant, where they are engaged in the same department of business. And the object of the rule is to make each servant vigilant in

seeing that the others are careful, prudent and faithful in the discharge of their duty, and if not, that it shall be to their interest to report all derelictions that occur.

Here, appellee was no nearer connected with the running of the train or its engines, than is a clerk of the company employed in keeping the books in their office, or a carpenter, smith, painter, or other mechanic employed in the car shop. He was engaged in an entirely different department from that of running trains, either in the yard or on the road. He did not have, nor could he have any control over the engineer. His means of doing so were not superior to that of an individual entirely disconnected with the road and its management. Thus it is seen that the reason of the rule fails when applied to appellee, and the reason having failed, the application of the rule should fail. We are of opinion that the rule should not be applied to appellee.

He was employed by the company, was at work under the orders of his superior, and it does not matter whether he was performing the labor where he was employed to work, if he acted with prudence, and the engineer was guilty of negligence.

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

Judgment reversed.

A. C. WARRINER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. CRIMINAL LAW—*when indictment is good.* When the offense is so plainly stated in the indictment that the nature of it can be easily understood by the jury, that is sufficient under our statute to constitute a good indictment, upon which the judgment of the court can be rendered.

2. SAME — *conversion of proceeds of sale by commission merchant.* On an indictment against a commission merchant for converting the proceeds of goods intrusted to him to sell on commission, to his own use, it is not a sufficient defense that the agreement was that the commission merchant was to send the consignor his check for the proceeds, and that he did send his check, when it appears that there were no funds in the bank on which the check was drawn, to pay it, and that the check was promptly presented and not paid.

3. In such case, if the defendant had funds in the bank at the time of drawing the check, the burden is on him to prove it, and also to explain why there were no funds there when the check was presented.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. LAMBERT TREE, Judge, presiding.

Mr. SIDNEY THOMAS, for the plaintiff in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an indictment, in the Criminal Court of Cook county, against A. C. Warriner, a commission merchant doing business in Chicago, for failing and refusing to account for and pay over to Hafford and Company, of Mattoon, whose goods he had received and sold on commission, and afterward converted the proceeds to his own use. The jury found the defendant guilty as charged, and the court, overruling a motion for a new trial and in arrest of judgment, rendered a judgment on the verdict, and assessed a fine against the defendant of four hundred dollars.

To reverse this judgment the defendant brings the record here by writ of error, and assigns as error that the verdict is against the law and the evidence; that improper evidence was admitted on behalf of the people, and proper evidence on behalf of the defendant excluded.

On the motion in arrest of judgment, it is urged the indictment is insufficient.

We have first considered the motion in arrest of judgment.

The prosecution is founded on section 78 of the Criminal Code, which is as follows:

"If any warehouseman, storage, forwarding or commission merchant, or other person selling on commission, or his agent, clerk or servant, shall convert to his own use any fruit, grain, flour, beef, pork or other property, or the proceeds or avails thereof, without the consent of the owner thereof, or shall fail to pay over the avails or proceeds thereof, less his proper charges, on demand by the person entitled to receive the same, or his duly authorized agent, he shall be fined not exceeding one thousand dollars, or confined in the county jail not exceeding one year, or both, and shall be liable to the person injured in double the value of the property or amount of the money so converted." R. S., 1874, p. 363.

We have carefully compared the indictment with this section of the statute, and are satisfied it is drawn substantially in compliance with it, and in the terms and language of the statute creating the offense. At any rate, the offense is so plainly stated that the nature of it could be easily understood by the jury, and that is sufficient, under our statute, to constitute a good indictment on which the judgment of the court can be rendered.

The error of plaintiff's counsel consists in mistaking the nature of the offense charged. The offense does not consist in violating instructions, but in doing the acts specified in the indictment. The indictment charges facts made indictable under the statute, when done by a commission merchant. There is no objection to the indictment, and the motion in arrest of judgment was properly denied.

As to the evidence, we are of opinion, as presented, it fully sustains the finding. The prosecutor was, with his mother, trading at Mattoon, in this State, under the firm name of E. Hafford & Co., and had shipped to the defendant, as a commission merchant, in August, 1873, and up to the fourth of September of that year, various articles of country produce, to be sold by him on commission, he to account to them for the proceeds by sending his bank checks, which they could negotiate. He did send these checks, but they were dishonored. That

they were presented in a reasonable time is not questioned, and payment thereof was demanded more than once before this prosecution was instituted. A demand of payment was made on the defendant, and he distinctly informed if he did not pay the amount due, admitted to be one hundred and ninety-seven dollars and ninety cents, and admitted to be the net proceeds of the sale of the articles sent him by the prosecutors, a prosecution would be instituted.

It is conceded defendant sent his checks to the consignors, for the net proceeds of the sales, but they were dishonored — they were not paid. It is contended that as defendant sent checks in pursuance of instructions, this was full compliance, but it was clearly the understanding of the parties, and all persons would so understand it, that the checks sent must be available checks, which, on presentation at the bank on which drawn, would be met by prompt payment. If not of that character, they would be of no more value than so much blank paper. It is not sufficient if a party draws his check on a bank in payment of a debt; it is incumbent on the drawer that he should have funds to meet it when presented. The defendant should have deposited these proceeds in the bank on which he drew his checks, and should have had funds there to meet them. A witness for defendant, Mr. Daviston, who was his book-keeper and salesman, testified that defendant had money in the bank at the time those checks were drawn, and had every prospect of keeping his bank account good to meet all of his checks. Being asked to state the reason why he did not keep his bank account good, so as to meet these particular checks, he replied, defendant had received a draft on New York, which had been deposited in bank to his credit. The bank transaction was not a Boston matter, but a New York matter, and defendant had drawn drafts on country dealers with whom he was dealing, and who were owing him.

There is no evidence that this draft on New York was passed to his credit for the purpose of meeting these checks, or that

it could be so appropriated, or what was the amount of this draft. It might have been for a very trifling sum, and appropriated to other purposes.

At this stage of the case, the court interposed this remark: "I do not think this evidence is material. We do not want to hear a history of all their business. I think the witness has said enough on this subject." To this, defendant noted an exception, and it is now insisted, had the witness been permitted to proceed, he would have shown by what means this draft on New York became and was rendered unavailable.

It was certainly proper for the defendant's counsel, on this intimation from the court, to state to the court that he expected to prove this New York draft was of an amount sufficient to pay these checks, but for a reason which he would show, it could not be made available, and if the court ruled this out, then he should have taken an exception and brought the question directly before this court, to pass upon its relevancy and materiality. Nothing of this was done, nor is any thing shown why these checks were not properly provided for by having funds in the bank ready to meet them, which all business men, jealous of their commercial honor, seldom fail to provide.

There is nothing in this record to exculpate this party. He has made no effort to take up these checks or save his credit, after repeated demands. The prosecutor has been injured by him to the extent of one hundred and ninety-seven dollars, ninety cents, by a wrongful appropriation of the proceeds of the sales of this property, which the prosecutor had in full confidence intrusted to him. His case is clearly within the statute, and it has been properly vindicated by this verdict and judgment, which we, in all things, affirm. Giving to this statute the strict construction it must receive, as held in *Wright* v. *The People*, 61 Ill. 382, we are satisfied this case comes fully within its provisions.

Judgment affirmed.

Mr. JUSTICE SCOTT and Mr. JUSTICE MCALLISTER dissent, on two grounds:

First. That accused was indicted for converting the proceeds of sale of goods confided to him to sell as commission merchant. But his principals authorized him to send checks for such proceeds. This created the relation of debtor and creditor, and the conviction was for not keeping his checks good. Secondly. If he could have been convicted for that, which we deny, he should have been permitted to explain why he did not or could not keep his bank account good.

ABRAM RUPLEY *et al.*

v.

JOHN F. DAGGETT.

1. SALE — *mistake as to the price.* Where there is a mutual mistake in regard to the price of an article of property, there is no sale and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale.

2. Thus, where the owner of a mare asked $165 for her, and the purchaser understood the price asked to be $65, and took her home with him and refused to pay more than the latter named sum, there being a clear misunderstanding between the parties, it was *held*, that there was no sale, and consequently no title passed.

3. INSTRUCTION. It is not error to refuse an instruction stating a correct abstract principle of law, when there is no necessity for it under the facts of the case.

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

This was an action of replevin, brought by John F. Daggett against Abram Rupley and Jacob Rupley, to recover a mare which the defendants claimed they had bought of the plaintiff.

It appears that at the first conversation about the sale of the mare, Rupley asked the plaintiff his price, the plaintiff swear-

ing that he replied $165, while the defendant testified that he said $65, and that he did not understand him to say $165. In the second conversation Rupley says he told Daggett, that if the mare was what he represented her to be, they would give $65, and Daggett said he would take him down next morning to see her. Daggett denied this, and says that Rupley said to him, "Did I understand you sixty-five?" Daggett states that he supposed Rupley referred to the fraction of the $100, and meant sixty-five as coupled with the price named at the previous interview. He answered, "Yes, sixty-five." Both parties, from this, supposed the price was fixed, Rupley supposing it was $65, and Daggett supposing it was $165, and the only thing remaining to be done, as each thought, was for Rupley to see the mare and decide whether she suited him. The next day Rupley came, saw the mare and took her home with him. The plaintiff recovered in the court below, and the defendants appealed.

Messrs. FELLOWS & LEONARD, for the appellants.

Messrs. HILL & DIBELL, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for $165, and it may be appellant was equally honest in the belief that he was buying at the price of $65. There is, however, some evidence tending to show that appellant Rupley did not act with entire good faith. He was told, before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given to him. He insisted, however, the price was $65, and expressed his belief he would keep her if there was a mistake. On his way home with the mare in his possession, he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought

to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be $165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for $65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay.

There was no error in refusing instructions asked by appellants. The court was asked to tell the jury if they believed, from the evidence, appellee had "sworn willfully and corruptly false in any material portion of his testimony, then they are at liberty to disregard his entire testimony, except so far as it may be corroborated by other evidence in the case." Conceding this instruction states a correct abstract principle of law, there was no necessity for giving it under the facts proven in this case. The verdict was right, and appellants were not prejudiced by the refusal of the court to give it.

All that was pertinent to the issues in the other refused instructions was contained in others that were given, and there was no necessity for repeating it.

No material error appearing in the record, the judgment must be affirmed.

Judgment affirmed.

FRANK C. TAYLOR *et al.*

v.

HENRY GILSDORFF *et al.*

1. MECHANICS' LIEN — *where title to land is in trustee with power to build, power to make contract, with the statutory incident of a mechanics' lien, is implied.* Where a deed by which land is conveyed to a trustee, to be held for the use of others, gives authority to build upon and improve the land, and to borrow money and mortgage the premises to secure it, for the purpose of building, it follows that the power to make contracts for building exists with the statutory incident belonging to such contracts, that of a mechanics' lien.

2. A wife conveyed her real estate to a trustee in trust for herself during the joint lives of herself and husband, with remainder over to the heirs or devisees of the husband, and to the husband's heirs if he survived the wife and their children. In the deed was a provision that the property might be built upon and improved for the purpose of providing a revenue, and giving the husband and wife the general management of the premises, acting in concurrence and with the approval of the trustee, and for the purpose of so building or improving; power was given to sell any portion of the premises, or to mortgage the same to secure any loan for that purpose. The husband, in his own name, made contracts for the erection of buildings on the premises, and the buildings were so erected, with full knowledge of the wife and trustee, and without any objection on their part: *Held*, that the persons performing labor and furnishing materials were entitled to enforce a mechanics' lien against the whole estate.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. HOWE & RUSSELL, for the appellants.

Messrs. WOODBRIDGE & BLANKE, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a petition for a mechanics' lien, filed against appellants, for labor and materials furnished in constructing certain dwellings on lot 4, block 16, in Bushnell's addition to Chicago.

The case was submitted to a jury in the court below, which found the amounts due the several petitioners. Their verdict on this point is not questioned. There was a decree granting the prayer of the petition, and ordering sale of the premises.

The premises were vested in a trustee, and it is urged as a ground for a reversal of the decree, that the whole estate in the premises could not be subjected to a mechanics' lien. The condition of the estate was this: On the 13th of June, 1871, Maria L. Taylor, wife of Frank C. Taylor, being seized in fee of lot 4, conveyed it to Ira Scott, as trustee. Without now dwelling upon the several provisions of the trust deed, it may be considered as vesting the estate in the trustee, in trust for Mrs. Taylor during the joint lives of herself and husband, with remainder over to the heirs or devisees of the husband, and to the husband himself, if he survived the wife and their children. Frank C. Taylor made, in his own name, contracts with the several petitioners for the improvement of the lot by the erection of a block of houses. These contracts were made while Scott was trustee. Afterward he resigned, and on a bill filed by Taylor and wife, one Milliken was appointed trustee by the Superior Court of Cook county. Milliken, as trustee, mortgaged part of the premises to Howe, to secure the payment of certain sums of money to the Franklin Savings Bank, and sold part to George Taylor, who are all defendants to the petition. The bill claims that the entire premises be subjected to the lien of the petitioners; that the rights acquired under these conveyances are subject to their liens, and that the whole estate be sold to pay their demands.

The claim is, that the interest in remainder in this estate, held by the trustee for the heirs of Taylor, cannot be subjected to a mechanics' lien.

Section 1 of the lien act provides, "any person who shall, by contract with the owner of any piece of land, furnish labor or materials," shall have a lien, etc.

Section 17. "The person who procures the work or materi-

als to be done or furnished, shall be considered the owner, to the extent of his right or interest in the premises."

Section 21. "Parties in interest shall include all persons who may have any legal or equitable claim to the land."

There must be a contract with the owner. And it is contended that it is only the real and beneficial ownership which is subject to the lien; that a trustee, who holds property for another's use, is not the owner intended by the statute; that the *cestuis que trust* are the real owners, and have the estate that the statute intends.

The particular provisions of the instrument creating the trust, must affect the question.

There is an express provision in this deed of trust, that the whole or any portion of the premises may be built upon and improved, for the purpose of providing a revenue, and giving Frank C. and Maria L. Taylor the general management of the premises, acting in concurrence and with the approval of the trustee. And for the purpose of so building or improving, power is given to sell any portion of the premises, or to mortgage the premises to secure any loan for that purpose.

There is no absolute equitable estate, created in behalf of the children. Their estate is one, under the provisions and conditions of the trust deed. It is expressly made subject to be defeated by a mortgage for the purpose of building, and in part, by a sale of any portion for that purpose. And we do not see why, by clear intent, it is not made impliedly subject to be defeated by a building contract lien. Authority is given to build. A contract for building is necessary. A mechanics' lien is a statutory incident of such a contract.

The giving of the authority must be regarded as contemplating its ordinary incidents, and that they would exist. The power to raise money by sale or mortgage, can only be cumulative. It cannot be held to exclude the power to make contracts for building, having the statutory incident belonging to such contracts, that of a mechanics' lien. There is nothing in the instrument to favor such an idea. For the purpose of

building, there may be created upon the whole estate, a lien by mortgage; and there appears no good reason why it may not be created by a contract for building. Because Frank C. Taylor made the contract, to hold that only his particular equitable interest in the premises, or that of himself and wife, should be subjected to the lien, is to take a too narrow view of the statute, and give an unreasonable construction to the trust deed. The improvement is not for the advantage of Taylor and wife alone, but inures to the benefit of the whole estate. The trustee owned the legal estate in the land, with the right of improving it by building, and of charging it for such purpose, by sale or mortgage.

We cannot doubt, that he was such an owner, within the meaning of the statute, that the entire estate in the premises was capable of being subjected to a mechanics' lien.

It is next objected, that the trustee did not concur in, or approve of, the contracts made by Taylor.

The objection arises under this provision of the trust deed: "That the whole or any portion of the premises may be built upon and improved, and that during the joint lives of the said Frank C. and Maria L. Taylor, they shall have the general management of said premises, acting in concurrence and with the approval of the said Scott, and under the restrictions and limitations of all the trusts and provisions herein made."

There was no express concurrence or approval; all that there was, was only implied.

At the time of the making of the trust deed, Mr. and Mrs. Taylor occupied the premises as a homestead. Mr. Scott lived across the street from them. Before the buildings were commenced, Taylor informed Scott that he was going to build a block of buildings upon the lot. The latter knew of the buildings going up on the premises. He never objected, or made hint of disapproval. But no express concurrence or approval appears.

It is material to consider the position of the latter as trustee. He was for the most part a passive trustee. He would

seem to have had little more than a negative on the acts of management of Taylor and wife. The general management of the premises was in them, acting, it is true, in concurrence and with the approval of Scott. In case of a sale of any portion of the premises, it was to be on such terms and in such manner as the Taylors should in writing request.

If there was to be a mortgage, it was only in case the Taylors should so elect, and they must unite in the mortgage, and it contain such covenants and provisions as they might deem best. It was not designated what was to be the mode of concurrence and approval, or how they should appear, except in the case of a deed or mortgage. The trustee was to unite in them. The general management of premises so situated would involve the doing of many important and constantly recurring acts, for the performance of which it could not be reasonably expected that the express approval and concurrence of the trustee should be obtained.

Express concurrence and approval were not required by the trust deed.

The dwelling-house upon this lot, in which the Taylors resided, had been burned.

To rebuild, the best interest of all concerned would seem to require. The buildings were being erected by those intrusted by the trust deed with the general management of the property, whose own personal interests were chiefly involved, furnishing a guaranty that the construction of the buildings would be in a manner which would be most advantageous to the estate. This, for the most part, passive trustee would seem to have had no occasion to withhold his concurrence or approval, and there is no pretense that he did. Having been informed beforehand of the intended erection of the buildings, and they going up before his own eyes, absence of disapproval, under such circumstances, amounted to approval.

Concurrence and approval may be by conduct, as well as by word. And especially would those entering into contracts with Taylor for furnishing labor or materials, have the right

to infer the fact of concurrence and approval, from such conduct.

We are of opinion that there was sufficient evidence, from which to infer the implied concurrence and approval of the trustee, and that no more than that was here required.

Although the contracts were made by Frank C. Taylor alone, the evidence shows that Mrs. Taylor knew and approved of them, and gave directions during the progress of the work, so that, so far as here may be necessary, she may be considered as a party to the contracts.

One of the claims upon which a lien was allowed, that of the Baumanns, is for services as architects and superintendents, and it is insisted that they have not furnished either labor or materials for erecting the buildings, within the meaning of the statute, and so are not entitled to a lien. The claim was not for services as mere architects, but as architects and superintendents. The jury found in favor of the claim. Without saying how it might be with a mere architect, who simply drew a plan of the buildings, we cannot say that in the work of superintendence of the buildings, the jury were not authorized to find that there was such labor, which was within the act which provides a lien for any person who shall "furnish labor for erecting any building." Like views seem to have been held elsewhere under similar statutes. *The Bank of Pennsylvania* v. *Gries*, 35 Penn. 423; *Mulligan* v. *Mulligan*, 18 La. Ann. 30.

Decree affirmed.

Mr. JUSTICE MCALLISTER, dissenting: The trust under which Scott held the premises was not a mere passive, but an active trust. So that the legal title was in him, notwithstanding the statute of frauds. The provisions of the mechanics' lien law, make an oral or implied contract valid for the purpose of a foundation for proceedings which may divest title. In other words, such a contract is thereby rendered valid, and, under the provisions of the act, is one which relates to and affects an interest in

real estate. But the statute requires, in order to give an oral contract such an effect, that it be made with the owner. This statute, for obvious reasons, has heretofore received, in this court, a strict construction. By such a construction, the legal title could only be affected by the contract on which the lien is predicated, by Scott becoming a party to it. It is not pretended that he became a party to it. But the opinion of the majority of the court goes upon the ground that knowledge by the trustee of the fact of the improvements being made, and the silence of the trustee, are equivalent to his becoming a party, and it is not placed upon or attempted to be brought within the range of the principle of estoppel *in pais.* I know of no doctrine or principle, aside from that of estoppel, upon which his silence and non-action could, under any circumstances, be regarded as equivalent to his execution of the written contract under which the lien is claimed to have arisen, and most certainly, the doctrine of estoppel *in pais* has no application to this case. His "concurrence," within the meaning of the trust deed, should, if the contract for improvements was in writing, have been manifested by writing; if oral, by being a party to it. In no other way could the title in him be divested by proceedings based upon the contract. Conceding that he was in no respect a party to the contract, and he clearly was not, the mere fact of silence, of non-action, or inattention does not constitute concurrence, which means more than passive or implied acquiescence. But *silence*, where a person is under no duty to speak or act, cannot be construed as either concurrence or acquiescence. The trustee was in no sense a party to the contract, nor did he have any agency whatever in procuring work or materials to be done or furnished. There is no view I can take of the case which brings it within the lien law, so as to subject the legal or entire interest in the premises to the lien.

Mr. CHIEF JUSTICE WALKER: I concur in the views expressed by my brother McAllister in this case.

Syllabus.

JOHN PLUMMER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. STATUTE — *as to the title and change in the same.* Unless a change in the title to a bill in the two houses concurring in its passage is one of substance, and calculated to mislead as to the subject of the bill, it may be regarded as a clerical mistake in nowise affecting the validity of the law.

2. Where a bill passed the House entitled "a bill for an act to prevent the keeping of common gaming houses," but when introduced in the Senate it bore the title "a bill for an act to prevent the keeping of common gaming houses, and to prevent gaming," by which title it passed that body and was reported back, enrolled and approved, the body of the bill being identical in both houses, it was *held* that the change in the title did not render the act void.

3. SAME — *title need not express necessary results.* The constitutional requirement in respect to the passage of bills is not, that but one subject shall be expressed in the title, but that the act shall embrace but one subject, which shall be expressed in the title. It is not necessary to express in the title the incidental results expected to flow from the act, but if it does, it will not render the act void.

4. INDICTMENT — *sufficiency of statement of offense.* Although an indictment may not state the offense in the language of the statute creating the same, yet, if it is stated so plainly that it may be easily understood by the jury, it will be sufficient.

5. JUROR — *ground of challenge — party to suit pending, etc.* The fact that a juror, whether of the regular panel or not, has a suit at law or in equity pending, for trial in the same court, at the same term, whether the same is actually tried or not at such term, is a good ground of challenge, and it is error to disallow the same.

6. SAME — *opinion from reports.* The fact that a juror has formed an opinion or impression based upon newspaper statements or rumors, about the truth of which he has expressed no opinion, will not disqualify him, if it shall appear from his statement, under oath, that he believes he can render a fair and impartial verdict in accordance with the law and the evidence.

7. But if the juror is unable to state that he can sit as an impartial juror in the case, he is incompetent. If exposed to influences the probable

effect of which is to create a prejudice in his mind against one charged with crime, and which it will take evidence to overcome, he is not competent.

WRIT OF ERROR to the Circuit Court of Stephenson county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. J. M. BAILEY, and Mr. J. I. NEFF, for the plaintiff in error.

Mr. JAMES S. COCHRAN, State's Attorney, for the People.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Plaintiff in error was indicted and convicted under the "act to prevent the keeping of common gaming houses, and to prevent gaming," approved February 29, 1872 (Laws of 1871–2, p. 462).

Evidence was given on the trial, showing that the title of the bill for this act, as it passed the House of Representatives, was, "a bill for an act to prevent the keeping of common gaming houses;" but when it was introduced in the Senate it bore the title, "a bill for an act to prevent the keeping of common gaming houses, and to prevent gaming," by which title it passed that body; and it was then reported back to the House of Representatives, with the message, that the Senate had concurred with the House in the passage of the bill, by that title. Subsequently, the chairman of the committee on enrolled and engrossed bills reported to the House, as properly enrolled, "an act to prevent the keeping of common gaming houses and to prevent gaming," and by this title it was approved by the Governor, and his approval reported to the House. The bill for the act was designated as "House bill No. 769," and this designation was preserved unchanged in its passage through both houses; and it was likewise affixed to the act when it was reported as enrolled, and also when it was reported as approved by the Governor. The identity of the body of the bill, through every step, from its introduction in

the House, until it was finally declared a law, is thus sufficiently established; and the only question in this regard is, does the mere change that occurred in the title render the law void?

It is claimed that the law cannot be sustained, because of this change in its title, under section thirteen, article four of the constitution, which reads: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Formerly, the title was considered no part of the statute, for it was usually framed by the clerk of that house in which the bill first passed, and was seldom read more than once. Potter's Dwarris on Statutes, 102; Sedgwick on the Construction of Statutory and Const. Law (2d ed.), 38. Nor can it now, in strictness, be considered any part of the law, although the constitutional mandate is to be observed, for this is simply to give notice of the general subject of the bill, so that neither the public nor the members of the Legislature shall be misled by the title. And, therefore, there is not the same necessity that the precise language of the title shall, with that formality and strictness necessary in regard to the body of the bill, receive the concurrence of both houses. Unless the change in the title is one of substance, and calculated to mislead as to the subject of the bill, we are of opinion it may be regarded as merely a clerical mistake, in nowise impairing the validity of the law. *The People* v. *The Supervisors, etc.*, 16 Mich. 254.

The requirement of the constitution, it will be observed, is not, that but one subject shall be expressed in the *title*, it is, "the *act*" shall embrace but one subject, which shall be expressed in the title. It is unnecessary to also express in the title the incidental results expected to flow from the act; but, if it be done, it does not render the act void; and the additional words here added may, we think, be regarded as an unnecessary specification of an object expected to be attained by the act, for, if gaming-houses are prevented,

it must follow as an incident that, to some extent, gaming will likewise be prevented. It is impossible that any one, reading the title of the act as it was when the bill passed the Senate, should not understand that it was intended thereby to prevent the keeping of gaming-houses, because the words "and to prevent gaming" are not repugnant to, but, on the contrary, are entirely consistent with that idea.

We feel, therefore, constrained to hold that the act is liable to no constitutional objection on the grounds urged.

The objections to the form of the indictment, we think also untenable.

The offense is stated, although not in the precise terms and language of the statute creating the offense, yet so plainly that the nature of the offense may be easily understood by the jury, and this is all that is required. Revised Statutes of 1874, p. 408, § 6.

In empanneling the jury by which plaintiff in error was tried, one John Hart was called as a juror, who, on being sworn and examined touching his qualifications as a juryman, testified that he was a party to a suit in chancery pending in that court for trial at that term. Plaintiff in error objected to him as incompetent to sit as a juror in the case, for that cause, but the court overruled the objection, whereupon plaintiff in error challenged him peremptorily. It appears from the record that plaintiff in error exhausted all the peremptory challenges to which he was entitled in selecting the jury, and it therefore becomes material to inquire whether this ruling of the court was erroneous.

The fifteenth section of the act relating to jurors, approved on the 12th of March, 1874, and in force from and after its passage, provides: "It shall be a sufficient cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in section two of this act; or, if he is not one of the regular panel, that he has served as a juror on the trial of a cause in any court of record in the county within one year previous to the time of his being offered as a juror; or, that he

is a party to a suit pending for trial in that court at that term." Laws of 1873–4, p. 117.

It is argued by the attorney for the people, that the objection that the juror is a party to a suit pending for trial is, by the language employed, limited to cases where he is not one of the regular panel. We are unable to so read the section. We understand this limitation applies only to jurymen who have served as jurors on the trial of a cause in any court of record in the county within one year, etc., and that the next clause is entirely independent of this one.

The section plainly, to our minds, specifies three totally distinct and independent causes of challenge:

First. When the juror lacks any one of the qualifications mentioned in section two.

Second. Where the juror is not one of the regular panel, and has served as a juror on the trial of a cause in any court of record in the county within one year previous to the time of his being offered as a juror.

Third. Where the juror is a party to a suit pending for trial in that court at that term.

Nor are we able to coincide with the attorney for the people in his construction of the words "pending for trial in that court at that term." He insists that it should appear not merely that the case was expected to be, but that it was actually tried at that term. This construction necessitates the addition of words not found in the statute, and in many cases, would entirely defeat the practical enforcement of the clause. If the parties were before the court, so that the cause might be tried at that term, it was pending for trial, whether it was actually then tried or not.

The conclusion necessarily follows, that, in our opinion, there was error in disallowing the challenge of plaintiff in error of this juror, for cause.

With regard to the objections taken to the other jurors, it is only necessary to observe, by the same section of the statute last referred to, it is provided that in the trial of any criminal cause,

the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement.

We think the juror Sullivan was competent under this provision. Although he had heard rumors, and formed an unfavorable opinion against plaintiff in error, he answers that he does not think this would prevent his rendering a fair and impartial verdict. His answers seem to be candid, and we see no cause to doubt his integrity.

The juror Broubaker, we do not think was competent. He is unable to state that he could sit as an impartial juror in the case. He was, among others, asked this question: "You think that you have heard reports which you believe to be true, in respect to the defendant, which would have a tendency, in some degree, to bias your mind in this respect?" And he answered: "It may have."

Where the juror has been exposed to influences, the probable effect of which is to create a prejudice in his mind against the defendant, which it would require evidence to overcome, to render him competent it should clearly appear that he can, when in the jury box, entirely disregard those influences, and try the case without, in any degree, being affected by them.

The objections arising on the evidence, and the refusal of the court to give certain instructions asked by plaintiff in error, we do not consider well taken, but, for the errors indicated, the judgment must be reversed, and the cause remanded.

Judgment reversed.

VINTON G. HARBAUGH

v.

THE CITY OF MONMOUTH.

1. CITY ORDINANCE — *effect of exceeding authority conferred by charter.* Even if a city ordinance prohibiting sales of intoxicating liquors, embraces a class of sales which the city has no power to prohibit, it may still be enforced as to such sales as the city does possess the power to prohibit.

2. EXCEPTION — *when it must be taken.* When the record does not show that exception was taken to the giving of instructions in the court below, such objections come too late, and cannot be considered when made in this court for the first time.

3. EVIDENCE — *in prosecution for selling liquor.* Under an ordinance prohibiting the sale of intoxicating liquors, except for certain purposes, it is not incumbent on the prosecution to prove that the sale complained of was not for the excepted purposes, but when a sale is proved, the burden of proof is on the defendant to show that such sale was lawful.

4. VARIANCE — *between complaint and the proofs, before justice of the peace, not material.* On the trial of an appeal from a judgment of a justice of the peace, upon a prosecution for violating a city ordinance, it is not a matter of any consequence whether the original complaint is technically correct or not, the only question being whether the ordinance was violated or not, without regard to whether the evidence corresponds with the complaint.

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

Mr. JAMES W. DAVIDSON, and Mr. M. M. LUCY, for the appellant.

Mr. JAMES H. STEWART, Mr. WILLIAM K. STEWART, and Mr. D. P. PHELPS, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by the city of Monmouth against appellant, to recover a penalty for selling spirituous liquors in violation of the ordinances of the city of Monmouth.

The action was commenced before a police magistrate, before whom the appellant was found guilty. An appeal was prosecuted to the circuit court, where a trial was had before a jury, which resulted in a verdict against appellant for $200. The court overruled a motion for a new trial, and rendered judgment upon the verdict.

The appellant brings the record here, and relies mainly upon the point, to obtain a reversal of the judgment, that the ordinance offered in evidence was not authorized by the charter of the city.

In the original charter of the city of Monmouth are contained the following provisions:

"Article 5, section 7. The city council shall have power to make regulations to insure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same.

"Article 5, section 20. To license, tax, restrain, prohibit and suppress tippling-houses, and other disorderly houses."

In 1865, the charter was amended by an act of the legislature, as follows:

"Section 1. That in addition to the powers already vested in the city council of the said city of Monmouth, by virtue of the above entitled act, the said city council shall have power to tax, restrain, prohibit and suppress tippling-houses, dram-shops, gambling-houses, bawdy-houses and other disorderly houses within said city, and within one mile thereof, but not to license any house or place for the sale of intoxicating drinks of any kind as a beverage.

"Section 2. To prevent and prohibit the introduction, keeping, manufacturing or selling of any vinous, malt, spirituous, mixed or intoxicating liquors within said city, and within one mile thereof (except for medicinal, mechanical and manufacturing purposes), and to prohibit the giving the same away, with a view to evade any penalty which may be provided for the unlawful sale of such liquors."

Section 3 gives the city power to make all ordinances neces-

sary for carrying into operation the powers specified in this act, and the act to which this is an amendment.

Under the charter as amended, the city council enacted an ordinance, sections 1, 3 and 8 of which were introduced in evidence.

Section 1 is as follows:

"Section 1. That any person who shall sell, barter or exchange any spirituous, vinous, malt, fermented, mixed or intoxicating liquors, or any lager beer, ale or porter of any kind, containing intoxicating properties, within the corporate limits of said city, or within one mile of said city, and each and every person knowingly aiding or assisting therein as agent, servant, clerk or otherwise, shall be adjudged guilty of a nuisance, and on conviction thereof shall be fined twenty-five dollars for each and every offense, and be imprisoned in the city prison of said city, or in the county jail of Warren county, until the fine and costs be paid."

Section 8 provides that the city council may license druggists to keep and sell spirituous liquors for sacramental, chemical and medicinal purposes, under certain restrictions.

Section 3 provides, the giving away spirituous liquors, for the purpose of evading sections 1 and 2 of the ordinance, shall be a sale, and punished accordingly.

It is not material to consider or determine whether the city council had the power under the charter to pass the ordinance, prior to the amendment of the charter made by the legislature in 1865.

At the time the ordinance was adopted, there can be no question but the city council had full and ample authority to prohibit the sale of intoxicating liquors, and to declare and punish the act of selling as a nuisance.

It was held by this court, as early as the case of *Goddard* v. *The Town of Jacksonville*, 15 Ill. 588, under a charter not more comprehensive in its provisions than the charter of the city of Monmouth, that the corporate authorities of the town

had the authority to declare the sale of intoxicating liquors a nuisance.

The law, as declared in that case, has since been affirmed and followed by numerous decisions of this court, and we must therefore regard that question as fully settled.

It is, however, insisted by appellant, that the first section of the ordinance offered in evidence is *ultra vires* and void, for the reason that the charter authorizing the city council to prohibit a sale contains the clause "except for medicinal, chemical and manufacturing purposes," and, by the terms of the ordinance, the sale is absolutely prohibited. But this prosecution was for the sale of liquors as a beverage. It was not claimed or pretended that appellant sold for medicinal or mechanical purposes. He seems, from the evidence, to have kept a saloon, and, as such, was in the traffic.

The question is not raised by this record whether the city council could prohibit the sale for medicinal or mechanical purposes.

The evidence contained in this record shows a clear violation of the ordinance, and that, too, of a character that the counsel of appellant concede the city have the power to prohibit.

Even were it true, as contended, that the ordinance embraced sales that the council had no power to prohibit, we perceive no reason why it may not be enforced to the full extent that the city council had the power to legislate on the subject.

This question arose in the case of *Kettering* v. *The City of Jacksonville*, 50 Ill. 39, and it was there held that an ordinance might contain a provision not authorized, and yet be valid in so far as authority was given to enact it. This decision is conclusive of the question raised.

The objections taken to sections 3 and 8 of the ordinance introduced it is not necessary to consider, as the plaintiff's right of recovery did not depend upon them in the least; and as they could in no manner prejudice the rights of the appellant, it was not error to permit them to be read to the jury.

It is also urged that the court erred in giving the second

and fourth instructions for appellee. The record fails to show that any exception was taken to these instructions when given, and the objection comes too late when raised for the first time in this court. Had the appellant desired to question the instructions, he should have excepted to them when given, and preserved the exceptions in the record by a bill of exceptions.

It is also urged by appellant that the court erred in refusing to give his first and second instructions, which were as follows:

"1. Unless the jury therefore believe from the evidence that the plaintiff has shown that said liquor was not sold for medicinal, chemical or manufacturing purposes, as charged in the complaint, then they will find for the defendant.

"2. The court instructs the jury that it is incumbent upon the plaintiff to prove the material facts as charged in the complaint, and if the jury believe that the complaint has not been proven as charged, they will find the defendant not guilty."

In regard to the first instruction, when appellee established a sale we are of opinion that then the burden of proof devolved upon appellant to show the sale was lawful. A different rule would require the plaintiff to prove a negative, which would be burdensome, and in many cases almost impossible to do, while on the other hand, if the defendant sold for medicinal or mechanical purposes, he had the evidence at his command, and could easily make the proof, and it is imposing no hardship upon him to require that he should furnish the proof.

As to the second instruction refused, the court was justified in refusing it upon two grounds, first, it did not require the jury to believe the facts therein specified, from the evidence, which it should have done, but aside from this, on the trial of the cause in the circuit court it was the duty of the court to have the cause tried on its merits, without regard to the complaint. It was a matter of no moment whether the complaint was technically correct or not; the real question before the jury was, whether there had been a sale by appellant in violation of law, without regard to whether the evidence corresponded with the complaint or not;

this was the real question for the jury, and no error was committed in refusing the instruction. *Town of Jacksonville* v. *Block*, 36 Ill. 507.

As no substantial error is perceived in the record, the judgment will be affirmed.

Judgment affirmed.

JOHN HAYWARD
v.
JOHN RAMSEY.

1. PRACTICE — *appeal perfected less than ten days before court.* An appeal perfected before a justice of the peace less than ten days before the next term of court, or whilst the appellate court is in session, must be continued over to the next succeeding term for trial.

2. SAME — *rule of court cannot repeal a statute.* A circuit judge is absolutely powerless to repeal or abrogate any provision of the statute by rule of court.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding.

Mr. JOHN HAYWARD, and Mr. D. E. STRAIGHT, for the plaintiff in error.

Mr. D. L. MURDOCK, for the defendant in error.

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

This was an action of replevin, brought by plaintiff in error, before a justice of the peace of Livingston county, against defendant in error, for the recovery of personal property claimed by plaintiff. A trial was had on the 12th day of January, 1874, which resulted in a judgment in favor of defendant. Plaintiff prosecuted an appeal to the circuit court of that county, by filing an appeal bond before the justice of the

peace. The justice transmitted the papers in the case and filed them with the circuit clerk on the 14th day of January. The circuit court was then in session, and had been for eight days. At that term, on the 6th day of February following, the case having been docketed, plaintiff was called, and, failing to answer, the appeal was dismissed, the judgment of the justice was affirmed and a *procedendo* awarded. To reverse that judgment this writ is prosecuted, and the rendition of that judgment is assigned for error.

The sixty-eighth section of the act of 1872 (p. 536) declares that "in case the appeal from the justice is perfected by filing the papers and transcript and judgment ten days before the commencement of the term of the court to which the appeal is taken, the appearance of the appellee may be entered in writing and filed among the papers in the case; and if so entered ten days before the first day of the term of court, the case shall stand for trial at that term." The language of this section so plainly excludes a trial of such an appeal perfected before a justice of the peace unless there has intervened at least ten days before the first day of the term to which the appeal is taken, that we are unable to see how any one could mistake its meaning. The language can have no other reasonable construction. To hold otherwise is a palpable violation of the plain provisions of the statute. Under the provisions of that section an appeal perfected less than ten days before the next term of court, or whilst the appellate court is in session, must be continued over until the next succeeding term for trial.

Where a suit is brought in the circuit court less than ten days before the next term of the circuit court, or during a session of the court, no one would make the summons returnable to that term and insist on a trial. The perfecting of the appeal is like the commencement of a suit in the circuit court. And the sixty-eighth section allows ten days for preparation for trial after the court has acquired jurisdiction of the parties.

Although the parties are bound to follow their case to the circuit court where the appeal is perfected before the justice, without further notice, still there must intervene ten days from the perfecting the appeal till the first day of the next term of the appellate court. An appeal taken less than ten days before the term is like service of a summons in an original case in the circuit court, not served ten days before the return term. In such a case the defendant is bound to appear and defend, but not at that term. In each of these cases the court acquires jurisdiction, but not for trial at the first term. To call an appellant and dismiss his appeal where the appeal was taken less than ten days before the next term, or during the session of the appellate court, is manifest error. We should have regarded it supererogation to have more than quoted the sixty-eighth section, had it not appeared that a practice similar to that adopted in this case prevails in some of the circuits. But with all we have said it does not appear to us that we have made it plainer than it is by the language of the statute itself.

But it is said that the statute requires the justice to return to the clerk a transcript with the papers, and the clerk to docket the case for trial. This is true, but when for trial? Not until the appellate court has jurisdiction of the case and the parties under the statute, or they shall voluntarily submit to a trial.

It is also urged in affirmance, that the cases of *Boyd* v. *Kocher*, 31 Ill. 295, and *Allen* v. *The City of Monmouth* 37 id. 372, apply to and govern this case. We are at a loss to perceive in what particular they have any bearing on this case. In those cases the appeals were perfected more than ten days before the next term of the circuit court, whilst in this the appeal was perfected whilst the term of the circuit court at which the appeal was dismissed was in session. Those cases stood for trial at the term at which the proceedings complained of were had, whilst in this case it stood for continuance under the statute.

Nor does the rule of court aid defendant in the slightest degree. The circuit judge is absolutely powerless to repeal or abrogate any provision of the statute by rule of court. His powers, like those of other officers, are subject to and controlled by the statute. No such power has been, even if it could be, delegated to him. In this case the statute gave to plaintiff in error the right to a continuance, and the circuit judge could, neither by rule nor any judgment he could render, deprive him of the right without his consent.

Counsel urge the merits of the case of defendant in error. And to that we will say, there is no evidence in the record, and we cannot decide the case on statements of his wholly outside of the record. We know nothing of the evidence before the justice, or who was the principal witness on that trial, nor can we know from any thing in the record, and hence we shall not consider the case on any thing foreign to what is found in the record. For the palpable error in dismissing the appeal, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

GEORGE W. CARNEY.

v.

THOMAS TULLY *et al.*

1. MECHANICS' LIEN — *notice by sub-contractor.* The notice provided in the mechanics' lien law, to be given by a sub-contractor to the owner of the property, to hold him liable, must be in writing, and must be served personally. Service by mail is insufficient to charge him.

2. SAME — *law strictly construed.* The statute in relation to mechanics' liens, being in derogation of the common law, those claiming its benefits must bring themselves clearly within its provisions.

3. EVIDENCE — *jury bound to regard same.* A jury has no right to disregard the testimony of three witnesses as to a fact, in opposition to that of one only, from mere caprice, but are bound to give it its just weight.

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

Messrs. SPRINGER & CORWIN, for the appellant.

Messrs. RUNYON, AVERY & COMSTOCK, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from a decree rendered by the circuit court of Cook county, in an action under the mechanics' lien law of 1869, to recover from Carney, the owner of the lot, for materials furnished. The contractors, O'Connor & Co., undertook to erect the building, he having made default in the payment for the same.

Both O'Connor and appellant were served with process, and on trial by the court and jury, a decree was rendered against both the defendants — O'Connor in the sum of seven hundred and nineteen dollars and seventy-seven cents, and against Carney in the sum of six hundred and fifty dollars and fifteen cents.

To reverse this decree against himself, Carney appeals.

The only question to which we have directed our attention is, have appellees, the plaintiffs in the action, brought themselves within the provisions of the statute? The act is amendatory of the mechanics' lien law, and was designed to protect sub-contractors, in which relation appellees stood to appellant.

The second section of the act provides, the party claiming to have performed labor, or to have furnished materials to the original contractor, shall cause a notice to be served upon the owner or lessee, or his agent, of the fact of his having performed labor, or furnished materials, and that he shall hold the house or building and the owner's interest in the ground liable therefor. If, then, a contract was in writing between the original contractor and sub-contractor, a copy of it, if obtainable, is to be served with the notice, and attached thereto, and the same must be served within twenty days from the comple-

tion of the sub-contract, or within twenty days after payment should have been made to the person performing the labor or furnishing the material.

Section 3 provides for service on an absent owner. Sess. Laws 1869, pp. 255, 256.

Appellant was a resident of the place where the building was erected.

From the terms employed in the second section the conclusion is irresistible, as the notice must be in writing, and the form given, that there must be personal service. The statute itself is in derogation of the common law, and those claiming its benefits must bring themselves within its provisions. Service of a written notice always means actual, personal service. The notice, if any was served on appellant, was served on the 7th of November, 1872, and by Thomas Tully, one of the appellees. He states it was at appellant's house on Butterfield street, and there were present in the room, besides appellant, two other gentlemen, one of whom looked like appellant's brother.

Appellant denies in the most positive terms that any notice was personally served upon him by either of the appellees, Thomas Tully, nor by any one representing him, nor by his brother. A notice being handed him, he stated he had seen the notice before it was sent to him by mail.

Never saw Tully at his house but once—at the time he saw him there he did not deliver to him a copy of such notice as was shown him a moment ago—he, Tully, had another errand at that time—he demanded the contract between witness and O'Connor, which he refused to give him—his brother and a gentleman by the name of Rawson were sitting in the room with them the only time Tully called.

The person "who looked like appellant's brother" was Edward Carney, and he testified that he saw Thomas Tully at their house on Butterfield street, and heard a conversation between him and appellant—was there all the time until Tully went away. There was nothing said about a notice for mechanics' lien at that time by Tully—he did not serve a notice

in writing for mechanics' lien on his brother at that time—another man named Rawson was also present.

Rawson testifies he saw Tully at appellant's house—was there all the time Tully was—heard all the conversation between them—Tully asked for a contract—appellant said he would give him a copy, and sat down to write one—Tully went out—nothing whatever was said at that time about the service of a notice of a mechanics' lien. Tully did not leave with appellant a copy of any instrument or notice for mechanics' lien or any other.

That this was the same collection of individuals spoken of by Thomas Tully in his examination as a witness, there can be no doubt. Their testimony disproves the statements made by Tully about the service of a notice at that time. The evidence greatly preponderates against him, and we know of no rule of law or of reason why the jury should not have been influenced by it. They had no right from mere caprice to discard this testimony, but were bound to give to it its just weight. Had they done so, they would have found there was no personal service of notice upon appellant.

That a notice by mail reached appellant is established, but that was not the kind of service the statute contemplates, and the court should so have told the jury. It is impossible to say what kind of service the jury found. If by mail, that was not sufficient. If personal service at appellant's house, the weight of the evidence is decidedly against any such service by Thomas Tully, or any other person representing appellees.

For the want of service of notice the liability of appellant to appellees, admitting their claim to be just against O'Connor, had not accrued, and he was at liberty to make payment to the principal contractor, notwithstanding the sub-contract.

For the reasons given the decree is reversed.

Decree reversed.

MR. JUSTICE SCOTT: I do not concur in the reasoning or the conclusions of this opinion.

EPHRAIM MARSHALL

v.

ADDISON L. TRACY.

NEW PROMISE — *after bankruptcy, renews original liability.* A subsequent promise to pay a note barred by a discharge in bankruptcy, removes the bar created by the discharge and renders it competent evidence under the common counts as an original cause of action.

APPEAL from the Circuit Court of Peoria county; the Hon. J. W. COCHRAN, Judge, presiding.

Mr. E. G. JOHNSON, and Mr. L. HARMON, for the appellant.

Messrs. CRATTY BROTHERS, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The declaration in this case is in assumpsit, and contains only the common counts. Appellant pleaded his discharge in bankruptcy as to the several causes of action, to which appellee replied a new promise since the discharge, and on that plea issue was joined. With the declaration an itemized account was filed. Appellee offered, and read without objection at the time, as evidence, a promissory note of appellee. He also offered to read a chattel mortgage, which recited an indebtedness, but objections being interposed the same were sustained.

One question raised was, whether appellee could declare on the original cause of action, or whether he was bound to declare specially on the alleged new promise. Chitty, in his work on Pleading, states the rule to be "when the subsequent promise is effectual, it is sufficient to declare upon the original consideration, unless where the promise is conditional, in which case it seems to be necessary for the creditor to declare specially."

The authorities are not all harmonious on this question, but the doctrine best sustained by authority is that the original cause of action is not destroyed by the discharge in bank-

ruptcy. The bar which the discharge interposes may be removed by an unconditional new promise, and the debt revived upon the original consideration. *Shippey* v. *Henderson*, 14 Johns. 178; *Way* v. *Sperry*, 6 Cush. 238; 1 Chitty's Pleading, 54.

In *Way* v. *Sperry* it was decided an unconditional promise by the maker of a promissory note to pay the same to the payee imparted to it again the quality of negotiability, although the promise was founded on no new consideration, and was not in writing.

In the case at bar the new promise to pay, if one was made, removed the bar created by the discharge in bankruptcy, and hence the note was competent evidence, under the common counts, as an original cause of action. It was not necessary the promise should be in writing. *Way* v. *Sperry*, *supra*. In *Graham* v. *Hunt*, 8 B. Monroe, 7, to which our attention has been called, as holding the doctrine that a promise to pay a note barred by discharge in bankruptcy, to be valid must be in writing, the indebtedness seems to have been secured by a specialty, and it was held a mere parol promise to pay the debt did not revive the specialty by which it was originally secured. The case is not analogous, and can have no application to the case we are considering.

The only question about which we can have any doubt is, whether there was an unconditional promise on the part of appellant to pay appellee the indebtedness which was due him prior to the discharge in bankruptcy. The question was submitted to the jury on instructions sufficiently accurate to enable them to comprehend the real issues involved, and it is not perceived how we can do otherwise than regard the verdict as settling the controverted facts.

The evidence, though slight, would justify the conclusion reached. The verdict is not so palpably against the weight of the evidence, as suggested, as would authorize a reversal of the judgment for that reason alone.

The instructions to which exceptions are taken, though not

free from all imputation of unfairness in the manner of their construction, when construed with those given for appellant, could hardly be said to be of such a character as to mislead the jury. The substance of all the charges is, the jury must be satisfied from the evidence there was an unconditional promise, after the discharge in bankruptcy, to pay the indebtedness, before a recovery could be had. We can regard the verdict in no other light than as finding such a promise was made. This fact would support the judgment, and it must accordingly be affirmed.

Judgment affirmed.

CONRAD J. FRY

v.

ORLANDO B. BIDWELL.

GUARDIAN'S SALE — *notice of required.* Where the statute requires notice of the application of a guardian to sell real estate to be published in a newspaper at least once in each week for three successive weeks, or to be posted in three public places at least three weeks before the session of the court at which the application is to be made, it is sufficient if the notice is published for three successive weeks in a newspaper, and the first publication is made three weeks before the session of the court.

APPEAL from the Circuit Court of Stephenson county.

Mr. SMITH D. ATKIN, for the appellant.

Messrs. BARTON & BARNUM, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This is an appeal from an order of confirmation of a guardian's sale of real estate, where appellant was the purchaser.

The sole question is, whether the notice given by the guardian of his intended application for leave to sell the real estate, was published for a sufficient length of time.

The requirement of the statute is this: "Notice of such application shall be given to all persons concerned, by publication in some newspaper published in the county where the application is made, at least once each week for three successive weeks, or by setting up written or printed notices in three of the most public places in the county, at least three weeks before the session of the court at which such application shall be made."

The notice given by the guardian was, by publication in the Freeport *Journal*, a weekly newspaper, stating that on the third Monday of November, A. D. 1872, he would apply, etc.

The notice, as appears by the certificate of the publisher of the paper, was published in every issue of the paper, commencing October 23, 1872, and ending November 13, 1872. It was then published October 23d and 30th, and November 6th and 13th. The court sitting on the third Monday of November, convened on the 18th of that month.

Appellant's counsel contends, that if the notice is given by publication in a newspaper, the three successive weeks of such publication must be *completed*, at least three weeks before the session of the court at which the application is to be made; that is, that three weeks must intervene the *third* publication and the session of the court.

We look upon this as a forced and unnatural construction of the language of the act.

Two ways are provided of giving the notice:

First. It may be given by publishing in some newspaper, etc., "at least once each week for three successive weeks."

Second. It may be given by setting up written or printed notices, etc., "at least three weeks before the session of the court," etc.

The plain reading of the section seems to us to be, that all that is required where the notice is by publication is, that it should be at least once each week for three successive weeks; and that the clause, "at least three weeks before the session of the court," does not apply to such publication, but applies

only to the giving of the notice by setting up the written or printed notices. To give it the contrary construction contended for by appellant, it would read, notice shall be given by publication "at least once each week for three successive weeks, at least three weeks before the session of the court at which such application shall be made." Had the legislature intended that the third one of the three successive publications should be at least three weeks before the session of the court, we cannot think they would have adopted any such awkward form of phraseology as the above, but would have expressed such intention in plain and intelligible terms. When the notice is to be by "posting," there can be no question, that if the notices are posted up three weeks before the sitting of the court, that would be a sufficient notice. Could the legislature have intended that, if the notice is given by publication, it should be a *six* weeks' notice, twice as long as that by posting, thereby implying the setting up of written or printed notices the better form of notice? We think not

The only room for any question, we think, is whether the space of three full weeks should not elapse from the first publication to the sitting of the court; as in this case, if the three successive publications had been October 30, November 6th and 13th, then, although it would have been published once in each week for three successive weeks, yet notice would not have been given for the space of three weeks before the session of the court, as the first publication would have been only nineteen days before the first day of the term. But that question does not arise here, as twenty-six days elapsed from the first publication to the sitting of the court. The judgment of the court below will be affirmed.

Judgment affirmed.

Syllabus.

THE PEOPLE *ex rel.* Henry B. Miller, collector, etc., *v.* JAMES OTIS.

1. TAXES AND TAXATION—*jurisdiction to render judgment.* It is the report of the collector that gives the court jurisdiction to act on an application for judgment against delinquent lands for taxes and assessments due thereon, and unless the law in respect to such report is substantially complied with, the court will have no authority to act.

2. SAME—*law to be strictly construed.* In summary proceedings to divest owners of title to their property, the law under which the same is sought, is to be strictly construed, and nothing is allowed to be taken by intendment merely. This rule applies on application for judgment against real estate for taxes and assessments due thereon.

3. Under the city tax act of 1873, the county collector, in applying for judgment against real estate for unpaid taxes or special assessments, must make a report of the delinquent list, verified by his affidavit, the same as under the general revenue law, and if such report and affidavit are substantially defective, or different from that required, the court will acquire no jurisdiction to render judgment.

4. SAME—*sufficiency of collector's affidavit.* An affidavit of a county collector, on application for judgment against delinquent lands and lots, that his report shows a complete list, etc., "as shown by the returns made by the city collector," to him, all of which taxes and special assessments he has been "unable to collect for want of authority of law," is materially different from the one required by law, and the court will acquire no jurisdiction to render judgment.

5. SAME—*statute construed as to errors and informalities.* The 191st section of the revenue law, as amended by the act, approved May 30, 1873, authorizing amendments and obviating the effect of omissions, errors, etc., cannot be held to waive a substantial compliance with those steps which are essential to give jurisdiction. It aids and obviates defects of form, but not of substance.

6. The statement of the valuation of the property upon which a tax is extended, in the collector's report or return, and the oath or affidavit required to accompany it, are substantial requirements.

APPEAL from the County Court of Cook county; the Hon. M. R. M. WALLACE, Judge, presiding.

Mr. T. LYLE DICKEY, and Mr. FRANCIS ADAMS, for the appellant.

Messrs. TULEY, STILES & LEWIS, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

A number of cases are now before us, in which the questions discussed are the same as in this, and which must, consequently, be governed by the present opinion.

The questions arise upon an application by the county collector of Cook county to the county court of that county, at its July term, in 1874, for judgment for municipal taxes, special assessments and water assessments, claimed to be delinquent, and due to the city of Chicago. The several appellees appeared and defended against the proceedings, specifying in writing the particular causes of objection relied on. The court sustained the objections and refused to render judgment as asked by the county collector; and from these rulings the city caused appeals to be taken to this court.

The fifteenth section of the act entitled "An act in regard to the assessment of property and the levy and collection of taxes by incorporated cities in this State," approved April 15, 1873, which we shall hereafter, for convenience of designation, refer to as "the city tax act," requires the city collector, within such time as the city council may, by ordinance, provide, to make a report or return in writing, to the general officer of the county authorized and designated by the general revenue law of this State to advertise and sell lands for taxes due the county and State, of all the lands, town lots and real property on which he shall have been unable to collect taxes, special taxes and special assessments, due and unpaid respectively thereon. And the sixteenth section provides "when said general officer shall receive the report or return provided for in the preceding section, he shall proceed to obtain judgment against said lots, parcels of land and property, for said general taxes, special taxes and special assessments remaining due and

unpaid, in the same manner as may be by law provided for obtaining judgments against lands for taxes due and unpaid the county and State; and shall, in the same manner, proceed to sell the same for the said general taxes, special taxes and special assessments remaining due and unpaid. In obtaining said judgment and making said sale, the said officer shall be governed by the general revenue laws of this State, except when otherwise provided herein."

The general revenue law of 1872, in section 188, directs that the collector shall file with the county clerk the list of delinquent lands and lots, which shall be made out in numerical order, and contain all the information necessary to be recorded, at least five days before the commencement of the term at which application for judgment is to be made, and said clerk shall receive and record the same in a book to be kept for that purpose, which said book shall set forth the name of the owner, if known, the proper description of the land or lot, the year or years for which the tax or special assessment is due, the valuation upon which the tax is extended, the amount of each kind of tax or special assessment, the costs and total amount charged against such land or lot. Section 190 of the same law is as follows: "On the first day of the term at which judgment on delinquent lands and lots is prayed, it shall be the duty of the collector to report to the clerk all the lands or lots, as the case may be, upon which taxes and special assessments have been paid, if any, from the filing of the list mentioned in the foregoing section up to that time; and the clerk shall note the fact in the book in which the clerk has recorded the list, opposite each tract upon which such payments have been made.

"The collector, assisted by the clerk, shall compare and correct said list, and shall make and subscribe an affidavit, which shall be, as nearly as may be, in the following form:

"'I, ——, collector of the county of ——, do solemnly swear (or affirm, as the case may be,) that the foregoing is a true and correct record of the delinquent lands and lots within the county of ——, upon which I have been unable to collect

the taxes (and special assessments, interest and printers' fees, if any,) charged thereon, as required by law, for the year or years therein set forth; that said taxes now remain due and unpaid, as I verily believe.'

"Said affidavit shall be entered on the record, at the end of the list, and signed by the collector."

It is conceded that the delinquent list filed by the county collector fails to conform to the requirement of section 188, in that the valuation upon which the taxes and special assessments are extended is omitted. The affidavit filed by the collector, also, instead of conforming to section 190, is different, and, so far as is necessary to be quoted, is as follows: "Also showing a complete list of all the real estate, lands, blocks, sub-lots, pieces and parcels of land upon which the municipal taxes, special assessments and water assessments, heretofore assessed and levied by authority of said city of Chicago, for the years A. D. 1872, A. D. 1871, A. D. 1870 and A. D. 1869, respectively, remain due and unpaid, together with the amounts of such taxes, special assessments and water assessments for such years respectively assessed and levied thereon, and so remaining due and unpaid, and the names of the owners thereof, so far as known, *as shown by the return made by the city collector of the said city of Chicago to the treasurer and ex-officio collector of Cook county, Illinois, pursuant to law*, all of which taxes, special assessments and water assessments contained in the foregoing list, *I have been unable to collect for want of authority of law*, and which are this day reported to the county clerk," etc.

It has been frequently held by this court, that the report of the collector is what gives the court jurisdiction to act on the application for judgment in such cases, and unless the law, in this respect, is substantially complied with, the court can have no authority to act in the case. *Morrill* v. *Swartz*, 39 Ill. 108; *Charles* v. *Waugh*, 35 id. 315; *Fox* v. *Turtle*, 55 id. 377; *Marsh* v. *Chesnut*, 14 id. 223.

But it is argued on behalf of the city, that the discrepancies

between the requirements of the law and the report of the collector are not such as to affect the jurisdiction of the court, because, it is said, where there is any fact which, by the general revenue law, is required to be contained in the delinquent list, on applicotion for State and county taxes, but which, by the city tax act, is not required to be contained in the report of the city collector, and which the county collector cannot himself know, then such fact must, of necessity, be omitted from the list filed by the county collector with the county clerk, and such omission does not vitiate the return. And this is claimed on the ground that the two laws, being in *pari materia*, must be construed together, and the latter referring directly to the former, the collector is only required to make his application in conformity with the former, as near as may be. If we comprehend the force of this position, it may be more clearly but fairly stated thus: Although the city tax act directs that the county collector shall proceed to obtain judgment in the same manner as may be provided by law for obtaining judgments against lands for taxes due and unpaid the county and State, except when therein otherwise provided; and the general revenue law directs that, in order to obtain such judgment, a certain report, verified by a prescribed affidavit, shall be filed, and the city tax act neither dispenses with that report and affidavit, nor directs how the county collector shall obtain information from which he can intelligibly and truthfully make them, it must be held that it will be sufficient for the county collector to make another and different report, verified by affidavit, in accordance with the actual facts.

This assumes that the law must be sustained, and made to conform to what we may suppose to have been the purpose of its enactment, at all hazards, whether its provisions are practically adapted to that end or not. In our opinion, that is beyond any power with which courts are invested. In summary proceedings to divest owners of title to their property, the law is to be construed strictly, and nothing is allowed to be taken by intendment merely. The city tax act does not authorize judg-

ment to be rendered without the presentation of a report of the delinquent property, nor does it authorize the county collector to present the report of the city collector, as made to him, and have judgment upon that. It does not, as seems to be supposed, authorize him to present a report verified by affidavit, "*as near as may be*," as required by the general revenue law. That qualifying phrase only occurs in the clause investing the county court with jurisdiction to hear the application, and directs that it shall proceed "as near as may be, as upon application for judgment for State and county taxes;" and has no reference whatever to the steps to be taken by the county collector, which are defined in a preceding clause. Nor does the act prescribe what kind of report shall be presented by the county collector for the purpose of obtaining judgment, nor how any such report which he may present shall be verified. It is framed upon the hypothesis that the duties of the county collector in these respects are clearly and sufficiently defined, by the general revenue law, and allows neither the collector nor the courts any discretion upon the question. It must necessarily follow, therefore, if this hypothesis is not well founded, and the requirements of that act, being strictly followed, leave it impossible for the county collector to make the report and affidavit required by the general revenue law, the fault is in the law, and the remedy must be sought in the legislature, which alone is invested with power to amend the law.

The affidavit of the county collector, as required to be made by the general revenue law, in our opinion, clearly implies that he had legal authority to collect, and that his inability to do so, has resulted from his being unable to obtain that from which collection could be made. The language employed, in itself, would seem to imply this. In addition to this, however, it is evident, if there were no authority to collect, the affidavit would be wholly useless, since its sole office is to establish, *prima facie*, the delinquency of the tax payer, and this requires that he should have failed in his duty to pay. The county collector is designated as the officer as to whom he is

to be shown as having been delinquent, yet if the county collector had no authority to receive, as is to be inferred from the affidavit filed, it is impossible that the tax payer could have owed any duty to pay him, and so his delinquency could not possibly be established by simply showing the county collector's inability to collect.

The affidavit, as filed, departs materially from the language required by the law, and conveys an entirely different meaning. This we regard as a failure to comply with the law in a respect which was vital to the jurisdiction of the court.

Nor do we think that section one hundred and ninety-one of the general revenue law, as amended by the act approved May 30, 1873, does, as claimed, obviate the objection. The portion of that section claimed to have this effect is as follows: "In all judicial proceedings of any kind, for the collection of taxes and special assessments, all amendments may be made which, by law, could be made in any personal action pending in such court, and no assessment of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, completed or returned within the time required by law, or on account of the property having been changed or listed in the assessment or tax list without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate, or in any manner affect the tax or the assessment thereof; and any irregularity or informality in the assessment rolls or tax lists, or in any of the proceedings connected with the assessment or levy of such taxes, or any omission or defective act of any officer or officers connected with the assessment or levying of such taxes, may be in the discretion of the court corrected, supplied and made to conform to law by the court, or by the

person, in the presence of the court, from whose neglect or default the same was occasioned."

Broad and comprehensive as this language is, it cannot be held to authorize the courts to waive a substantial compliance with those steps which are essential to give jurisdiction.

The reasonable construction is, amendments shall be allowed to the same extent with regard to such proceedings, that they could be allowed in any and all personal actions in the court; and mere technical or formal errors and irregularities shall not affect the validity of the tax or assessment. When, therefore, the record is defective and the facts do not authorize an amendment to be made so as to make it conform to the requirements of the law, the question is whether the defect is one of substance or merely of form. If the former, it is not aided by the section—if the latter, it is.

We can but regard the statement of the valuation of the property upon which the tax was extended in the report or return of the collector, and the oath or affidavit required to accompany his report or return, as substantial requirements, and that the rights of tax payers might, in many instances, be materially prejudiced by their omission. No attempt was made to amend the record, in these respects, and make it conform to the requirements of the law, and, in our opinion, it was impossible that such amendments could have been made in conformity with the facts.

We express no opinion upon the other questions which are discussed in the briefs before us, inasmuch as what has been said is sufficient to affirm the judgment below.

Judgment affirmed.

HARVEY D. ASHLEY

v.

HORACE I. JOHNSON *et al.*

1. EVIDENCE — *competent to prove the fact of the execution of a writing by oral testimony.* On the trial of an action for a false arrest, it is competent to prove, by the justice of the peace who issued the warrant upon which the arrest was made, the fact that a written affidavit was made before him on which he issued the warrant.

2. SAME — *when contents of an affidavit may be proved by oral evidence.* Where a justice of the peace who issued a warrant for the arrest of a plaintiff in an action for false imprisonment, testifies to the fact that an affidavit in writing was made before him, upon which the warrant was issued, and the loss of the affidavit is proved, it is competent to prove its contents by oral evidence.

APPEAL from the Circuit Court of Livingston county; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding.

Mr. S. S. LAWRENCE, for the appellant.

Mr. WILLIAM T. AMENT, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by Harvey D. Ashley against Horace I. Johnson and O. C. Kilbury, in the circuit court of Livingston county, to recover for an alleged false arrest.

A default was entered as to O. C. Kilbury, and the defendant Johnson pleaded the general issue; a stipulation was filed that Johnson might introduce any and all evidence under the general issue that might or could be introduced under special pleas.

The cause was tried before a jury, and the defendant Johnson found not guilty, and the damages of plaintiff assessed at $25, against Kilbury.

The plaintiff entered a motion for a new trial which the court overruled, and rendered judgment upon the verdict.

The plaintiff brings the record here, and relies upon two grounds to obtain a reversal of the judgment.

First. The court admitted improper evidence for the defendant.

Second. The verdict of not guilty, as to Johnson, is against the weight of evidence.

The facts, in brief, out of which this litigation grew are these: On the 27th day of October, 1871, the plaintiff was driving through Livingston county a large herd of cattle. When near Fairbury, six head of cattle belonging to the defendant Johnson, by some means got into the drove and were being driven off with the herd. Johnson missed his cattle and followed the plaintiff to Fairbury, and at that place made some efforts to obtain them but did not succeed.

The plaintiff then went on with the drove, and when about two miles from Fairbury he was again overtaken by Johnson and a constable. Johnson obtained his cattle, and the plaintiff was arrested by the constable and taken to the office of a justice of the peace in Fairbury, where he remained a short time and left; on the next day he was again arrested by the defendant Kilbury and taken before the same justice of the peace, where a trial was had and he was discharged.

The evidence admitted to which exception was taken, was that of Ross, the justice of the peace. He was asked to state if a written affidavit was made before him upon which he issued the warrant under which the arrest was made.

We perceive no objection to this evidence. It was competent for the witness to state the fact that an affidavit was made; this the court permitted, but did not at that time allow the witness to state the contents of the affidavit.

After this, proof was introduced as to the loss of the affidavit, and the court allowed the contents of it to be proven. In this we see no error, as the proof was not objected to on the ground that the loss had not been established, but alone on the ground that it had not been legally established that an affidavit had ever existed.

Syllabus.

In regard to the other point made, that the verdict as to the defendant Johnson is contrary to the evidence. Without entering upon a critical review of the testimony introduced before the jury, it is a sufficient answer to the position assumed, that there is a clear and direct conflict of evidence, which it was the duty of the jury so far as possible to reconcile. This they did, and while we might be inclined to the belief that the verdict should have been the other way, yet we cannot on that ground disturb the finding.

This court has repeatedly held that where the evidence is conflicting we will not disturb the finding, unless the verdict is clearly against the weight of evidence. Such this record does not disclose. The judgment will therefore be affirmed.

Judgment affirmed.

PEORIA AND ROCK ISLAND RAILWAY COMPANY

v.

ROBERT MITCHELL.

1. PRACTICE — *change of venue.* An application for a change of venue should be made at the earliest opportunity, and where a party, knowing all the time of the ground relied upon for a change of venue, delays making his motion until towards the latter end of the term of court, and no reason is shown why the motion was not made on the first day of the term, a change of venue will not be granted.

2. SAME — *setting aside default discretionary.* Setting aside a default is a matter of discretion that this court will not control except in extreme cases, and where it is manifest the discretion has been abused to the great wrong and injury of the party complaining.

3. JUDGMENT — *when sufficiently definite and certain.* A judgment against a railroad company, on an appeal from an assessment of damages for land taken by it, which refers to the verdict wherein the land taken is properly described, is sufficiently definite and certain, as to the land for the taking of which the judgment is rendered.

4. EXECUTION — *when should be awarded.* Where the verdict of a jury, on an appeal in a case of assessment of damages for land condemned by a

railroad company, finds that the land has been taken by the company, and not merely that it is proposed to be taken, it is proper to award execution on the judgment.

APPEAL from the Circuit Court of Stark county; the Hon. J. W. COCHRAN, Judge, presiding.

Messrs. INGERSOLL & PUTERBAUGH, for the appellant.

Messrs. MCCULLOCH, STEVENS & WILSON, for the appellee.

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

An application was made by appellant to the county court of Stark county for the assessment of damages by reason of the appropriation of a portion of appellee's lands for railroad purposes. They were appointed, acted, and made their report to the circuit court, as required under the provisions of their charter. From the finding of the commissioners, so returned, appellee appealed, and, on the case being called for trial, no one appeared on behalf of appellant, and a default entered and the damages were assessed; a motion to set aside the default was entered, but overruled by the court. The record is brought to this court on appeal, and a reversal is asked.

It is first insisted the court below erred in refusing to grant a change of venue of the case. Even if it were conceded that the affidavit contained sufficient grounds, the application was not made in proper time. The affidavit states that the information of the grounds alleged came to the knowledge of affiant at the time the judge was appointed to his office, and the delay in making the application was because negotiations for a compromise were pending. The record shows that the court convened on the 7th day of April, 1873, and the motion for the change of venue was not made until the 17th of that month.

The sixth section of the venue law provides that a change shall not be allowed after the first term of the court at which

the party applying could be heard, unless he shall show the causes have arisen, or come to his knowledge after such term, and shall also give ten days' notice of his intention to apply, except where the causes have arisen or come to his knowledge within less than ten days of making the same. Regular practice required that the application should have been made at the earliest opportunity, for a change of venue. The party had no right to keep parties and witnesses in attendance till toward the latter end of the term, knowing all the time of the grounds relied on, and then make his motion. The statute contemplates no such practice. No reason is shown why the motion was not made on the first day of the term, without delaying ten days. The fact that propositions were pending for a compromise of the case in nowise prevented appellant from filing his petition and entering his motion. Nor was the notice of the intended application given, although the record shows that affiant knew of the grounds certainly ten days before the motion was entered, and we presume for a much longer period. This is a requirement of the statute, positive in its character, and which cannot be disregarded. There was no error in refusing to change the venue.

It is next urged that the court below should have set aside the default. That is a matter of discretion, that this court will not control, except in extreme cases, and when it is manifest that the discretion is abused, to the great wrong and injury of the defendant. In this case we can see no such abuse. The affidavit states that counsel had set the cause for hearing on Thursday of the first week, and on finding the day before that he could not be present at the trial, he telegraphed to opposing counsel to know if he would set the case for some day the next week, when he replied he was willing to fix it for any day of the next week, and appellant's counsel suggested no day, nor did he even reply. This certainly fixed no day, and it was left to the option of counsel to fix the day, which he failed to do.

The opposing counsel had a right to know what day the case

would stand for trial, that he might have his witnesses ready, and not be required to keep them in attendance until some day the following week appellant should indicate that they were ready. Appellant's counsel should have replied, fixing a day. Again, an attorney who was attending to other cases for appellant's counsel, when the case was called on Thursday, and appellee's counsel said he was willing any day should be fixed, so that he was sure of having a trial at that term, when the court suggested there might be no jury the next week, agreed that the case should be set on Saturday, the day it was tried. This attorney undertook to act for appellants, and opposing counsel was not informed that he had no power to act. We fail to see that appellants have any right to insist they have not been fairly dealt by in the matter. Their attorney could have named a day, or the attorney who fixed the day could have telegraphed him that it was fixed for Saturday, and he could have reached Toulon in time to have tried the case. It was all a matter of favor that consent was given to extend the time beyond the call of the case on the docket. Clients have rights, when insisted upon, their attorneys cannot concede for the accommodation of others.

We do not have, nor can we have enough of the facts before us to say whether or not the judgment is or not excessive. That we cannot determine unless we had all the evidence before us. It is, however, claimed that it should only have been for not exceeding fifty dollars. But, even supposing the jury allowed too much for the land taken, they found that appellee had been damaged $75 over and above the land taken, and from the counter affidavit, we think it was proper, or, perhaps, very decidedly too small. It appears that the witnesses varied in the price of the land from fifty to seventy-five dollars per acre; that forty rods of hedge was destroyed, worth two dollars per rod, and about two acres more of land were rendered almost useless, which should have enhanced the damages. Both affidavits considered, we are not prepared to

hold that injustice has been done, or that the court below abused its discretion in refusing to set aside the default.

It is urged that the judgment is indefinite and uncertain. The verdict is specific. It describes a strip of land taken, as one hundred feet wide, etc., as the same is laid out and surveyed over a specified quarter of land. The judgment describes it as "the land taken by the defendant, and assessed by the jury herein." The judgment refers to the verdict, and the verdict to the tract of land and the survey, for a description, and this is so certain that no one need mistake the premises for which the assessment was made and that was condemned for the use of the road. We do not regard the objection as well taken.

It is lastly urged that the court erred in awarding execution. The charter provides that the jury impaneled to try the appeal shall find the value of the land so taken as required by the company, and the damages over and above the benefits which shall accrue to the owner, and that the judgment of the court shall be entered accordingly. According to this provision, the verdict contains all that is necessary, and the judgment is not erroneous. The verdict finds that the land was taken, and not that it was proposed to be taken by the company. And when it is already taken, what other judgment could be properly entered? Surely not a judgment that the company pay when they should take the land. Certainly not a mere finding that appellee had sustained damage to the amount found by the jury, and that the company pay the amount, and leaving appellee to sue upon the judgment if not paid. Appellant says, under the charter, the company have a right to tender the money, and receive a deed. The awarding of an execution in nowise prevents appellant from tendering the money, and if appellee refuses to receive it, the court would stay the execution, but if they fail to make the tender, he should have the power to obtain the money for the land of which he has been deprived, and which the company, without paying for, have appropriated to their use. And the

only effectual means known to the law, is by execution for the money, or proceedings to recover the land.

The judgment of the court below is affirmed.

Judgment affirmed.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

CARL EBERT.

1. NEGLIGENCE — *injury resulting from want of outlook on railroad cars being pushed.* Where a person driving a team in a city on a very cold and blustering day, being muffled up to protect himself from the severity of the cold, while driving across a track near a public elevator, was struck by a car being propelled by an engine in the rear, and severely injured, and there was no one stationed on the car or on the ground to give warning, and it appeared, if there had been, the injury might have been avoided, it was *held,* that as the injury was the result of negligence on the part of the company, it was liable in damages to the injured party.

2. DAMAGES — *whether excessive.* A verdict of $10,000 damages in favor of one severely injured by negligence of a railway company, when the plaintiff was only a day laborer, and not wholly disabled, and the negligence was not reckless, was held so excessive as to justify the inference the jury were actuated by prejudice and passion, and should have been set aside. But a remittitur of $6,000 having been entered, and judgment entered for $4,000, it was *held,* that this was not so excessive as to justify a reversal.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. JNO. N. JEWETT, and Mr. CHARLES T. ADAMS, for the appellant.

Messrs. BRANDT & HOFFMAN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case, brought to the Cook circuit court, by Carl Ebert against the Illinois Central Railroad Com

pany, for an injury sustained by a collision of one of the trains of that company. The jury found for the plaintiff, and assessed his damages at ten thousand dollars. On motion made by defendants for a new trial, the plaintiff's attorney remitted six thousand dollars of the finding, whereupon the court overruled the motion for a new trial, and rendered judgment for the balance, being four thousand dollars, and the defendants appeal.

The errors assigned are, that the verdict is against the law and the evidence, and the damages excessive.

We are of opinion, after a careful perusal of the testimony, that the evidence sustains a verdict against the defendants. The accident happened on the grounds of the company, on a cold, blustering, snowy day, in January, 1873; a day on which one exposed to its blasts would use all the expedients at his command to ward off, or at least temper its severity. So it was with this plaintiff. He was employed hauling ice, and was muffled up to protect himself from the cold, going along at a slow pace with his load. On his route were several tracks of the defendants, which it was necessary for him to cross. These tracks, or some of them, ran into Buckingham's elevator, and as he was about crossing track No. two, so called, about forty feet from the elevator, a train of cars, not drawn, but propelled from the rear by an engine, ran into the wagon, pushed the horses and plaintiff into the elevator, killing the horses and seriously crippling the plaintiff, disabling him from the performance of the labor to which he is accustomed.

There was no outlook upon the train; no flagman at the crossing, and no means used by the servants of the company to apprise plaintiff of the approach of the train, though one or two witnesses testified the bell was rung, and one Dormedy, an employee at the elevator, testified that he made every effort he could, to notify plaintiff of the approach of the train, but that he was unheeded. It does not appear that plaintiff made any special effort to see if any train was approaching

on that track. He says he saw cars on it, but they were not in motion.

It was great negligence of the company in failing to have some person on the train on top of the forward cars, or upon the ground in front. It is no excuse that the day was cold and stormy, and that a person posted on the top of the cars would be exposed to danger. It is the duty of the servants of the company to expose themselves to danger when necessary, not to rush into danger recklessly, but to maintain their post let what may happen. Had a vigilant man been on the front car, it is not at all probable this accident would have occurred. Indeed, it is quite certain it would not. The accident, then, having been occasioned by the negligence of the company, they must bear the consequences — they must respond in damages.

Were the damages properly assessed in the case? Do the facts justify a finding so heavy? Ten thousand dollars is a very large sum of money, in the possession of which very few can boast. It is a small fortune, which few acquire in a life of incessant labor. This the jury awarded to one whose prospects in life did not extend beyond his wages as a day laborer, and who has not been, by the negligence of the defendants, wholly disabled. It is true, the company were at fault, but not so greatly as to aggravate it to wilfulness. Compensatory damages were all the jury were justified in awarding, under the evidence. A verdict for ten thousand dollars is so enormous as to justify the inference the jury were actuated by prejudice and passion, not listening to the dictates of cool judgment. The enormity of the finding so shocked the sense of justice of the plaintiff's counsel that they at once remitted more than one-half of the amount. We cannot but think the verdict was the result of passion and prejudice, and it is none the less so after the remittitur, for the incentives to the finding abide as well in what remains as in the original amount found. The verdict was for ten thousand dollars. That verdict was the result of passion and prejudice. If those incentives prompted the verdict they vitiate the verdict, and it should

have been set aside. But a practice has found place in our jurisprudence which sanctifies an outrageous verdict by entering a remittitur, and it has so often received the sanction of this court that it may be too late now to displace it.

The verdict, as it was made to be by the remittitur, is large, but we cannot say it is so excessive as to warrant this court in disturbing it. The judge before whom the cause was tried thought it right, and he had a better opportunity of understanding the merits of the case from the facts than we can have, and we must affirm the judgment. The instructions fairly presented the law of the case.

Judgment affirmed.

CHARLES T. BARNES

v.

BENJAMIN F. EHRMAN.

MARRIED WOMEN — *may execute mortgage with power of sale.* The statute which provides that "any married woman, being above the age of eighteen years, joining with her husband in the execution of any mortgage, conveyance, power of attorney or other writing of, or relating to the sale, conveyance or disposition of her lands or real estate, or any interest therein, shall be bound and concluded by the same, etc.," gives to a married woman, by her husband joining with her in its execution, power to execute a mortgage or deed of trust containing a power of sale, and a sale under such a power will effectually bar her equity of redemption.

APPEAL from the Superior Court of Cook county; the Hon. S. M. MOORE, Judge, presiding.

Mr. JAMES DUNNE, for the appellant.

Messrs. HOLMES, RICH & NOBLE, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The bill alleges that in March, 1873, Mary J. E. Foster was the owner of the lands involved in this controversy; that she and her husband, Charles G. Foster, were indebted to appellee in the sum of $7,500, for which they gave him their three promissory notes, each for the sum of $2,500, payable in one, two and three years, and for the better securing of such indebtedness, Mrs. Foster and her husband executed a mortgage, or deed of trust, upon her separate real estate, as described in the bill, which deed of trust contained a power of sale. Default was made in payment of the first note, and appellee, having advertised the property for sale, in accordance with the terms of the mortgage, this bill was filed to enjoin the sale, on the ground the power of sale contained in the mortgage, as well as all other covenants therein contained, are inoperative as to Mrs. Foster. Appellant is a purchaser from Mr. and Mrs. Foster, and now insists the mortgage constitutes no lien on the premises, and that he takes the property discharged from the indebtedness secured thereon.

It is not claimed Mrs. Foster, by joining with her husband, could not make a valid mortgage on her separate real estate, but it is argued the power of sale and all other covenants contained in the mortgage, beyond pledging her "interest in her estate," are void as against her.

It will not be necessary to inquire what authority a married woman had at common law, if any, to bind herself by covenants in relation to her separate estate, for we are of opinion the statute in force at the date of this transaction gave her, by her husband joining with her in its execution, power to execute a mortgage or deed of trust containing a power of sale, and that a sale under such a power would effectually bar her equity of redemption. That statute provides: "Any married woman, being above the age of eighteen years, joining with her husband in the execution of any mortgage, conveyance, power of attorney, or other writing of or relating to the sale,

conveyance, or other disposition of her lands or real estate, or any interest therein, shall be bound and concluded by the same in respect to her right, title, claim or interest in such estate as if she were sole." 2 Gross' Stat. 53, § 90.

The power of sale usually contained in a mortgage or deed of trust is an irrevocable authority to aid in the alienation of the estate, and bears no analogy to covenants declared by the common law to be inoperative in the deed of a married woman.

It is a power of attorney in relation to the sale of her separate estate, and having joined with her husband in its execution, it is authorized by the statute, and may be enforced against her to the effectually barring of her equity of redemption in the premises to be conveyed.

It will not be necessary to consider the point made on the insufficiency of the notice. No sale was made under the notice given, the same having been stayed by the temporary injunction. In case a sale shall hereafter be made, it must be done after new notice given in accordance with the terms of the mortgage.

The bill was properly dismissed and the decree will be affirmed.

Decree affirmed.

MORRIS B. DERRICK

v.

THE LAMAR INSURANCE COMPANY.

1. APPEAL — *when may be prosecuted by one not named a party to the suit.* Where, on a creditor's bill, the cause is referred to the master in chancery to take proofs of all claims against the estate of the defendant which may be presented to the receiver, and a claim is sought to be proved before the master by a creditor who is not a party to the bill, and the master reports to the court that he has disallowed the claim, and upon exceptions taken to the report the court overrules the exceptions and sustains the

report, an appeal on behalf of such claimant will lie to the Supreme Court.

2. ASSIGNMENT — *of insurance policy, may be vacated if obtained by misrepresentation.* Where a policyholder who had sustained a loss of property insured, was induced, by false representations of the officers of the company issuing the policy as to the ability of the company to pay its debts, to assign his policy for less than was due on it, to one who was acting for the company in settling its losses, in concurrence with the officers making the false representation, it was held that the assignment should be annulled and the policyholder entitled to recover on his policy in a court of equity.

3. LIMITATION — *clause of as to suit, in insurance policy, waived by fraud on part of company.* A clause in an insurance policy limiting the right of action on the policy to a specified period of time is waived if the company, by fraud, or by holding out reasonable hopes of an adjustment, prevent the assured from bringing suit within the time limited.

APPEAL from the Superior Court of Cook county; the Hon. S. M. MOORE, Judge, presiding.

Mr. F. C. INGALLS, for the appellant.

Messrs. SHUFELDT, BALL & WESTOVER, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

Edwin Burnham and Edward R. Burnham having before recovered a judgment against the Lamar Insurance Company, on the 23d day of October, 1872, filed their creditor's bill against the company and others, in the Superior Court of Cook county, to obtain satisfaction of the judgment.

Such proceedings were had upon the bill, that on the 23d of November, 1872, a receiver of the insurance company was appointed by the court below, vested with all the rights and property of the company, with power to prosecute and defend all suits, collect all moneys due the corporation, and enforce all liabilities of its stockholders. On the 18th day of January, 1873, the court decreed that the receiver, out of the proceeds of collections made by him, pay the costs and expenses, and then pay to the complainants, and to all other creditors of the Lamar Insurance Company who should come in and file their

claims under that decree, *pro rata*, or share and share alike, until all the demands against said company should be paid in full. Upon the report of the receiver, showing that there were divers claims against the company, and that he had no means of determining their amounts and validity, it was ordered by the court, May 1, 1873, that it be referred to the master to take proofs "of all claims against the Lamar Insurance Company which may have been or may hereafter be presented to the receiver," and ascertain the amounts thereof, and whether the same are just and valid claims. Afterward, on October 31, 1873, the court ordered that all persons having claims against the Lamar Insurance Company or its property present and prove the same before the master within ninety days from the entry of the order, or be forever barred from sharing in the estate or assets of said company, and that the receiver publish notice of the limitation. The notice was duly published, and on December 3, 1873, the appellant, Morris B. Derrick, in pursuance of the order of the court, and within the time therein limited, presented to, and made proof of, before the master, a claim against the company for a loss by the fire of 1871, at Chicago, of $4,865 on property upon which he held a policy of insurance in the Lamar Insurance Company for $3,500.

On the 11th day of June, 1874, the master made report to the court of the proofs and his finding thereon, and that from the proofs he found against the claim of appellant, for the reason that previous to his filing his claim before the master, he had assigned his rights, under the policy of insurance and proof of loss, to John H. Wise. Exceptions were taken to the master's report, on hearing of which June 11, 1874, the court overruled the same, and adjudged that appellant's claim be rejected and disallowed, wherefrom this appeal was taken.

It is objected that the appellant cannot maintain the appeal, because he is not a party to the suit or to the record. The bill was not filed for the benefit of others as well as the complainants, and it is true that appellant was not a party to the

suit, nor had he filed a petition to be made a party and to share in the benefits of the decree; yet, appellant was a party in interest, had rights to be adjudicated in the court below, and he was properly there before the master, in pursuance of an order of the court.

It is laid down in Barbour's Chancery Practice, vol. 1, p. 382, that it is not necessary that the person who appeals should be actually a party to the record, provided he has an interest in the question which may be affected by the decree or order appealed from; and that even creditors coming in before the master under a decree have been held entitled to appeal, although not parties to the bill, because the decree affected their interests, and that a creditor coming in before a master, and having a claim disallowed on exceptions to the report, may appeal from the order disallowing the exceptions. In *Strike* v. *McDonald*, 2 Harr. & Gill, 191, there were two modes recognized as being according to established practice in that State, whereby other creditors could be permitted to come in and participate in cases of this sort, namely, either by petition, or by filing the vouchers of their claims. We accede to this, as a proper rule of practice.

We are of opinion the appeal in this case lies.

It appeared from the proofs that the risks of the Lamar Insurance Company had been reinsured by the People's Insurance Company of San Francisco, which latter company was made a party to the bill. The assignment of the policy from appellant to John H. Wise, which was stated by the master as the reason for rejecting appellant's claim, was under the following circumstances. Wise was the vice-president of the People's Company, and acting on its behalf, in settling losses under policies which had been given by the Lamar Company and reinsured by the People's Company. The sum received by appellant for the assignment was $712.50, and he was induced to make such compromise in consequence of the misrepresentations, as he testified, of the principal officer of the Lamar Company, of its resources and ability to pay its losses. The com-

promise and settlement were effected by the concurrent action of the principal officers of the companies. The testimony on that subject is that of appellant alone, and that quite clearly makes out such a case of misrepresentation as should vacate the compromise and annul the assignment, Wise appearing not to be a *bona fide* assignee, but to have been acting on behalf of the People's Company, so that the assignment should be regarded as no more than an attempted form of extinguishment of the policy. Here, as Wise had an apparent interest as assignee, the more proper course would have been for appellant to have proceeded by petition, making Wise a party, so that he might have had an opportunity to assert whatever rights he might claim, and that they might be bound by the decree.

But as, according to the proofs made, appellant had a just claim for relief, and the apparent interest of Wise was but nominal and formal, if the latter was deemed a necessary party, he should have been brought into court, instead of dismissing appellant's claim.

It is objected that appellant's claim is barred by the limitation clause in the policy limiting the right of action to one year. In *Peoria Marine and Fire Insurance Co.* v. *Whitehill*, 25 Ill. 466, and *Fire and Marine Insurance Co.* v. *Chesnut et al.* 50 id. 112, it was held that such a provision in a policy would be waived if the company, by fraud, or by holding out reasonable hopes of an adjustment, deterred the assured from bringing suit within the time limited. This supposed fair compromise of the claim with the company, within the year, and the non-discovery of its alleged unfairness until eighteen months afterward, sufficiently accounts for not bringing the suit within the year, and the company, by its own conduct, waived the provision, within the principle of the above decisions.

We are of opinion there was error in the order and decree of the court below, in overruling the exceptions to the master's report, and disallowing the claim of the appellant, and such

order and decree are reversed, and the cause remanded for further proceedings, with leave to appellant to file his petition to come in and prove his claim, making John H. Wise a party.

Decree reversed.

WILLIAM M. ZEARING

v.

JOHN RABER.

1. STREET — *lots sold in reference to.* Where the owner of land has the same platted, showing a street, and sells a part with reference to such street, which is mentioned in the description in the deed, although the street is not opened, or the map thereof acknowledged or recorded, this will be an immediate dedication of the street as to such purchaser, and the grantor and all persons claiming under him will be estopped from denying the existence of the street.

2. If land is conveyed as bounded on a street, this is not merely a description, but an implied covenant that there is such a street, and the grantor and those claiming under him are forever estopped from disputing the existence of such street.

3. CHANCERY JURISDICTION — *to preserve use of street.* Where lots are sold with reference to a street abutting the same, a court of equity will interfere to prevent a party claiming under the original owner and grantor from destroying the full use of such street as originally designed.

APPEAL from the Superior Court of Cook county; the Hon. SAMUEL M. MOORE, Judge, presiding.

This was a bill in chancery, by the appellee against the appellant, to prevent a threatened obstruction of the use of a street or way. The facts appear in the opinion.

Messrs. DENT & BLACK, and Mr. W. M. ZEARING, for the appellant.

Messrs. ROSENTHAL & PENCE, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

James, Springer and Green, being owners, as tenants in common, of a certain out lot, south and in the immediate vicinity of the city of Chicago (except a strip extending through its center from north to south, used as railroad right of way), laid out a street across such lot from east to west, extending from State street to what was then called Thompson street, but is now known as Wentworth avenue. They caused ditches to be dug and a roadway thrown up along the street, so far as it extended on their ground, and erected a fence on its north side from State street to the railroad right of way. They also prepared a map of the lot, showing the location of this street, designated thereon "Green street."

The map, however, was neither acknowledged nor recorded for the purpose of making a statutory dedication of the street.

One Walenta subsequently became the purchaser of a portion of the lot, which was conveyed to him by deed from James, Springer and Green, by the following description: "Commencing at the south east corner of said lot 5, and running thence due north 152 feet to a street 66 feet wide, extending from State street to Thompson street; thence due west 672 feet, more or less, to land owned and occupied by the Michigan Southern and Chicago and Rock Island railroads; thence south 152 feet, thence east 672 feet, more or less, to the place of beginning."

This property was subsequently conveyed to appellee, by deed, by the same description. After the sale and conveyance to Walenta, we may assume, for the purposes of the questions to be determined, without critically noticing the several deeds relating to his title, appellant became the owner of the residue of the lot, except that part occupied as railroad right of way. In the deeds under which he derived title, this language occurs in describing the property conveyed to him: * * * lot number 5, in section 16, township 38 north, range 14 east, excepting and reserving so much of lot 5 as was sold to Ru-

dolph Walenta, October 4th, 1859, and described as follows:" (as in said deed to Walenta) "the premises hereby conveyed, containing $3\frac{65}{100}$ acres, more or less, subject to any and all railroads, public streets, lanes, alleys or highways running upon, along or through said premises, or any part thereof."

Aside from the language in the deeds, the evidence is clear that Walenta, in purchasing from James, Springer and Green, and appellee, in purchasing from him, did so with express reference to the supposed existence of the street; and that when appellant purchased, he was fully informed of what had been done to establish the street, and what rights had been acquired on the faith thereof.

The question is, can appellant now be heard to deny the existence of the street?

It is unimportant whether the public have so far accepted the dedication as to be bound to keep the street in repair, since the question involved is simply one of private right. Nor do we conceive it necessary to determine where the fee in the soil of the supposed street is; whether it is in the adjacent property holders to the center of the street, or remains in the original owners until there shall be sufficient evidence of acceptance by the public. If appellee is entitled to have the street kept open for use, it will be sufficient.

That appellant is, under the facts given, estopped from denying the existence of the street, can hardly admit of controversy. The principle applicable is well stated by the editors of Smith's Leading Cases (7th Am. ed., vol. 2, 154), in a review of the authorities relating to the point; and inasmuch as what is there said covers the entire ground in controversy, and meets with our approval, we shall content ourselves with transcribing it.

"If one owning land exhibit a map of it, on which a street is defined, though not as yet opened, and building lots be sold by him with reference to a front or rear on that street, or lots he conveyed being described as by streets, (*Scheuler* v. *Commonwealth*, 26 Penn. St. 62 and ed. 29) this is an immediate

dedication of that street, and the purchasers of lots have a right to have that street thrown open forever; *Wyman* v. *Mayor, etc.*, 11 Wend. 487; *Livingston* v. *Mayor, etc.*, 8 id. 85; and see the *Matter of Twenty-ninth and Thirty-ninth Streets*, 1 Hill, (N. Y.) 189, 192; and this principle is not limited in its application to the single street on which such lots may be situated. If the owner of land lays out and establishes a town, and makes and exhibits a plan of the town, with various plats of spare ground, such as streets, alleys, quays, etc., and sells the lots with clear reference to that plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege and advantage which the plan represents as belonging to them as a part of the town, or to their owners as citizens of the town. And the right thus passing to the purchasers is not the mere right that such purchaser may use these streets, or other public places, according to their appropriate purposes, but a right vesting in the purchasers, that all persons whatever, as their occasion may require or invite, may so use them; in other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers, that the streets and other public places, indicated as such upon the plan, shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use. *Rowan's Ex.* v. *Town of Portland*, 8 B. Monr. 232, 237; see also *Bowling Green* v. *Hobsen*, 3 id. 478, 481; *Huber et al.* v. *Gazley et al.* 18 Ohio 18; *Dummer* v. *Doe ex dem. Selectmen of Jersey City*, Spencer, 86, 106; *Wickliffe* v. *City of Lexington*, 11 B. Monr. 163."

Other authorities, cited in appellee's briefs, will, on examination, be found fully sustaining this quotation. Thus in *Parker* v. *Smith*, 17 Mass. 412, and in *Thomas* v. *Poole*, 7 Gray, 83, it is held that the general principle often recognized in that State is, "If land be conveyed, as bounded upon a way or street, this is not merely a description, but an implied covenant that there is such a way, and the grantor and his heirs are estopped to deny such a way as existing. So also a bound-

ary, on a passage-way two rods wide, which is to be laid out between the premises and land of A, estops the grantor, and those claiming under him, to deny the existence of the passage-way. *Tufts* v. *Charlestown*, 1 Gray, 271."

To the same effect is *Hawley* v. *The Mayor*, 33 Md. 280; see also *Smith* v. *Lock*, 18 Mich. 56; *Trustees et al.* v. *Walsh*, 57 Ill. 368.

The principle is equally applicable to the portion of the street lying west as to that lying east of the railroad right of way, the description in the deed to Walenta expressly stating that the line of the property conveyed ran *north to a street sixty-six feet wide, extending from State street to Thompson street;* and the conveyances to appellant, in clear and direct terms, *excepting public streets, etc., running upon or through said premises.* What difficulties may be encountered in crossing the railroad right of way, or in opening up the street there, in nowise concern appellant. He has no right in the streets laid out over the lot by his grantor, and appellee is entitled to have them as they were represented when his property was conveyed to Walenta.

The only remaining question relates to the jurisdiction of a court of equity, and upon this we entertain no doubt. The evidence shows a threatened nuisance, tending to deprive appellee and others of the full and free use of this street, as he is entitled to have it used, and this is a well recognized ground for equitable interposition. 2 Story's Equity Jurisprudence, § 927; *Corning* v. *Lowrie*, 6 Johns. Ch. 439; *Rowan's Ex.* v. *Town of Portland*, 8 B. Monr. 232; *Hills* v. *Miller*, 3 Paige, 254.

We see no cause to disturb the decree below, and it is therefore affirmed.

Decree affirmed.

JOHN HATCH *et al.*

v.

WILLIAM A. JORDON.

1. FRAUDULENT CONVEYANCE — *both parties must participate in fraud.* In order to impeach a conveyance of land for fraud, both grantor and grantee must be shown to have intended to commit the fraud as against creditors of the grantor.

2. SAME — *fraud not presumed.* Fraud against creditors in a conveyance of the debtor's property cannot be presumed, but must be proved.

3. When a debtor not in debt sells his interest in land to another and receives payment in full, and after debts are contracted by the firm of which he is a member, he conveys the land to the purchaser, neither he nor his grantee having any knowledge of the indebtedness, the conveyance cannot be impeached for fraud as to the creditors.

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

Messrs. OLIN & PHELPS, for the appellants.

Messrs. BRECKENRIDGE & CARNSEY, for the appellee.

MR. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, exhibited in the circuit court of Will county, by William A. Jordon, a judgment creditor of John Hatch, against appellants, John N. and Sabrina S. Hatch, to set aside a deed made by John Hatch to Sabrina S. Hatch, and to subject the land conveyed by the deed to the payment of certain judgments.

The circuit court rendered a decree setting aside the deed and subjecting the land to the lien of the judgments, to reverse which the defendants to the bill have prosecuted an appeal.

The circuit court set aside the deed, on the ground that it was fraudulent as against creditors, and the only question presented by the record is, whether the evidence upon which the

court based the decree was sufficient to establish fraud in the conveyance of the land.

It appears from the evidence that in the year 1869, John S. Hatch died intestate, leaving a widow and son, appellants, as his only heirs. His estate consisted of a homestead of twenty acres, the land now in question, a ten-acre wood-lot, and some $5,000 in bonds, notes and mortgages, and a small quantity of personal property.

The estate being free from indebtedness, no administration was had upon it.

The appellant John Hatch became of age in May, 1870; in June following he formed a copartnership with one Edward Jordon, a brother of appellee, in the hardware business. The business was conducted in the firm name of Jordon & Hatch.

In 1871, the firm became indebted to appellee, and several notes were given, signed by the firm, for the indebtedness. The first was dated April 15th, 1871, due October 15th, 1871. The last note dated July 1st, 1871, due July 20th, 1872. Judgments were rendered upon a part of these notes August the 20th, 1872, and upon the remainder in the month of December following.

Prior to the rendition of the judgments, and on the 2d day of March, 1872, John Hatch conveyed to Sabrina S. Hatch all interest he held in the homestead.

Thus far there is no dispute in regard to the facts. The complainant examined several witnesses, but no new facts were elicited from them which could impeach the fairness of the conveyance.

Appellants were both examined as witnesses, and if the decree is to be sustained, it must be done by the facts obtained from their evidence.

Sabrina S. Hatch testifies, that in the spring of 1870 she and her son agreed upon a division of the property. By the arrangement her son was to take a $500 bond, one horse and a wagon and the homestead; and she was to have the rest of the property. A few days after this division of the

estate was agreed upon, John Hatch conceived the notion of forming a partnership with Jordon.

In order to raise funds to accomplish this purpose, he then sold his interest in the homestead to the appellant Sabrina S. Hatch, for $3,000, which she paid over to him. She remained in possession of the land, but no deed was executed by John to her until the 2d day of March, 1872.

The testimony of John Hatch in regard to the transaction agrees in substance with that of his mother.

By what process of reasoning this evidence establishes fraud in the conveyance of the land we are at a loss to understand.

At the time the contract was made between appellants, and when John Hatch received payment in full for the land, the debt upon which judgment was subsequently rendered, was not in existence, and at that time it is neither claimed nor pretended that John Hatch was indebted to any person. When the purchase money was paid and Sabrina S. Hatch was left in the possession of the land, the sale was complete, and had a court of equity been called upon, a conveyance of the land might have been decreed.

There is another feature about this transaction that shows the conveyance was not made for the purpose of defrauding creditors.

The notes upon which appellee obtained judgment were not signed by John Hatch, but they were executed by his partner in the name of the firm. At the time the deed was executed John Hatch testifies he had no knowledge of the existence of the notes or the debt for which they were given; he did not know the firm was indebted to appellee, except upon one note which was secured by mortgage on real estate; that he had no knowledge of these notes until a summons was served upon him some five months after the deed was made to his mother.

This being true, and there being no evidence in the record to dispute it, upon what ground it can be insisted the deed

was executed by appellant with an intent to defraud creditors it is difficult to perceive.

At the time the deed was executed it does not appear that Sabrina S. Hatch had any knowledge or suspicion that her son was indebted in any amount whatever, on the contrary she testifies she had no knowledge that he was indebted to any person except the amount he owed her. If her evidence be true, and we fail to find any thing in the record to impeach it, she bought the land in 1870 and paid the purchase money long before any debt was in existence; that five months before any suit was commenced against John Hatch to obtain a judgment, she in good faith obtained a deed, without knowledge that he was involved. Under such circumstances fraud could not be imputed to her, even had it been established that her grantor made the deed to place the property beyond the reach of creditors.

We understand the rule to be well settled in this State that, in order to impeach a conveyance for fraud, both vendor and vendee must be shown to have intended to commit the fraud, before the deed can be avoided. *Gridley* v. *Bingham*, 51 Ill. 153; *Ewing* v. *Runkle*, 20 id. 448; *Myers* v. *Kinzie*, 26 id. 36. It is also a well settled doctrine that fraud cannot be presumed, but must be proven. Under this rule, and in view of the doctrine announced in the cases cited *supra*, we do not think the evidence before the court was sufficient to impeach the conveyance of March 2d, 1872.

The record contains some evidence in regard to other property, but it has no bearing upon the conveyance of the property involved in the decree, and hence it is not necessary to notice it here. The decree will be reversed and bill will be dismissed.

Decree reversed.

AARON BOWERS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. CREDIBILITY OF WITNESS — *instruction may be based on statements made out of court.* Where a party as a witness has made statements out of court different from those on the stand, an instruction that if he had been successfully impeached, or had willfully sworn falsely as to any matter or thing material to the issue, then the jury might disregard his entire evidence, unless corroborated by other unimpeached testimony, is not erroneous, as it is for the jury to say what the statements amount to as grounds of impeachment.

2. SAME — *rule for judging weight of testimony.* In weighing the evidence, it is the duty of the jury to take into consideration the deportment of the witnesses while testifying, as well as any interest they may have in the result of the suit, and it is not error to instruct them to consider these facts.

3. NEW TRIAL — *newly discovered evidence.* When newly discovered evidence is merely cumulative, and not of a decisive character, and the party has shown no diligence in finding it before the trial, a new trial will not be granted.

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

Mr. HARVEY E. SHIELDS, and Mr. JOHN PORTER, for the appellant.

Messrs. HANNAMAN & WILLOUGHBY, for the People.

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

This was a prosecution under the bastardy act, against Aaron Bowers. The charge was that he was the father of a bastard child by Hannah C. Johnson. He was bound over for his appearance at the circuit court, where, on a trial, the jury found him to be the father of the child. A motion for a new trial was entered, but overruled by the court, and the judgment required

by the statute was entered, and this appeal was taken, and various errors are assigned.

Amongst others, it is insisted that the court erred in giving, refusing and modifying instructions to the jury. The first instruction to which exceptions are taken was the first in the series given on the part of the prosecution. It informs the jury that if they believe that the witness named had been successfully impeached, or had wilfully sworn falsely as to any matter or thing material to the issue, then the jury might disregard his entire evidence, unless corroborated by other unimpeached testimony. It is urged that there was no ground for the instruction, but the evidence shows that he had made statements out of court different from those he made on the stand. It was for the jury to say what the statements amounted to as grounds of impeachment. In this there was no error.

We fail to perceive any force in the criticism to the fifth instruction for the prosecution. It certainly asked no more than a party has the right to require of the jury. In weighing the evidence it is the duty of the jury to take into consideration the deportment of the witnesses whilst testifying, as well as any interest they may have in the result of the suit, and it was no error for the court to instruct them that they should consider these facts in reference to any one or all of the witnesses. If appellant desired such an instruction regarding any witness on the part of the prosecution, he should have asked it, and the court would no doubt have given it. Nor can we see that the striking out of the word "real" before that of "father," in the first and second of appellant's instructions, could have in the slightest degree operated to his prejudice. It did not change the meaning in the slightest degree, and could not have misled the jury.

It is also insisted that the evidence does not sustain the verdict. On examining it we find that it is irreconcilably conflicting, and it was for the jury to determine to which side they should give the weight. The evidence was all fairly before them, and, seeing and hearing the witnesses testify, they

had every facility to find the truth, and with its finding we are not dissatisfied.

The affidavits filed in support of the motion for a new trial, only disclose cumulative evidence, which is by no means conclusive in its character. Even had it been before the jury, we are not prepared to say the result would have been different. All know that there is nothing in which all persons are more liable to be mistaken than in the recollection of dates. There are very few, if any, who can remember dates accurately. Our experience has taught us that with the most retentive memories, the most truthful and upright, such mistakes are common. Again, appellant does not show diligence in endeavoring to procure this evidence. Whilst the evidence is conflicting, several witnesses do say that the prosecuting witness, on the hearing before the justice, fixed the eleventh day of December, on Monday of the week in that month, which was the eleventh, as the time when the coition occurred. We think the evidence clearly preponderates in favor of the fact that she did so fix the day. If so, appellant was fully apprised before the trial that it was on the eleventh, and not the sixteenth, for which he would have to defend himself from the charge. The entire record considered, we are not able to find any error for which the judgment of the circuit court should be reversed, and it must be affirmed.

Judgment affirmed.

ASA SCOTT

v.

HENRY BRYSON.

1. TRESPASS — *when it lies.* Trespass is a possessory action, and the plaintiff must, at the time the injury is committed, have an actual or constructive possession as well as a general or special property in the chattel injured, carried away or destroyed, in order to maintain the action; and

though the possession be tortious, yet trespass lies against a stranger who divests such possession.

2. EXEMPLARY DAMAGES — *in trespass.* Where a landlord takes his tenant's corn under an honest belief that he has the right to sell the same and divide the proceeds, without any notice of a division by the tenant, exemplary damages should not be given against him in an action of trespass by the tenant.

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

Messrs. DINSMOOR & STAGER, for the appellant.

Messrs. KILGOUR & MANAHAN, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

The declaration in this case was in trespass *de bonis asportatis*, for taking and carrying away a quantity of corn. Plea, the general issue.

Trespass is a possessory action; and the plaintiff must, at the time of the injury committed, have an actual or constructive possession of, as well as a general, special, or qualified property in, the chattel injured, carried away or destroyed, in order to maintain the action; and though the possession be tortious, yet trespass may be maintained against a stranger who divests such possession.

The theory of plaintiff, Bryson's, case was, that he worked Scott's farm on shares, from the spring of 1872, and was to have half the crops, the small grains to be divided at the machine, the corn to be divided in the field and put in cribs. He testifies that this was the contract under which he tilled the land, and that he divided the corn in the rows. Scott, the defendant, took no part in the division, and did not know that plaintiff had made one. The cribs were all under one roof, were really one, but divided into several compartments. Scott shelled the corn which plaintiff claims to have set apart as his own, and hauled it off, except about thirty-five bushels, to Sterling and sold it.

The action was brought for taking away this corn. Scott testifies that the agreement, under which the corn was raised, was, that he was to furnish tools and seed and Bryson the labor and teams. The latter was to live on the place one year, was to raise the crops, etc., and put the corn in the cribs. That the grain was all to be his, Scott's, when it was put into the cribs, and he was to allow Bryson the prices at Sterling for one-half of it. The defendant introduced evidence of the declarations of Bryson to several persons to the same effect. These declarations were denied by Bryson, and it appeared, by uncontroverted evidence, that the parties did, in fact, divide oats and wheat in the manner Bryson testified they were to be divided. Under these circumstances and this conflict of evidence the jury found for the plaintiff, and assessed his damages at two hundred and fifty dollars, and the court, overruling defendant's motion for a new trial, gave judgment upon the verdict, from which defendant took an appeal to this court.

The parties do not disagree in their testimony that Bryson was to work Scott's land on shares, and was to have half the crop. Nor does the defendant deny that by the agreement the crops were to be divided as stated by plaintiff; but his version of the transaction was, that, when so divided, the whole were to belong to him and he was to pay plaintiff, for his share, the price at Sterling.

The bill of exceptions purports to contain all the evidence, but contains no instructions, so that we cannot judicially know what rule of law was laid down by the court as to the measure of damages. The evidence, however, is uncontradicted that the quantity of corn taken and sold by Scott, was just eight hundred bushels, and that the market value was twenty-two cents per bushel. Laying out of view, therefore, the defendant's evidence, tending to show an agreement with the plaintiff that he, the defendant, was to have the right to sell the corn and allow the plaintiff the market price at Sterling, the judgment exceeds the actual damages proven, by the sum of seventy-four dollars. This finding can be justified only upon the ground of

the excess being for smart money or punitive damages. We have examined this record with care, and find in the testimony no basis for punitive damages. If Bryson made the division, as he testifies, he gave Scott no notice of the fact; nor did he inform him which compartment of the crib contained his (Bryson's) share and which Scott's. There is a strong preponderance of evidence that Scott took the corn in question under a claim of right, made in good faith. He testifies himself that the original agreement was, that he was to have plaintiffs' share, and allow him the market price at Sterling for it. Several other witnesses testify to plaintiff's admissions to the same effect. This evidence stands opposed only by plaintiff's unsupported testimony. Under such a state of the case it would be a perversion of the principle upon which the rule allowing punitive damages rests, to permit this verdict to stand. The court below erred in not granting the defendant's motion for a new trial, and for that error the judgment must be reversed and the cause remanded

Judgment reversed.

JOHN KELLY

v.

GILMAN GRAVES.

1. ASSIGNMENT — *proof to hold assignor liable.* In order to hold the indorser of a promissory note liable to the indorsee when no suit is brought against the maker, it must be proved that the institution of such a suit would have been unavailing.

2. SAME — *assignor not bound to point out property.* The assignor of a promissory note is under no legal obligation to give information of the maker's property when requested by the assignee, and his failure to do so will create no liability. The assignee must ascertain at his peril, the fact of the insolvency of the maker.

APPEAL from the Circuit Court of Livingston county; the Hon. N. J. PILLSBURY, Judge, presiding.

Mr. C. C. STRAWN, for the appellant.

Mr. L. E. PAYSON, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit, brought by Kelly against Graves, as an indorser of a promissory note, made by Stephen Halstead to Graves, for eighty-five dollars, bearing date November 22, 1872, and payable to Graves or order ten months after date, with ten per cent interest, the declaration averring the insolvency of the maker at the time of the maturity of the note, and since, and that the institution of a suit against him would have been unavailing. The suit was commenced September 26, 1873.

Kelly recovered, and Graves has appealed for the purpose of reversing the judgment.

It is insisted that the verdict was against the evidence, and that there was error in the instructions to the jury.

There having been no suit against the maker, it was necessary, in order to maintain the action, to prove that the institution of such suit would have been unavailing.

There was not much evidence upon that point, and it was conflicting. Only the plaintiff himself, and the constable, Payne, testified to the insolvency of the maker, and they do not appear to have been very familiar with the actual state of his circumstances and condition, in regard to property. And the defendant, only, gave testimony to show the solvency of the maker. But he evidently had better opportunity to know the maker's actual circumstances, as the latter had been living in the family of Graves a year or two prior to the maturity of the note. From defendant's evidence, the jury were warranted to find, that, at the time of the maturity of the note, the maker owned a mare and the undivided half of a threshing machine. These, together with one other mare, had been embraced in a chattel mortgage, which Halstead, the maker, had given to Graves, to secure the payment of the note.

This mortgage, with the knowledge of Kelly, had been released, leaving the property in Halstead.

His interest in the threshing machine was subsequently sold on execution. But Graves testifies that Halstead afterward bought it back. One of the mares too had been sold on execution, leaving the other one remaining with Halstead.

Stress is laid by appellant on the fact that Graves did not point out this property to Kelly, when the latter applied to him, and said if Kelly would tell him of property that Halstead had, he, Kelly, would not resort to Graves. But Graves was under no legal duty to give information of Halstead's property. It was for Kelly, at his peril, to ascertain for himself the fact of the insolvency, and he was not entitled to any aid from Graves; and so long as the latter did not mislead, and did nothing more than to decline furnishing any assistance or information, no legal liability would result therefrom. Its only significance must be as evidence tending to show the want of property.

The finding of the jury against the plaintiff, upon the question of insolvency, we do not think is so palpably against the weight of the evidence as to require that it should be disturbed.

This finding would necessarily determine the issue in favor of the defendant, and we find it unnecessary to consider other questions which were raised upon the evidence. We do not perceive any substantial ground for complaint, in the giving, modifying, or refusing of instructions.

The judgment will be affirmed.

Judgment affirmed.

MICHAEL CUNNINGHAM

v.

THOMAS W. FERRY *et al.*

1. MECHANICS' LIEN — *under implied contract.* Where the proof shows that the petitioner for a mechanics' lien furnished the owner of a lot, lumber for building a house thereon, that it was so used, and that it was furnished within one year from the commencement of the work, this will entitle him to a lien as upon an implied contract.

2. ANSWER— *when two witnesses required to overcome.* Where an answer in chancery, though sworn to, states the material facts upon information and belief, the rule requiring the testimony of two witnesses to overcome it does not apply.

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

Messrs. BENNETT, KRETZINGER & VEEDER, for the appellant.

Messrs. RICHMOND & CONDEE, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a proceeding to enforce a mechanics' lien, for lumber furnished for the erection of a house.

The objection that there is a variance between the allegations and the proofs, as well as the objection that the verdict of the jury and the amount thereon decreed to be due the petitioners, is unauthorized by the evidence, we do not consider well taken. We have gone through the evidence carefully, and, without repeating it at length, we deem it sufficient to say that in our opinion, there is no substantial variance — such as would authorize a reversal — between the allegations and the proofs; and there is evidence sufficient to sustain the finding as to the amount due.

The contract was an implied one, and the proof was sufficient under the act of February 21, 1861 (Laws of 1861, p. 179). It showed that the petitioners, at the request of the owner of the

lot, furnished him with lumber for building a house on the lot, and that it was used for that purpose; and that the lumber was furnished within one year from the commencement of the work. *The Chicago Art. Well Co.* v. *Corey et al.* 60 Ill. 73.

The point is made that the petition was not filed or proceeding instituted within six months after the last payment for the lumber was due. Even if this objection could be urged by the appellant, who is not a creditor or incumbrancer, but a subsequent purchaser with express notice of the lien of the petitioners, the evidence does not support it. Appellees' evidence shows the lumber was to be paid for in ninety days, that is, as we understand, after delivery. The last was delivered October 17, payment for which was therefore due February 25, and the petition was filed May the 3d, within less than three months.

The objection that appellant's answer being under oath, is entitled to be received as true, unless overcome by evidence equivalent to that of two direct witnesses, is based on a misapprehension. The material facts put in issue by the answer are stated "on information and belief," and not as of the knowledge of the party, and the rule insisted on can, therefore, have no application.

The instruction asked by appellant, and refused by the court, states the law correctly; but we do not perceive there was any necessity that it should have been given.

The jury were previously instructed at the instance of appellees, that appellees' right to recover depended upon their having proved precisely the same facts as contemplated by appellant's instruction. They had all the instruction in that regard that was necessary.

We are of opinion there is no substantial error in the record, and the decree will, therefore, be affirmed.

Decree affirmed.

Statement of the case.

MICHAEL R. KELLY

v.

THOMAS W. TRUMBLE.

1. BOND FOR DEED — *does not give right of possession.* A contract or bond for the future conveyance of land does not of itself necessarily imply that the present possession shall pass. It may pass by the express terms of such contract, but in the absence of appropriate language to indicate such intention, the right of possession remains with the legal title.

2. ALTERATION — *materiality.* The addition of words to a bond for a deed, giving a right of immediate possession, by the obligee, without the knowledge or consent of the obligor, being a material alteration, avoids the contract, even though such was the original intention outside the written contract.

3. PAROL EVIDENCE — *to show sale of land when the written contract is avoided by alteration.* Where one party fraudulently alters a contract in a material matter, without the consent of the other, so that it is not admissible in evidence, the other party may prove the original contract by parol, when the statute of frauds is not pleaded, and have a specific performance decreed.

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

This was a bill in chancery, by Michael R. Kelly, against Thomas W. Trumble, to remove a cloud from the title to lands therein named, created by certain tax deeds, and for the cancellation of a certain bond given by the defendant to the complainant for a deed to the same land. The defendant filed a cross-bill for the specific performance of the contract of sale. On the hearing the court dismissed the original bill, and gave the relief sought in the cross-bill.

Messrs. WOODRUFF BROS., for the appellant.

Messrs. HENRY & JOHNSON, for the appellee.

PER CURIAM: The bond offered in evidence by appellant was properly excluded by the court. As executed by the parties, there was no provision authorizing appellant to have the present possession of the land. If the law would have supplied the words added by appellant, the alteration would have been immaterial, and it would not have affected the validity of the bond. But a contract for the future conveyance of land does not, of itself, necessarily imply that the present possession shall pass. It may pass by the express terms of such a contract, but in the absence of appropriate language to indicate such intention, the right to possession remains with the legal title. The words added were, "and I do hereby grant immediate possession of the above-described premises to the said Michael R. Kelly and Leander Smith, and said possession is hereby surrendered." The evidence is clear they were added subsequent to the making of the bond, by appellant, in the absence of appellee and without his knowledge or consent. It is not sufficient to cure this objection to say that the words added expressed the real contract between the parties. This would tend to show that the bond, as drawn, did not truly declare the contract between the parties, but would afford no justification to one of the parties, without the consent of the other, to change its terms. One party to a written instrument has no right, without the consent of the other party to it, to reform its language, however inaccurately it may express the real contract between them. Unless the parties shall mutually consent to such reformation, it can only be effected through the aid of a court of equity.

The bond being properly excluded as evidence, was it proper for the court to render a decree under the cross-bill on the parol contract? That there was a contract, is not questioned. The evidence of that contract was attempted to be reduced to writing, but by the fraudulent act of the appellant that evidence is virtually destroyed — that is, his fraudulent act in changing its terms has rendered it inadmissible as evidence.

Under these circumstances, we see no reason why appellant

should not be allowed to show, by parol, what the real contract between the parties was. Parol evidence is always admissible for the purpose of showing fraud or mistake in the execution of an instrument, and in admitting it for this purpose, it becomes necessary to show what was the real agreement of the parties.

In *Hunter* v. *Bilyeu et al.* 30 Ill. 228, this court, after a careful review of the authorities, held, where mistake in the execution of an instrument is charged, parol evidence may be resorted to for the purpose of proving what was the real contract of the parties, and a court of equity may reform a contract according to the evidence of the intention of the parties, and decree its specific performance at the same time.

There is here no question under the statute of frauds. It is not pleaded, and if it had been the evidence shows sufficient part performance to relieve the case from its operation.

We are of opinion, therefore, that the court did not err in ascertaining from parol evidence what the contract was, and decreeing its specific performance.

Appellant, by destroying the bond as an instrument of evidence, did not deprive appellee of all evidence, nor was he bound to resort to it for any purpose. He was authorized to rely on his parol contract, entirely disregarding the written evidence.

The decree is affirmed.

Decree affirmed.

DANIEL PARKER *et al.*

v.

GEORGE PLATT *et al.*

CONTRACT — *services — care and skill required.* Where a person engages to work for another he impliedly undertakes that he has a reasonable amount of skill in the employment, and engages to use it and a reasonable

amount of care, and a failure to do so will prevent him from recovering the contract price, and limit him to what the work is reasonably worth, or the employer may recoup all the damage he may sustain for the want of reasonable skill and care in executing the work.

APPEAL from the Circuit Court of Iroquois county; the Hon. N. J. PILLSBURY, Judge, presiding.

Messrs. BLADES & KAY, for the appellants.

Mr. M. B. WRIGHT, and Mr. B. F. SHANKLAND, for the appellees.

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

Appellants entered into an agreement with George Platt to bore them an artesian well, for which they were to pay nine dollars per day. He was to furnish two hands and the tools, and appellants the remainder of the help and to board the hands. The work was commenced, and when the well had been sunk one hundred and seventy feet the tools were broken, and after considerable effort to get them out the well was abandoned, leaving the auger and a part of the rods in the hole. It was claimed that appellants were partners, but that is denied by them. Payment was demanded, but resisted, because it was claimed not to be due, and that by the carelessness of the appellees the rods were broken and the tools left in the well, and that it thereby became useless to appellants. They offered to pay if appellees would remove the tools, or would sink another hole of the same depth, which appellees declined to do; but they offered to sink another well the same depth, and if water was not obtained, appellants should pay for both. This appellants declined, and thereupon this suit was brought, and appellees, on appeal by appellants, recovered in the circuit court a judgment for $52.13; from which this appeal is prosecuted.

Whether or not the time had expired for the payment of the money if appellants are liable, was a question for the jury.

On the question whether appellees observed reasonable care and proper skill, we think the evidence clearly shows they did not when the tools were broken. All persons impliedly undertake, when they engage to do work, that they have a reasonable amount of skill in the employment, and that they will use it, and also engage for a reasonable amount of care, and a failure in these respects prevents them from recovering the contract price, but only what the labor is reasonably worth. Or the employer may recoup all the damage he may sustain for want of reasonable skill, or for the want of or the observance of reasonable care in executing the work.

A skillful and experienced man in the business in that vicinity, testified that he had sunk forty wells in that section, and that he had broken but one set of tools; whilst appellees broke theirs twice in sinking this one but one hundred and seventy feet. He says, in hard-pan he only attempts to go five or six inches without drawing his auger; whilst here they were endeavoring to force it twelve inches, and it had penetrated about two and a half inches when the rods broke. Again he says, when he finds that the boring becomes hard he turns the auger back until it is loosened. This does not seem to have been done in this case. Again, one of the appellants, who was sitting by, observed the strain, and warned the appellee, who had charge of the work, of the danger of the rod breaking, not two minutes before the occurrence. This appellant was not skilled in the business, nor had he any experience in such business. But the amount of resistance and the force applied rendered the danger apparent to an unskilled person. And to this evidence appellees introduced no rebutting testimony.

To this point there seems to have been but slight attention given by parties in the court below, it rather being alluded to than presented prominently by the instructions. We are therefore of opinion that the case should be presented to another jury.

As to the question of partnership, the parties will no doubt be able to present evidence that will free that question from all reasonable doubt.

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

Judgment reversed.

THE ELGIN HYDRAULIC COMPANY

v.

THE CITY OF ELGIN.

ACTION — *right of corporation to sue for obstructing raceway to its mills.* Where it is made the duty of a corporation to keep a raceway leading to its works in repair, though it does not own the way itself, if a city so constructs a sewer as to deposit dirt and gravel in the raceway and obstruct the flow of water therein, and the corporation is compelled to expend money to remove such obstruction, an action lies in its favor against the city to recover the money so expended.

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

Messrs. BOTSFORD, BARRY & KRIBS, for the appellant.

Messrs. JOSLYN, LYNCH & CLIFFORD, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action on the case, brought by the Elgin Hydraulic Company against the City of Elgin, to recover for damages sustained and money expended in removing dirt, gravel and refuse matter deposited in a certain raceway, constructed to convey water from the mill-dam at Elgin to the mills, factories, etc., of the stockholders of the company, situate along the raceway, to operate such mills, etc.; the deposits having been carried into the raceway through a certain sewer, built by the

city, having its outlet into the raceway. Upon a trial had before a jury, the court below, at the conclusion of the plaintiff's testimony, instructed the jury to find the defendant not guilty, which was accordingly done, and judgment rendered in favor of the defendant, and the plaintiff appealed.

The declaration averred that the plaintiff was possessed of, and in the exclusive use, control and occupancy of the raceway, and that, by the provisions of the charter and by-laws of the company, it was its duty, in the exercise of its corporate powers, among other things, to maintain and preserve the raceway and to do all other acts and things for the preservation and maintenance of the water power connected therewith, and the regulation of the same for the use and benefit of the stockholders of the company, with averments sufficient to show a cause of action in other respects. The evidence showed that the Elgin Hydraulic Company was composed of the owners of the water power at Elgin, who were its stockholders; that the company did not own the race, but that it was built for the benefit of all the owners of water power on the east side of Fox river; that the company had the exclusive possession, care and charge of the race, and did all the repairs on the race and dam, and paid for such repairs out of the treasury of the company; that the moneys were raised by assessment on the stockholders, except what was raised by special assessment upon the property of individual stockholders; that the city constructed the sewer; that through it, dirt and gravel were deposited in the raceway, which caused injury to the mill owners, etc.; that the company expended one hundred and seventy dollars in the removal of the dirt and gravel, which was paid out of the treasury of the company, and had been previously collected from assessments.

The objection taken to the sufficiency of the proof is, that the race did not belong to the company; that it had no interest in the race, but was a mere agency for the repair of it, and hence had no right of action in itself, for the injury done to the race. But the company was a corporation created for the special purpose of keeping this raceway in repair, had the exclusive

charge of it for such purpose, was given power to raise money therefor, and was given the right to sue. The obstruction of the raceway in the manner shown, although the company had no property interest in it, was a pecuniary damage done to the corporation itself, in necessitating, in the performance of its statutory duty, and actually causing, the expenditure of its own money for the removal of the obstruction.

It is objected that as the evidence showed that the obstruction of the race caused damage to two certain mill-owners in lessening their power, they would have a right of action therefor, and if this action is sustained, the defendant would be exposed to two recoveries by different persons for the same injury. But this action is not for damage done to the owner of any mill in lessening his power, but only to recover for the expense of removing the obstruction. The mill-owners' damage suggested would be a different one.

We are of opinion the evidence showed a cause of action in the plaintiff, and that the jury were wrongly instructed.

The judgment will be reversed and the cause remanded.

Judgment reversed.

THE PEORIA AND ROCK ISLAND RAILWAY COMPANY *v.* GEORGE MCCLENAHAN.

1. JUDGMENT — *limited to amount claimed in justice's summons.* In actions originating before justices of the peace, the plaintiff's recovery is limited to the amount of his demand indorsed on the summons.

2. RAILROADS — *duty as to keeping excavations free from water or ice.* The law does not require a railway company to keep the excavations along the sides of its track free from water and ice, and it will not be liable for stock killed in consequence of ice therein, so as to prevent escape from the track, over the same.

APPEAL from the Circuit Court of Stark county; the Hon. J. W. COCHRAN, Judge, presiding.

MESSRS. INGERSOLL & PUTERBAUGH, for the appellant.

PER CURIAM: This was an action originally commenced before a justice of the peace, by appellee, to recover the value of a cow and calf killed upon the railroad track of appellant.

The record discloses two errors, for which the judgment must be reversed.

The first is, the judgment rendered in the circuit court exceeded the demand of appellee, endorsed upon the back of the summons.

The law is well settled that in actions commenced before a justice of the peace, the recovery is limited to the demand endorsed upon the back of the summons. In this case the demand was $50, and the judgment rendered in the circuit court was for the sum of $56.50.

At the request of appellee, the court gave to the jury the following instruction: "If the jury believe from the evidence that the said railroad company had made excavations along the side of the track of their road, and had negligently suffered said excavations to fill with water, and to freeze, so as to prevent the escape of said cow from said railroad track, and said cow was prevented from escaping in consequence thereof, and was killed by the defendants' train, then the defendants are liable to the plaintiff for the value of the cow and calf so killed, deducting what said stock was worth after it was killed."

This instruction was erroneous. The law does not require a railroad company to keep the excavations along the side of its track free and clear from water or ice.

In the construction and keeping in repair of the road bed, appellant, no doubt, necessarily made the excavations on each side of the track. In many instances it might be impracticable, if not impossible, to keep the excavations free from water and ice. To impose a requirement of this character upon appellant would not be just, neither is it sanctioned by the law.

The instruction should not have been given. For the two errors indicated the judgment will be reversed and the cause remanded. *Judgment reversed.*

J. K. HALL
v.
JAMES HAMILTON.

1. RELEASE OF ERRORS—*by attorney, on cognovit, binding.* Where a defendant, by his attorney in fact duly authorized, confesses judgment and releases any and all errors, this will preclude him effectually from assigning any error in the proceedings.

2. COOK COUNTY COURTS—*judges must sit separately.* Each of the judges of the circuit and superior courts of Cook county, under the constitution, is invested with all the powers of a circuit judge, and may hold court in a branch thereof, and it is error for more than one to preside at the same time during the trial of any case, or to participate in any decision. The record should show that but one judge presided.

3. But if the record shows more than one judge present, this is only an error which does not affect the jurisdiction of the court, and may be waived or released.

4. SAME—*judges of other circuits may preside.* Judges of other circuits may hold branches of the Cook county circuit and superior courts, and the statute authorizing this is not in conflict with any constitutional provision.

5. CIRCUIT JUDGE—*extra compensation when holding court out of his circuit.* So much of the act entitled "Courts" as provides for compensation being paid to a judge holding a branch court out of his circuit, in addition to his salary, is unconstitutional and void.

WRIT OF ERROR to the Superior Court of Cook county.

Messrs. PRENTICE & HOOKE, for the plaintiff in error.

Messrs. HIGBEE & PLUMMER, for the defendant in error.

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

This was a confession of judgment in the Superior Court of Cook county, at the June term, 1874. The declaration concludes to the damage of the plaintiff $614, and the *cognovit* confesses an indebtedness of $634, and judgment was rendered

for that sum. The warrant of attorney, by virtue of which this judgment was confessed, authorizes and empowers Forrester, or any other attorney, to enter the appearance of the defendant, to waive service of process, and confess judgment on a note in favor of defendant in error for the amount due, at any time after maturity, with an attorney's fee of twenty dollars, and to file a *cognovit* for the amount due, with an agreement that no writ of error should be prosecuted or appeal taken, and to release all errors. The *cognovit* so agrees and expressly releases all errors.

On such a record we are unable to comprehend by what rule of law this writ may be maintained. Where the defendant, in the most solemn and deliberate manner, waives of record all errors that may have occurred on the trial of a cause, it would be unheard of to permit him to assign as error that which he had solemnly released of record. It would be an act of bad faith on his part, that justice must forbid, and which we can never sanction. If a party cannot be bound by his deliberate admissions of record in open court, we would be at a loss to know how he could be estopped. After a party has thus deliberately waived all errors, we cannot but feel surprise that the case should be brought to this court, and it must be for purposes of vexation or some other equally wrongful purpose.

Nor does the fact that the errors were released by his attorney in fact, in the slightest degree change the aspect of the case. There is no pretense that plaintiff in error did not execute the warrant of attorney, and if he did, he solemnly gave authority to him to release the errors as he did, and every principle of good faith and justice requires that he should be bound by the action of his attorney within the scope of his authority. Such has always been the doctrine, and we are not aware that it has ever been controverted; nor do we see how so elementary a principle could be. To hold otherwise would overturn the business of the country, as much, if not the larger portion, of the commerce of the world is transacted through

agents of various kinds. The release of errors in this case was as effectual as if made by plaintiff in error in person.

It is urged that the *cognovit* was entitled in the circuit court of Cook county and that it was error to file it and take the confession in the Superior Court of that county. It may be that this was technically an error, but we have seen that all errors were released. Again, the confession was clearly within the power conferred. The warrant authorizes the confession to be made in any court of record and the Superior Court answers to the description. We could not reverse for such a technical error even if it had not been released. No court should be astute in finding nice technicalities to hinder or prevent justice, and such nice technicalities if allowed would have that effect.

It is also insisted that the Superior Court consists of only three judges, and that from the *placita* to this record, it appears that there were five judges present, and constituting the court.

By the 23d section of Art. VI of our constitution the county of Cook is created a judicial circuit. And it provides that the circuit court of Cook county shall consist of five judges, until increased as therein provided. "The present judge of the Recorder's Court of the city of Chicago and the present judge of the circuit court of Cook county shall be two of said judges," and "The Superior Court of Chicago shall be continued, and called the Superior Court of Cook county." The 25th section provides that the judges of the circuit and Superior courts of Cook county shall receive the same salaries, payable out of the State treasury, as may be payable to the circuit judges of the State. It is also provided by the 24th section that "Any judge of either of said courts shall have all of the powers of a circuit judge, and may hold the court of which he is a member. Each of them may hold a different branch thereof at the same time."

From these constitutional provisions it is apparent that it was intended that each of the judges of both courts should be invested with all the powers of a circuit judge, and should, alone, and independent of the others, perform all the functions and discharge all the duties imposed by the constitution

and legislative enactments, which pertain to the circuit judges of the State. We are unable to perceive any provision of the constitution which requires the judges of either or both courts to act collectively or even a *quorum* on any question, nor has it been required by the General Assembly. Whether the General Assembly might not require all or a majority of the judges of each court or both courts to sit in bank and determine all questions of law arising on pleadings, in arrest of judgment, and in the decision of all motions for new trials, it is not material to now consider, as no statutory requirement of the kind has been imposed. Although called by different names, the judges of each court are severally, under the law as it now stands, in fact, but circuit judges. (See *Jones* v. *Albee*, 70 Ill. 34. And being circuit judges they should in all things conform to the laws, usages and practice governing the circuit courts of the State. When holding court each judge should hold a separate branch, and keep and in all things perform the duties of a circuit judge. The record should show that he alone was presiding, unconnected with either or any of the other judges of either court. The record of the business he may transact should state that he was present holding a branch court, and should not state that any other judge was present. It does not matter whether the journal of the proceedings of the several judges is entered in one or several books, so that it shows what is done by each.

One judge may settle a portion of the pleadings, or decide motions in a case, and another judge may settle other portions of the pleadings and decide other motions, and another judge may try the case, or all may be done by one judge, so the record shows what was done by each judge in the case. There is no law now in force authorizing all the judges to sit together, and try and decide cases. The law contemplates the action of but one judge, sitting at the same time, in the trial of a case. And it is error for more than one to sit at the same time on the trial of the case, but it is only an error, that may be waived or released.

In this case the *placita* to the record shows that three of the judges of the Superior Court were present, as also two circuit judges. If the record is true in this regard, then the decision of all questions was submitted to five judges instead of but one, as contemplated by the law. If that number sat and decided questions, they may have been decided by three of the five, and the decision different from what it would have been had but one judge sat. Hence such an organization of the court is not such as litigants are entitled to have when their causes are tried.

But the court thus organized is not without jurisdiction. Either of the five judges had jurisdiction to try any and all causes, and the association of the others with him did not detract from or deprive him of the jurisdiction vested in him by the constitution and the statute. The *placita* to all records in that court, and to transcripts to this court, should show that one judge sat on the trial, who it was, and that he was holding a branch court. But being only error, which may be waived or released, plaintiff in error released it with all others by the *cognovit* filed by his attorney in fact.

As to the fact that two judges from other circuits sat in the case, we have seen that did not oust the court of its jurisdiction. In the case of *Jones* v. *Albee*, *supra*, it was held that judges from other circuits might hold branches of the Cook circuit and Superior courts; that such action was not prohibited by the constitution and was expressly sanctioned by the statute. Nor do we see any reason to change the conclusion there reached. If the legislature were to require these courts in Cook county to sit separately in bank, then a very different question would arise, whether judges of other circuits could be authorized to participate in the transaction of business required to be disposed of by a full bench.

We have seen that each of the judges is vested with the same power, whether of the one or the other of these courts. The thirty-ninth section of the chapter entitled "Courts," R. S. 1874, p. 331, provides that "judges of the several circuit courts of

this State may interchange with each other and with the judges of the Superior Court of Cook county, and the judges of said circuit courts and of the Superior Court of Cook county may hold court, or any branch of the court, for each other, and perform each other's duties, where they find it necessary or convenient." This section fully authorizes circuit judges to hold branch courts for the Superior Court of Cook county, or of the circuit court for that or any other circuit. Nor do we see any provision of the constitution which prohibits judges from interchanging with each other, or prevents the legislature from authorizing judges to hold branch courts for each other.

The fortieth section of that chapter provides for compensating judges who shall hold court or a branch court for another judge out of his circuit or judicial district, by authorizing an appropriation of ten dollars per day to such judge, out of the county treasury. The sixteenth section of the judiciary article of our constitution is this: "From and after the adoption of this constitution, judges of the circuit courts shall receive a salary of $3,000 per annum, payable quarterly, until otherwise provided by law. And after their salaries shall be fixed by law they shall not be increased or diminished during the terms for which said judges shall be respectively elected; and from and after the adoption of this constitution no judge of the Supreme or circuit courts shall receive any other compensation, perquisite or benefit, in any form whatsoever, nor perform any other than judicial duties to which may belong any emoluments." This language is as full, clear and comprehensive as could be well conceived to prevent Supreme and circuit judges from receiving any other compensation than their salaries, under any name or pretense whatever, for the discharge of any duty pertaining to their offices. And it is prohibitory on the judges from receiving the compensation for the performance of such duties except their salary. It also prohibits the General Assembly from providing any other. But the power to hold such courts as branch courts does not depend upon the fortieth section of the chapter entitled "Courts."

The power is conferred by the thirty-ninth section of that act, and if circuit judges choose under that section to go out of their circuits to hold courts, or branch courts, for other judges, without compensation therefor, we fail to see that it violates any provision of the constitution. The power to perform the duties in other than their own circuits in nowise depends upon the power to receive extra compensation therefor, as they are still performing judicial duties.

The judgment of the court below must be affirmed.

Judgment affirmed.

Mr. JUSTICE SCOTT: I concur in this decision, but not in all the reasoning in the opinion.

The Superior Court of Cook county is composed of three judges, and it is proper the *placita* should show how many of them may be present on the day fixed by law for the convening of the court, or at any other time during the term. This is all the office the *placita* performs. The proceedings are to be had in the Superior Court, and hence any order made by either of the judges in the trial of the cause will be presumed to be authorized by law. Commonly, the bill of exceptions will show before which judge the cause was tried. The fact the clerk in making up the transcript may certify that any particular number of judges were present, cannot vitiate the record. It is sufficient if it shall appear by the record the cause was heard before either of the judges of the Superior Court, or any other judge authorized by law to hold a branch of that court.

Mr. JUSTICE SHELDON: I concur with Mr. JUSTICE SCOTT.

EUGENE TUTTLE

v.

AUREN GARRETT *et al.*

1. RES ADJUDICATA — *in Supreme Court.* When on error to this court certain facts are found from the evidence, and the cause reversed, and remanded merely to supply proof of a particular fact, the facts found by this court must be regarded as settled and not open to be questioned on a second writ of error.

2. GUARDIAN AD LITEM — *for minor defendants.* Where a person is sued with certain minor defendants in chancery, as their guardian, and he appears, answers and defends in that capacity, and procures a reversal of the decree against the minors, a second decree against the minors will not be reversed because the record shows no appointment of a guardian *ad litem*, or proof that such person was in fact guardian.

3. COSTS — *as against infants.* On bill for a reconveyance of land against the minor heirs of a grantee to whom the land was conveyed as security or indemnity, it is error to decree costs against the infant defendants.

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

Messrs. WEAD & JACK, for the plaintiff in error.

Mr. H. B. HOPKINS, for the defendants in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This case has heretofore been before this court, and is reported in 16 Ill., p. 354.

The bill was filed for a reconveyance of real estate alleged to have been conveyed to John Tuttle, the father of appellant, for the purpose of securing him against his liability as surety for Garrett, and particularly upon an appeal bond in a certain case, of *Stevenson & Wardwell* v. *Garrett*, appealed by Garrett from the circuit court to the Supreme Court, in which case the Supreme Court rendered a decree against Garrett for over $1,200, and also the costs in the circuit court. The bill averred

that the demands for which Tuttle was liable as surety had been paid.

The decree in the case when here before was reversed and the suit remanded for the want of proof that the decree against Garrett in the appeal case, rendered by the Supreme Court, had been paid.

After the cause was remanded to the circuit court, further testimony was there taken for the purpose of supplying the proof indicated by the former opinion of this court as wanting; and at the November term, 1855, of the court below, the cause was again heard and a decree for a reconveyance was again rendered in favor of the complainant. Upon this last decree Eugene Tuttle, the youngest of the heirs, sues out a writ of error.

It is claimed that the subsequent evidence which has been taken to show that the Stevenson & Wardwell decree against Garrett was paid by the latter, is not sufficient to prove that fact. Upon an examination of the evidence we find that it very satisfactorily establishes the fact of the payment in full of that decree rendered in the Supreme Court, and of all the costs in that suit in the circuit court. The proof, then, being supplied which was found wanting in the record before, it would seem to follow that the present decree should be affirmed.

But the further objection is made that the proof in the record is insufficient to establish that the absolute deed, on its face, from Garrett to John Tuttle, was but a mortgage. That fact in the former decision of this court was taken as established, and it was there found that all the liabilities of Tuttle, to secure against the payment of which the deed was given, had been paid by Garrett except the decree in favor of Stevenson & Wardwell, and for want of proof of the payment of that decree the decision of the court below was reversed, no other error in the record being intimated.

We must regard the fact of the deed being a mortgage as settled by the former decision of this court, and that that question is not now open to consideration.

It is also further objected, that no guardian *ad litem* was appointed for the minor defendants, that there is no proof that James Taylor was in fact their guardian, and no proof of the death of John Tuttle.

In addition to the same answer as above, to be made to these objections, it appears that James Taylor was sued with the minors, as their guardian, appeared and answered for them in that capacity, denying knowledge of the allegations of the bill, and calling for strict proof, and when the decree in the cause was against the minors, he prosecuted the former writ of error to this court, and procured its reversal. This was all that a guardian *ad litem* could have done. The statute provides that guardians, by virtue of their office as such, shall be allowed in all cases to prosecute and defend for their wards. Under such circumstances, we would hardly feel called upon to reverse a decree, because no formal order appears appointing a guardian *ad litem*, and no letters of guardianship are shown to have been given in evidence.

It was erroneous to decree costs against the infant defendants. *Fleming* v. *McHale et al.* 47 Ill. 282.

The decree will be affirmed, except as to costs, and reversed as respects them at defendants' costs herein.

Decree modified.

NANCY B. WALKER

v.

SARAH ANN CARRINGTON *et al.*

1. FRAUD—*proof of, against agent to avoid sale.* Where a conveyance of land is sought to be set aside, as having been induced by fraudulent representations of an agent, whose duties were advisory only, with no power to sell, the burden of proof lies upon the complainant to establish by clear and satisfactory proof that the agent acted in bad faith, and made material statements to the grantor to influence the sale, which he knew to be false, and that such statements influenced the sale.

Syllabus.

2. SAME — *degree of proof as effected by lapse of time.* After the lapse of twenty years, when the principal parties to a transaction are dead, and it is sought to be impeached for fraud, the most clear and satisfactory proof of the fraud will be required to overcome the presumption of fairness and innocence.

3. SAME — *false representations must be relied on.* Where the representations of an agent, which are relied on to avoid a sale and conveyance, relate to the quality and value of the land sold, and it appears that the grantors, who were trustees, had actual knowledge of the facts from a personal inspection of the land, and by information from the husband of one and the father of the beneficiaries, it will not be presumed that the representations of the agent had any material influence upon their conduct as inducing the sale.

4. SAME — *sufficiency of proof.* Where an agent advised his principals, in the winter of 1850–51, of an offer of five dollars per acre for land, and stated that was the best offer that could be had, and advised a sale, proof that he was offered ten dollars per acre in 1848 will not, after the lapse of twenty years from the sale, be sufficient evidence to show actual fraud on the part of the agent.

5. MARRIED WOMAN — *husband may act as agent.* Where property is clearly that of a wife, her husband may act as her agent in its management, either by the appointment of her trustee, or, since the married woman's act of 1861, by her own appointment, and while his receiving the rents of her land may be viewed with suspicion, it is not conclusive evidence of fraud.

6. PURCHASER — *who may become.* The fact that a purchaser of land is a brother-in-law of an agent, even if the agent has power to sell, does not imply that confidence as to preclude him from becoming the purchaser of land, and much less so when the power of the agent is simply advisory.

7. FRAUD — *presumption against, after great length of time.* Although the acts and conduct of a party may be suspicious, yet if they can as well be attributed to honest motives, and may be as well consistent with fair dealing as with the reverse, they will be attributed to the former, especially after a great length of time, when it is extremely difficult to give a full and explicit explanation.

8. AGENT — *may acquire property after his trust is ended.* While it is true that a trustee or agent cannot be interested in a sale made by himself, yet when he has fully discharged his trust and sold property to a third person in good faith, having no interest in the same at the time, he may afterwards acquire the title from the purchaser, and such fact, or the fact that his wife acquires the title, will not afford ground for avoiding his sale.

Statement of the case.

9. LACHES — *to bar equitable relief.* Where a bill was filed to set aside a conveyance of land, twenty years after the deed was made, on the ground of fraud in the agent advising the sale, it was held that the claim was a stale one, on the ground of laches, and that this was a good defense in itself.

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

This was a bill in chancery, by appellees against appellant and one Cyrus Bentley, charging that appellant holds certain land in trust for appellees, and praying that she be decreed to convey title in the same, etc.

A brief statement of the facts alleged in the bill, shows, that Charles Walker, now deceased, in his lifetime, and on the 7th day of May, 1841, being the owner of a certain quarter section of land in the town of Jefferson, in Cook county, which is the land in controversy, together with his wife, the appellant, conveyed the same by deed to one Eliphalet Terry, of Connecticut, who is also now deceased. Eliphalet Terry, by his last will and testament, bequeathed $1,500 to Seth Terry, his brother, and Charles Boswell, in trust for his sister Mary, and directed that on her death it should be divided among his four children, one of whom was the appellee Sarah Ann Carrington, and that her interest should be held in trust by said trustees. He also bequeathed to the trustees $5,000, to pay the income to the appellee Sarah Ann, for life, and at her death to divide the principal equally among her children. The residuum of his estate he directed should be divided into four equal parts, one of which he bequeathed to the trustees for the use of the appellee Sarah Ann, upon the like trust as the $1,500. He also gave the trustees full power and authority to sell and convey the real estate.

Eliphalet Terry died in July, 1849, and his will was properly proven and admitted to probate.

The appellees Edward and Sarah Ann Carrington are hus-

band and wife; and the other appellees, Catharine, Sarah and Edwin T. Carrington, are their children.

On the 17th day of September, 1849, the heirs at law of Eliphalet Terry united in a deed conveying to the trustees named in his will, the property in controversy, in trust, to hold the same for the use of appellee Sarah Ann and her children, with power to sell and convey the same.

After Walker conveyed the land to Terry, he continued to look after it, as Terry's agent, and was authorized to ascertain if he could make sale of it. This continued until some time in 1847, when his agency was withdrawn.

After the death of Terry, and in 1850, the trustees appointed Walker as their agent to look after the land, and assist them in making sale of it. The appellee Edward Carrington, who resided in Connecticut, was also, to some degree, assisting the trustees, and had some correspondence with Walker in regard to the sale of the land. On the 17th day of July, 1850, Walker wrote him he had made inquiry about the property and could find no one to make an offer except Mr. Bentley, who had made an offer two years before. He proposed to negotiate with Bentley and others, for the sale of the property, and informed them that Bentley would like to know if his offer was accepted, so as to purchase elsewhere if rejected. The terms proposed from Bentley were $600, in cash, or $200 in cash and the balance $200 in one year, $200 in two years, and $200 in three years from date. Walker also, in that letter, advised Carrington, if they wanted to sell, the offer was a fair one, as not more than half of the property could ever be plowed, that the balance was very wet, and that the railroads made lands twenty miles from the city, (Chicago,) worth more than this, in consequence of having to go from it to the city, a distance of six or seven miles, by wagon.

On the 18th of November, 1850, Walker again wrote to Carrington that Bentley would take the land as he had offered, adding:

"My opinion is, if you wish to sell, you had better take it.

I find there is more of the low marsh than I supposed. The prairie all lies vacant out there, so wet the farmers do not like to settle, and it will be a good many years before one-quarter will be occupied, and forty to sixty acres of it will cost the value of the land to drain it; you will do no better with him. I so understood the offer the first time. If you wish to hold, you may do better in five or six years, but at this time there are two or three one hundred and sixty acres in that neighborhood offered at five dollars per acre, on five years' credit, with no buyer. If you make up your mind to take the offer, I will close the contract with him, or you may make out a deed and send it, and I will see to all the securities, and send you the money paid."

The trustees authorized the trade to be accordingly closed with Bentley, executed and forwarded to Walker the proper conveyance, which bears date March 10th, 1851, and in due time Walker returned to them Bentley's notes and mortgage to secure the deferred payments.

On the 19th of February, 1868, Bentley, by deed, conveyed the land to appellant.

Charles Walker died in June, 1868, leaving appellant his widow.

Terry and Boswell resigned as trustees on the 14th of October, 1851, and Jared Deming was appointed their successor. Subsequently he resigned, and appellee Edwin T. Carrington was appointed his successor.

Seth Terry died in 1865 or 1866.

The bill charges that the representations made by Walker, in his letter of the 18th of November, 1850, were false, and known by him to be so when made; that the trustees placed entire confidence in these representations, and believed them to be true; that appellees have, within a recent period, discovered that the sale was made by and through Walker, as agent of the trust estate, really to and for appellant, his wife, or for himself; and that he or his wife was the real party purchasing, and paid the purchase money, and not Bentley. It

further charges misrepresentation and design upon the part of Walker, in the letters and correspondence, to mislead the trustees touching the value of the property; that at the time of the sale it was, to Walker's knowledge, worth from $2,500 to $3,000; and that the trustees believed Walker to be acting in good faith, and relied solely upon the truth of his representations, as contained in his letters, in making the conveyance. It is also denied that either the trustees or appellees had any knowledge that Bentley was purchasing for Walker or his wife, but they were induced to and did believe, from Walker's representations, that Bentley was buying for himself.

It is also further charged by the bill that appellees and the several trustees are, and have been since the execution of the deed to Bentley, non-residents of the State of Illinois, and unacquainted with the value of lands in Cook county.

The answer of appellant and Bentley admits the conveyances by the trustees, Terry and Boswell, to Bentley, and by Bentley to appellant; alleges that Bentley, for the period of seven successive years, and from his purchase until his conveyance to appellant, was possessed of the land by actual residence thereon by tenants, and having a connected title in law, deducible of record from the United States; that from and after the conveyance by Bentley and wife to appellant until the filing of appellees' bill, and during all that time and for more than seven successive years next before the bringing of the suit, Bentley and appellant, as his assigns, were possessed of all and singular the said land and premises, by actual residence by their tenants respectively and continuously, — having a connected title at law and in equity, deducible of record from the United States and that at the time of exhibiting the bill, and for a long time previously, appellant claimed to be, and was, and still is, the legal and equitable owner of said premises; and they severally further set up the provisions of sections 8, 9 and 10 of chapter 66 of the Revised Statutes of 1845.

The answer further alleges, that, respecting the pretended

rights and claims of the appellees, and the several matters and alleged grounds of relief stated in their bill, appellant is the legal and equitable owner of the premises for a valuable consideration, and in good faith, without notice of the matters alleged in the bill, and that the matters on which appellees pretend to found their supposed right in the premises occurred near twenty years before the filing of the bill; that since that time the said Charles Walker has died, and that they are unable to make proof as to what he did or did not communicate to the parties who sold and deeded the premises to Bentley; that the said transactions have, long since, become and are obscured by lapse of time, and that the alleged rights of appellees are stale and antiquated; and that appellees ought, consequently, to have no relief, etc.

The answer further denies all charge of fraud, etc., and all other allegations of the bill.

The court decreed in favor of the appellees.

The errors assigned are:

1. That the court erred in not dismissing the bill of complaint of the said complainants.

2. That the court erred in decreeing relief to the complainants upon the evidence in this case, and in not dismissing the said bill of complaint out of court.

Messrs. LAWRENCE, WINSTON, CAMPBELL & LAWRENCE, and Messrs. AYER & KALES, for the appellant.

Messrs. LYMAN & JACKSON, and Mr. E. A. SMALL, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellees charge both actual and constructive fraud upon Charles Walker, while acting as agent for the trustees, Terry and Boswell; and it is essential to the success of their claim that it shall appear that either actual or constructive fraud is clearly proved.

Walker had nothing to do in determining that the land should be sold, the time when the sale should be made, nor the price for which it should be sold, any further than his advice may have affected the trustees in these respects. He was employed to look after the land and find a purchaser for it. The discretion of determining whether and when the land should be sold, and, if sold, at what price, was vested in the trustees, and there is no proof that they attempted to delegate any portion of this discretion to Walker. His duties were simply advisory; and the charge made imposes the burden on appellees of establishing, by clear and satisfactory proof, 1st, that he acted in bad faith and made material statements to the trustees to influence the sale, which he knew to be false; and 2nd, that they, in making the sale, were influenced by those material and false statements. In examining the evidence it is proper we should take into consideration that the suit was not commenced until nearly twenty years had elapsed after the transaction which is to be investigated; that more than that time intervened the taking of much of the evidence and the occurrences to which it relates, and that Walker, whose conduct is sought to be impeached, and Terry, the trustee who acted most prominently in the transaction, had both been dead for several years before the bringing of the suit was contemplated. If, indeed, it is clearly established there was fraud as charged, and that the knowledge of it was concealed from appellees, these circumstances may be of no importance; but they are quite important in determining whether the fraud charged has been sufficiently proved. The observations of Mr. Justice STORY in *Prevot* v. *Gratz*, 6 Wheat. 497, 498, in discussing the sufficiency of evidence introduced to prove fraud, under like circumstances, are quite as pertinent here as they were there. He said: "But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transaction, it operates by way of presumption in favor of innocence, and against imputation of fraud. It would be unreasonable,

after great length of time, to require exact proof of all minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that can fairly be expected in such cases, if the parties are living, from the frailty of human infirmity, is, that the material facts can be given with certainty to a common intent, and, if the parties are dead, and the case rests in confidence, and in parol agreements, the most we can hope is to arrive at probable conjectures, and to substitute general presumptions of law for exact knowledge. Fraud or breach of trust ought not lightly to be imputed to the living; for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear beyond a reasonable doubt."

The representations made by Walker, which are claimed to be fraudulent, are found in certain letters written by him in regard to the sale of the land, and particularly in two addressed by him to Edward Carrington, who was corresponding with him on behalf of the trustees, in which he represented that he could find no one to make an offer for the property except Bentley, who proposed to purchase it at $600 cash, or $800 in payments of $200 in cash, $200 in one year, $200 in two years and $200 in three years; that if they wanted to sell, the offer was a fair one; and, in the last of these letters, which was written on the eighteenth of November, 1850, the following was added:

"The prairie all lies vacant out there, so wet the farmers do not like to settle, and it will be a good many years before one-quarter will be occupied, and forty to sixty acres of it will cost the value of the land to drain it. You will do no better with him. I so understood the offer the first time. If you wish to hold, you may do better in five or six years; but at this time there are two or three one hundred and sixty acres in that neighborhood offered at five dollars per acre, on five years'

credit, with no buyer. If you make up your mind to take the offer, I will close the contract with him," etc.

It appears from the evidence that Edward Carrington and Seth Terry had both been upon the land before the sale, and must, therefore, have had a personal acquaintance with its location, and some general idea of the quality of the soil, and what proportion was probably wet and what dry land. Carrington says he was in Chicago in 1845 and in 1846, and he subsequently corresponded with Walker in regard to the sale of the land, in the lifetime of Eliphalet Terry, and several years before his correspondence with him was resumed on behalf of the trustees. In the letter from Walker to him, from which we have quoted, Walker makes direct reference to Carrington's having been with him on or near the land, in these words: "I find there is more of the low marsh than I supposed when you and myself were out there." Noble says he had an introduction to a man by the name of Terry — don't know what his first name was. * * "The introduction was made by Charles Walker. Terry and Walker were then upon the property together; that is, the property in this suit. It was some time in the summer. * * * I made a bargain with Terry for the grass on that same ground. Nothing was said by Terry about selling it. He had only purchased it a little time before that, or something about then. That was as I understood," etc. He also says it was in the neighborhood of twenty years before the time he was giving his evidence. It is not pretended that Eliphalet Terry visited the property, and the reasonable inference is that the Terry alluded to was Seth Terry, the trustee, and the time subsequent to the death of Eliphalet Terry in 1849, and before the negotiations for the sale in the fall of 1850.

So far, then, as the trustees had actual knowledge from a personal inspection of the land, and by information from Edward Carrington, who was husband of one and father of the other beneficiaries, it is not to be supposed the representations of Walker had any material influence upon their conduct.

Seven witnesses were introduced by appellees, who testified the value of the land was, at the time of the sale, ten dollars or more per acre.

But one of these, however, Gray, testified to any circumstance tending directly to show knowledge in Walker that the land was of that value. He says he endeavored to buy it of Walker in 1848; that he called on Walker and inquired if he was the owner of the property. Walker said he was. Witness asked him if the property was for sale. He said it depended on what he could sell it for. He finally made a conditional offer, and in respect to this he uses this language: "I did not consider it binding on his part, or on mine, to sell it for ten dollars an acre. I afterwards called, and he told me it was not for sale."

We are inclined to the belief that the witness, though doubtless actuated by honest convictions, is mistaken — most probably by assigning the conversation to too early a period by several years. It is apparent that such a mistake might well occur — and, indeed, it is matter of common observation that they frequently do occur, where the period over which the memory is required to extend is much shorter than it was here. A quarter of a century had elapsed between the time of the conversation and the time at which the witness was called to testify. The conversation had been productive of no practical result, it appears to have been in no way connected with any important event which we can suppose would be indelibly imprinted on the memory; and it is not shown that there was, during this long time, any occasion for recalling or reviving the recollection of the conversation. It is exceedingly improbable that Walker should have held such a conversation in regard to the land, at the time stated by the witness.

It is shown by the evidence that Walker sold and conveyed the land to Eliphalet Terry in May, 1841; that he acted as Terry's agent in looking after it and trying to get a purchaser for it, until Edward Carrington, becoming dissatisfied with him, had his agency withdrawn; and there is no pretense that he

had any thing to do with the land between that time and his subsequent appointment by the trustees in 1850. Carrington says "I became dissatisfied with his management of it [the land] and withdrew the agency from him." The last letter in evidence from Walker to Carrington, written in the lifetime of Eliphalet Terry, and which, from other evidence, seems to have been the culminating cause of Carrington's dissatisfaction, bears date Sept. 20, 1847. That the withdrawal of the agency followed this letter, at least before the end of the year, is clearly shown by a subsequent letter written by Walker to the trustee, Seth Terry, dated the 21st of February, 1851, in which, after alluding to a certificate of purchase that had been given to Farwell on a sale of the land for taxes, he says: "I succeeded in buying the certificate, and got it assigned to me. This mistake is because Mr. C. took it out of my hands in 1847," etc. No rational motive is shown, and none is perceived, why Walker should have professed to be the owner of land, over which he did not even have an agency, when he must have known that the records would have disclosed to any one examining them the true state of the title. Had his purpose been to cheat or defraud thereby, it is natural to suppose some attempt would have been made to do so. He is made to appear to tell a falsehood without an apparent purpose, and to encourage negotiation merely for the pleasure of breaking it off.

But, aside from this, it does not follow because Gray may have offered Walker $10 an acre for the land in 1848, Walker knew he was advising that it be sold for less than it was worth, in the fall and winter of 1850, '51. It is not shown that Gray, or any one else, at that time offered $10 an acre for the land, or that any one, other than Bentley, was willing and desiring to buy it at any price. Walker may then have forgotten Gray's offer, or, if recollecting it, may have been unable to find any one who would make as good a one. This is a charitable and reasonable presumption which the law requires us to indulge, unless it is inconsistent with the clearly proved facts.

As illustrative of the liability of persons in fixing an estimate

of value, at a period of time far remote from that at which the value is desired to be ascertained, to deceive themselves by misapplying dates, we may allude to the evidence of Noble who gives it as his opinion the land at the time of the sale was worth from $20 to $25 per acre. In giving his means of knowledge of the value of real estate in the vicinity, at the time, he says: "Knows of two sales before that, one was by Hayes, the other by Wells. Wells sold ten acres to Clybourn for about $18 an acre in 1847 or 1848, and Hayes sold for $22 an acre, he thinks in 1848 or 1849." He also says, in a previous part of his evidence, that he himself sold to Mrs. Chapron ten acres of land for a thousand dollars in 1852 or 1853.

Now Mrs. Chapron swears, and the abstract of title confirms her, that the sale by Noble to her, instead of having been made in 1852 or 1853, was made on the 28th of November, 1855.

Hayes swears he was not in that country until in January, 1851, and he owned no land in Jefferson until in 1852 or 1853; that he purchased a quarter section there as late as 1853.

And J. H. Clybourn swears the property sold by Wells was to his brother, and that the sale was not made until in 1863.

There were six witnesses who testified on behalf of appellant, that gave it as their opinion, in substance, that the land at the time of the sale was worth no more than Bentley paid for it. All of them, although not, as most of the witnesses for appellees were, residents of the town of Jefferson, were familiar with the value of real estate there in 1850–51, and knew the land in controversy. Some of them were, during those years, largely engaged in buying and selling real estate in the town of Jefferson.

As a reason why lands were cheap in that vicinity at the time, they show that government lands could be bought in that country, although not in that town, with land warrants, at less than one dollar and a quarter an acre. Chicago did not have a population exceeding twenty thousand; the streets of the city and the roads leading into it were in bad condition; there was

no gas, and but an inadequate supply of drinking water; adjacent to the city, and in almost every direction, there were large tracts of land covered with water, and the country between Chicago and Jefferson was chiefly low, wet prairie, unfit for general agricultural purposes without expensive drainage.

Mahlon D. Ogden, whose firm was doing a very large real estate business at that time in this town, as well as elsewhere in the county, says: "The country at that time leading to Jefferson was what we considered very low, swampy, marshy land; roads bad, a great deal of land not fit for cultivation without large drainage." He also says, in 1849, 1850 and 1851, sales were very slow, not easily made, except to parties who wanted to occupy; no speculation. In 1851, 1852 and 1853 prices took an upward turn, and went on better up to 1856, when they got high, and in 1857 they went low again.

Herbert, who was tenant on the land to appellant from 1858 to 1859, says when he went there no improvements were on the land, except the street or road. There were forty-five or fifty acres of what he calls dry, tillable land, about forty acres of slough, and the balance was fit for cutting grass, and some parts of it for pasture. The land being lower than other lands around it, was flooded by the water flowing from them.

We cannot take the time to quote the evidence of all the witnesses in full. It is sufficient that, after a careful perusal of the entire evidence, in which we have not confined ourselves to the abstract alone, we are clear in the conviction that the charge of fraud is not proved with that degree of certainty the law requires, in view of the death of Walker and the lapse of so great a time.

If the question were simply, does the evidence preponderate that the value of the land was, at the time of the sale, greater than that for which it was sold, our conclusion might be otherwise. But, while such a preponderance tends to show Walker did know the value of the land was greater than he represented it to be, it is by no means conclusive on that ques-

tion. So many circumstances affect the value of lands which different minds may look at in different ways, that it would be grossly unjust to condemn an estimate as fraudulent, merely because more persons should be found to say it was too low than that it was fair and reasonable. Of those who are found sustaining the estimate of Walker, there are several men of large experience in real estate transactions, who were well acquainted with the land in controversy, and familiar with the value of land in its vicinity at the time the transaction occurred, and there is no attempt made to impeach the honesty of their motives or the sincerity of their convictions. It is impossible to say, from what appears in evidence, that Walker may not have been equally honest and sincere in his estimate of the value, and if so, even if inaccurate, his representations were not fraudulent.

The great misfortune, as it seems to us, resulted to appellees from the determination of their trustees to sell at an inopportune time. Had they waited, as suggested by Walker, four or five years; or better still, twenty or twenty-five years, it would have saved them what they now feel they have lost. But with that Walker had nothing to do. There is no evidence showing that he influenced the trustees, in the slightest degree, upon that question.

But it is charged that Walker was interested in the sale to Bentley, and therefore, although he may have been guilty of no actual fraud, the sale was fraudulent in law. This, like the preceding question, depends entirely upon the evidence.

It has already been observed that Walker conveyed the land to Eliphalet Terry on the 7th day of May, 1841, and his subsequent agency in regard to it needs no further explanation. The deed by the trustees to Cyrus Bentley was made on the 24th day of April, 1851, and Bentley conveyed to appellant on the 19th day of February, 1868. Bentley was a brother-in-law of Walker, and brother of appellant.

In a letter written by Bentley on the 11th of May, 1870, and addressed to Jared Deming, who was for a time trustee

for appellees, for the purpose of having a formal release of the mortgage which he had given to secure the deferred payments for the land executed, he used this language: "Mrs. Charles Walker (widow of Charles) is the owner of this land, I (her brother) held the title in my own name for her and gave the notes and mortgage for part of the purchase money when the land was purchased of Messrs. Terry and Boswell. Mrs. Walker being now about to sell some of this land, the purchaser desires that the mortgage may be released from the records."

This, the appellees allege and swear, was the first notice they had that appellant had any interest in the land; and it undoubtedly led to the filing of the bill.

Appellant and Bentley were both examined as witnesses and their testimony, together with the letters of Walker and Bentley, constitute the entire evidence on this branch of the case.

Appellees claim that the proof is complete that when the sale was made it was in fact to appellant, and that Walker knew it when he recommended the sale to Bentley. There is no admission of any thing like this in the letters of Walker, and the only thing claimed to have that effect in the letters of Bentley is what we have quoted from his letter of May 11, 1870, to Deming.

This, in our opinion, is not an admission that when he purchased he was purchasing for appellant, but simply that he held the title for her as trustee. When he commenced to hold as trustee he does not say. It is consistent, it is true with the idea that he held it all the time as trustee, yet we do not think it is inconsistent with the hypothesis claimed by appellant, that some little time after the purchase, by an arrangement with her, it was determined that she was to have the land, and that he should hold it for her. The language of the letter is equally as true under that hypothesis as the other. Indeed, in view of the fact that the letter seems to have been unreserved, and perfectly frank, in detailing the history of the transaction, it would seem to have been more reasonable, if the purchase had

been in fact made for appellant, that language would have been used.

Bentley was twice examined as a witness, once by appellees and once by appellant. In his first examination he said he could not say, when he made the offer, whether he bought the property for appellant or himself. After the purchase was made, or at the time of its consummation, he determined it should be for appellant.

In reply to this interrogatory — "When did you first tell him (*i. e.* Walker) you had concluded to purchase for his wife?" — he answered: "I cannot remember positively, but my impression is, after he had delivered me the deed and I gave him the notes and mortgage for the deferred payments, and was asked for the first payment. Could not state that before the sale was completed I did not inform Walker I was purchasing the property for his wife. I might have done so, but have no recollection of doing so, and my best impression is I did not; nor do I know whether Mrs. Walker did or did not know I was going to purchase the property for her. I have no recollection of having any conference with her on the subject, and, according to my best recollection, I acted on my own judgment and discretion in the premises, as I have done in making investments for her."

Again, in answer to a subsequent interrogatory, whether he did not inform Walker before the sale was consummated that he intended to purchase the property for appellant, he said: "I cannot, at this length of time, state what I did not do. I can only state that my impression is that I did not until the sale was consummated."

Upon being, at a subsequent day, examined on behalf of appellant, he said: "I have felt delicate in this matter about testifying to any thing very positive that transpired so many years ago, but since giving my deposition I have thought a great deal about it, trying to refresh my memory in various ways, and I cannot recall a single instance or circumstance that leads me to think or believe that I bought the property for Mrs.

Walker. I had bought property of Mrs. Walker for myself before. I recollect in this matter of the defective acknowledgment, I insisted to Mr. Walker that if I took this property, he and his wife must make a quitclaim deed to me, to correct this defect in the acknowledgment of Mrs. Walker, and he promised to do so. I insisted upon this at the time the abstract was prepared, and when I was in treaty for the property."

Appellant testified: "I have a remembrance that my brother, Cyrus Bentley, made a purchase of the land in question; remember having heard that he had bought it; remember Mr. Herbert, who lived in Chicago about that time. He was a brother-in-law of Mr. Walker. I recollect of going out in company with Mr. and Mrs. Herbert to view this land. It was after I had heard that Cyrus Bentley had bought it. I cannot say exactly what time of year it was, but think it was either in May or June of 1851. I fix the date in this way: it was not very long before my husband's sickness in that year; he was sick in August, 1851, of the cholera. The circumstances under which I came upon the ground at that time were, that my husband said to me he thought he would like to have me go out, together with Mr. and Mrs. Herbert, to see the land. Whether I was then owning, or whether I was to have it, it was my impression that he took me out at that time with Mr. Herbert to see what they would think of it; that it was perhaps optional with me whether I would have it or not."

And again she said: "I had an impression something like this: My brother thinks he can do better than to hold this land, and, therefore, he turns it over to me. * * I remember, some time after this, my brother saying to me, 'I rather think I missed it in letting you have this land; I had better kept it.'"

In answer to the question whether she and her husband had any conversation relative to Bentley's buying the land for her, she said: "I never recollect his talking with me at all. I remember of no conversation upon the subject relative to having

an interest in the property prior to May or June, 1851, at the time I went upon the ground. That was the first of my knowing or thinking, and I know of no conversation prior to that time, in which I was to have an interest in the property."

This evidence, standing alone, cannot be regarded as sufficient to prove that Bentley, at the time he purchased, was purchasing for appellant, or that Walker, when he recommended the sale, supposed that his wife was interested in it.

There are, however, a number of other circumstances which, it is claimed, should be taken into consideration, which are inconsistent with the idea that Bentley purchased for himself.

In a letter written by Bentley on the 23d of September, 1870, to Edwin T. Carrington, one of the appellees, who was then trustee for his mother and sisters, in regard to the property bequeathed by his grandfather, Eliphalet Terry, in alluding to the notes and mortgage executed to Terry and Boswell for the deferred payments on the land, he says: "These notes were all paid through Charles Walker, who attended to the business, and when Mr. Walker paid the last note I supposed he got a release of the mortgage given on said one hundred and sixty acres to secure said notes. Mr. W. died a couple of years since, and we find, since his death, no release of said mortgage on record, and conclude if he obtained a release he neglected to record it, and the same is lost."

Bentley, in giving his evidence in his first examination, also said: "As to the property in question, I had no active control of it, except to visit it occasionally, and to know who occupied it, and what improvements were made upon it. Mr. Walker had the principal charge and management of it by an arrangement with me. For several years the property was not occupied, except that parties had the privilege of cutting hay for a compensation; afterwards it was improved and leased. Mr. Walker gave them the privilege and received the compensation, and accounted to Mrs. Walker for the proceeds, keeping an account upon his books, and the books of the several firms of which he was a member, in the name of Mrs. Walker. I

know this was done, and saw the accounts, and examined them upon the books myself. * * * Primarily, Walker and his firms received the rents and profits, and Mrs. Walker had the benefit of them."

Transactions of this kind are always viewed with suspicion; still, where the property is clearly the property of the wife, the husband may act as her agent in its management, either by appointment of her trustee, or, since the act of 1861, relating to the separate property of married women, by her own appointment. *Brownell* v. *Dixon*, 37 Ill. 197; *Wortman* v. *Price*, 47 id. 22; *Pierce* v. *Hasbrouck*, 49 id. 23; *Dean* v. *Bailey*, 50 id. 481.

It appears from the evidence of Bentley that appellant had an estate coming to her from their father, which she was desirous should be preserved for her, separate from the property of her husband, and in 1849, at her request, and with the consent of Walker, he became her trustee for the management of this estate. The agreement was by parol merely; but Bentley, from thenceforth until since Walker's death, acted as her trustee, and no objection has ever been urged against the mode of his appointment.

He swears that on the ninth of September, 1849, he loaned Walker, for the use of his firm, Walker & Clark, $1,010, on which interest was to be paid at the rate of twelve per cent per annum, of appellant's money. This was the proceeds of two notes, which their father had executed to appellant many years before, in renewal of notes which he had given her before her marriage. The impression of the witness is, after Walker delivered him the deed to the property, and he had given the notes and mortgage, and when he was asked for the first payment, he informed Walker that the purchase was made for the appellant, and directed him to apply the amount due from himself on account of the money borrowed from witness belonging to Mrs. Walker, in payment of the notes. He further says, as a reason for appointing Walker agent to look after the land, he felt that, inasmuch as he was not proposing to

charge any thing for his own services, and was engaged in the active practice of the law, while Walker was engaged in business which rendered it not inconvenient for him to discharge the duties of the agency, and was, moreover, the husband of appellant, it was not unreasonable to ask him to assume whatever of burden there was in the matter. It does not appear that there was any circumstance to cause him to doubt Walker's competency so to act, or the prudence of his selection. He says Walker was a man of high character, he had had many business transactions with him and never had cause to doubt his integrity. That Walker owed the money to Bentley, as trustee for appellant; that it was agreed he should discharge the debt by paying the notes given by Bentley; and that he, as trustee of appellant, in good faith, accepted the payment of the notes as a payment of the debt due from Walker, can only be doubted by discrediting Bentley's positive and uncontradicted testimony. There is no pretense that the notes were not paid, and the circumstance of the neglect to obtain the release of the mortgage is evidence of negligence merely, and as consistent with the good faith of the transaction as with its opposite; indeed, it would seem more probable, if bad faith had existed, greater care would have been used to have avoided every pretext for a subsequent examination into the transaction, than if there had been no consciousness of danger to be apprehended from that source.

We are unable to perceive any thing so unreasonable in the nature of the fact testified to by Bentley, in this respect, as to raise a presumption against his veracity. On the contrary, we think they are capable of being reconciled as consistent with good faith in all the parties concerned in the transaction.

The relationship, of itself, does not imply such confidence between Walker and Bentley, even if the former had been the trustee to sell, as would preclude the latter from becoming the purchaser of the property.

Bentley says: "I cannot remember when my attention was first called to the fact that the property was for sale. It was

sometime before I purchased * * * * * * * * * * * * Walker told me where the land was, and said something about the quality of it. As to the value I can't remember particularly what he said, but my impression is that he gave it as his opinion that the land was worth about $5 an acre on a reasonable time for the payment of it. * * My impression is he expressed the opinion that at that price it might eventually prove to be a good investment; but he did not give it as his opinion that it would be a good investment at that price, with a view to converting it and turning it into money again in a short time, or until the lapse of years.

"Regarding my reasons for making the purchase, I think after a conference with others, though am not positive about it, I came to the conclusion that it would be a good investment, after the lapse of years, and as I had money that I could invest permanently, without needing it again for years, I was induced to purchase it; I do not remember previously to have visited the ground or land, but relied on Walker's statement as to the situation and character of it, and I think I traced it on a map." This is all there is in the evidence showing that Bentley purchased under Walker's advice.

We discover nothing here which is necessarily inconsistent with fair dealing. The object of Walker's agency was to find a purchaser for the land, and what he said to Bentley is no more than might have been said to any other possible purchaser. He did not represent that the land could be obtained for less than it was then worth, and his conjectures as to the profits to be derived in the future from buying and holding it, in no wise affected the duty he owed to the trustees. There is nothing in the language from which we can infer he was intending his wife should have the land; and Bentley's evidence is explicit that he was ignorant of what Walker wrote to the trustees in regard to the sale; that there was no conversation between Walker and himself, or between anybody and himself, for the purpose of regaining the property either from Walker

or his wife; and he adds: "I acted independently of Walker, and on my own judgment and responsibility, in making the purchase, and not until after May 11th, 1870, did I hear any allegations of fraud, nor had I the slightest conception that anybody supposed there had been any in the sale and purchase of this land; nor do I know of any unfairness or concealment having been practiced by any person or persons."

It appears from the letters of Walker to Edward Carrington, in evidence, that on the tenth of July, 1847, Walker wrote him: "I yesterday by contract sold your lot to William N. Bentley, Jr., for $600, to be cash within six months, and probably all down. Mr. Bentley has found a customer for it by the name of William D. Knapp. I have got of the money, so as to make it sure, etc., and he directs the deed had better be made to Knapp."

In a letter written to the same person on the twentieth of September, 1847, Walker informs him that the man with whom Bentley made the conditional bargain will not pay $800, but will pay $750 and no more, and closes by advising him to take it. It was after the receipt of this letter that Carrington caused Walker to be removed as agent, as we have before shown.

In the letter written by Walker to Carrington on the seventeenth of July, 1850, he informs him that he has made some inquiry, and can get no one to make an offer for the land except Mr. Bentley, who, he says, was the person that first made the offer two years before.

In a subsequent letter Walker says: "Bentley's name, the purchaser of the land, is Cyrus."

Bentley made an abstract of title before closing the purchase, from the records of Cook county, in which it appeared that in the certificate of the acknowledgment of the deed from Walker and wife to Eliphalet Terry the name of Walker's wife was given as Mary instead of Nancy B. This seems to have been an error of the recorder only, but it does not appear to have been known to either Bentley or Walker at the time, and

there was no certificate that the acknowledgment, which was taken in the State of New York, was in conformity with the laws of that State. The land had also been sold for taxes to Farwell.

These objections were pointed out by Bentley to Walker; and in a letter written by Walker to Seth Terry on the twenty-first of February, 1851, he used this language: "It has taken me a long time to get Mr. Bentley to examine the title to the land sold, as he was full of professional business. I found it was sold and past redemption, and lost, if Mr. Farwell had not been my particular friend. I succeeded in buying the certificate, and got it assigned to me. * * * I see that my deed is informal to Mr. Terry, but I and my wife can quitclaim it to Mr. Bentley, which will cover the tax title and all.

"Mr. Bentley shows you how you must deed to have the deed good, and you will please make out the papers accordingly, in strict compliance, and forward," etc.

From these letters and circumstances, appellees' counsel insist these conclusions are to be deduced: First, there was, from the first letters, written by Walker to Edward Carrington, a design to repossess himself of this land, either by getting the title in his own name or in that of his wife; and secondly, to conceal all knowledge of this design from the trustees.

The name of Knapp, they claim, was a myth, and Bentley was to be used to assist him in accomplishing his design. The letters, it is argued, show great artifice and adroitness in representing the difficulty of selling the property and in magnifying trifling objections to the title, etc., so as to reconcile the trustees to the sale and satisfy them with the small price for which it was sold.

It seems to us this line of argument assumes what it devolves upon appellees to prove. If we shall assume that Walker was, all the time, laboring to get the title to the property in himself or in his wife, and that he used Bentley as a mere instrument to accomplish his end, we may discover much adroitness and skill in the artifices to which he resorted.

But does the evidence necessarily tend to prove that such was his design?

If it is susceptible of an explanation, equally reasonable, consistent with the fidelity and good faith of Walker as a trustee, we must adopt it.

Appellant had a brother named William N. Bentley, who died in 1852, and appellant says she heard her husband talking with him about the land, but she recollects of no conversation relative to her having an interest in the property. Cyrus Bentley says that in 1847 his brother William N. lived in Beloit, but was frequently in Chicago, and between 1847 and 1850 was engaged in frequent real estate transactions with Walker. There appears, therefore, no insuperable difficulty to his having made the offer represented; nor, if made, why it should not have been made in good faith. But who was Knapp? Walker and William N. Bentley, if alive, might tell. It surely cannot be regarded as strange or suspicious that William N. Bentley, twenty-five years before this evidence was taken, knew a man to whom he could have sold the land, yet who is unknown to the witnesses who have testified. It is not shown there could have been no such person; and in the absence of such proofs the presumption must be, especially after the lapse of the great length of time that has intervened, that the representation was correct.

The fact that Walker alludes to Cyrus Bentley as the same person who had made the offer two years before, we think of no importance. It was, manifestly, a mistake of his, resulting, probably, from the fact that both were brothers of his wife. But of what consequence was it, in the view claimed by appellees, whether the last offer was made by the same person who made the former offer or not? It does not appear that it would have been less objectionable to the trustees to convey to Cyrus than to William N.

And as between persons occupying an apparently equally indifferent relation to the trust, the only question of importance to them was evidently the price that was proposed to be paid.

So far as the objections urged by Bentley to the title are concerned, we think they are precisely such as would have been urged by any cautious and prudent man in purchasing for himself.

That they were easily removed does not materially affect the question. The record showed their existence, and it was but the part of prudence to require that they should be corrected before title was made and the transaction closed. It is, to our mind, much more reasonable that, if he had at the time known that he was purchasing for appellant, he would have made no objection to the acknowledgment of the deed, so far as her name was concerned, knowing that it would be wholly immaterial.

It is insisted, waiving the question on the evidence, and conceding that Bentley, in fact, purchased for himself, yet inasmuch as appellant shortly thereafter became invested with an equitable interest in the property, in which Walker, by virtue of his marital relation, had rights, the sale was void, because, it is argued, a sale made by an agent is invalid when it has been made one day and upon a subsequent day the trustee or agent becomes interested in the property, and *Kruse* v. *Steffens*, 47 Ill. 113, is referred to as sustaining the position. In that case it was held: "The fact that the person entrusted by law to make the sale becomes the purchaser, whether by direct or indirect means, creates such a presumption of fraud as requires the sale to be vacated, if application is made in proper time."

The evidence showed that Schrieber was the auctioneer, and bid off and knocked down the lands to himself as the purchaser. He paid no portion of the purchase money, nor did he execute note and mortgage on the premises to secure the same. After the sale nothing was done until the deeds were interchangeably executed by the administrator and Schrieber, and it was said: "As the deeds were both executed at the same time, the law will regard them as forming a part of the same transaction. Considered in this light, the effect was pre-

cisely the same as if the administrator had conveyed the lands to himself."

The question was one of evidence only. It was not said, nor has it been held by this court, where the trustee has fully discharged his duty and ended his trust, he may not subsequently negotiate for the ownership of the trust property. The question was before us, and the reverse was held to be the law in *Munn et al.* v. *Burgess et al.* 70 Ill. 604.

When Bentley determined to hold the property in trust for appellant, Walker's duties as agent for its sale had been entirely concluded. The property was sold, and what subsequently became of it could in no possible way relate back to and affect the question of its original value. Nor do we conceive that it was a matter which Walker was under any obligation to communicate to the trustees when he was informed by Bentley of the disposition he intended to make of the property. If, at the time he recommended that the property should be sold to Bentley, he had known Bentley was designing the purchase for appellant, he should undoubtedly have communicated that fact to the trustees, for they were entitled to know of any interest he might have in the sale which might affect the fairness and good faith of his recommendation. But after the sale was concluded no such consideration could apply.

We are, moreover, of opinion that the claim of appellees is barred as a stale claim, upon the grounds of laches and long acquiescence in the adverse right of appellant. As early as 1858, and thence until the filing of the bill, appellant was in the open and notorious possession of the land by her tenants. Her claim seems to have been known in the neighborhood of the land even at an earlier date by several years. The taxes, except for the year 1863, were all paid in her name and for her. In 1864, a deed from a former owner of the land to her was placed on record, thus giving thenceforth constructive notice that she was claiming as owner.

By the long delay in filing the bill and in consequence of the death of Charles Walker and Seth Terry, many circumstances

that might otherwise be susceptible of satisfactory proof, are unsusceptible of proof, and, in this, delay has wrought injury to appellant, which it is inequitable that appellees should profit by.

The rule applied in *Carpenter* v. *Carpenter*, 70 Ill. 457, *Dempster* v. *West*, 69 id. 613, and recognized in *Munn et al.* v. *Burgess et al.* 70 id. 604, is equally applicable here. The decree will be reversed and the bill dismissed.

Decree reversed.

Mr. JUSTICE BREESE: Believing the theory of appellees is the correct theory of this case, and that it is sustained by sufficient proof, I am unable to concur in the opinion of the majority of the court.

ROBERT L. WILSON

v.

GEORGE M. SAWYER *et al.*

VENDOR'S LIEN — *waived by taking security.* Where the vendor of land takes the purchaser's promissory note with personal security for the unpaid purchase money, and afterwards, by direction of the purchaser, conveys the land to a third person, and assigns the note, the presumption of a lien will be repelled, especially after the lapse of several years.

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

Messrs. KILGOUR & MANAHAN, for the plaintiff in error.

Mr. J. E. MCPHERRAN, for the defendants in error.

Per CURIAM: This was a bill by plaintiff in error to subject certain lands owned by one Eliza M. Smith to a vendor's lien for purchase money, and subject it to the payment of a certain judgment recovered by one Silas R. Wilson against defendants in error, Burditt and Sawyer. The bill is not sustained by the

proofs. It alleges a sale of the lands to Burditt and Sawyer jointly, whereas the proof shows the contract of sale was entered into March 20, 1858. It was in writing, under seal, and was between plaintiff in error as vendor and Burditt as purchaser. One hundred dollars was paid in cash and Burditt gave his note for $293.68, payable in one year, with Sawyer's name upon it. In September, same year, by Burditt's directions, plaintiff in error and wife executed a deed of this land to the above named Eliza M. Smith, who has ever since owned it. Plaintiff assigned said note to said Silas R. Wilson, who, in 1867, brought suit upon it and recovered judgment in his name, on which he has sued out execution. This bill was filed in January, 1870. We are of opinion that by taking Burditt's note with the name of a third person upon it, presumptively as a surety, conveying the lands to Smith and assigning that note to Silas R. Wilson, the presumption of a lien is repelled. Especially is this so in view of the lapse of time. The decree of the circuit court dismissing the bill is affirmed.

Decree affirmed.

THOMAS HUSTON *et al.*

v.

JOHN H. ATKINS.

JURY — *right of trial by.* Upon objections being filed to the report of surveyors in fixing disputed boundaries of land, denying its correctness, it is error in the court to refuse a trial by jury when demanded, to try the issues made.

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

Mr. C. M. HARRIS, for the plaintiffs in error.

Mr. JOHN J. GLENN, for the defendant in error.

PER CURIAM: This was a proceeding instituted by Atkins, defendant in error, against plaintiffs in error, in the Henderson circuit court, under the act, entitled "An Act to provide for the permanent survey of lands," passed March 25, 1869.

Pursuant to the provisions of the act, a commission of surveyors was appointed, who made a survey of the lands in question, and filed their report in court, whereupon the defendants below filed objections to the report denying its correctness, and made a motion that a jury come to try the issues so made. The court overruled that motion, to which exception was taken. Judgment passed confirming the report of the surveyors, on which the defendants brought error to this court. Several errors are assigned; but inasmuch as the denial by the court of a trial by jury is fatal to the judgment, the other errors assigned will be disregarded. The right of trial by jury, in this class of cases, was expressly affirmed by this court in *Townsend et al.* v. *Radcliffe et al.*, 63 Ill. 9. That case is decisive of the one at bar. The judgment of the court below will be reversed and the cause remanded.

Judgment reversed.

CRAIG, J., having been of counsel for defendant in error in the court below, took no part in the decision of this case.

CHARLES BRADLEY

v.

JOHN E. BARBOUR.

CIRCUIT COURT — *branch held by another judge.* Under the statute the judge of any circuit court in this State is authorized to hold a branch term of the Superior Court of Cook county, and the statute infringes no constitutional provision.

APPEAL from the Superior Court of Cook county; the Hon. JOHN BURNS, Judge, presiding.

Syllabus.

This was an action of assumpsit brought by John E. Barbour against Charles Bradley and one Lott Frost. Bradley alone was served with process and pleaded the general issue.

Messrs. KNOWLTON & HUMPHREYVILLE, for the appellant.

Messrs. SCOTT & KING, for the appellee.

Per CURIAM: The question argued in this case is governed by *Albee* v. *Jones*, 70 Ill. 34. It appears by the placita and bill of exceptions, that trial was had before the Hon. John Burns, one of the circuit judges of the State, while holding a branch term of the Superior Court of Cook county. This, in the case referred to, was held to be authorized by statute and no infringement of any constitutional provision.

Judgment affirmed.

THOMAS KNOX *et ux.*

v.

PETER BRADY.

1. MISTAKE — *reforming deed of married woman.* The deed or other contract of a married woman respecting her separate property since the passage of the act of 1869, in relation to conveyances, may be reformed for mistake, the same as if she were sole, and its execution may be proved, and her contracts respecting her separate property specifically enforced in equity; but as to the lands of her husband her contracts are void, and a mistake in a conveyance of the same cannot be reformed as against her.

2. MARRIED WOMEN — *deed of, for husband's land.* A married woman can only relinquish her rights of homestead and dower in her husband's lands by joining with him in the execution of a deed or mortgage. All other contracts in relation thereto are void for want of capacity.

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

This was a bill in equity to reform a deed for land executed by husband and wife, for a mistake in the description of the property. The court below granted the relief sought.

Mr. G. O. BARNES, for the plaintiffs in error.

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

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Prior to the passage of the act of 1869, amendatory of the act of 1845, entitled "conveyances," it had been uniformly held by the decisions of this court, the deed of a married woman could not be reformed, no matter how clearly it might be established, there had been a mistake in the description of the property intended to be conveyed. *Moulton* v. *Hurd*, 20 Ill. 137; *Spurck* v. *Crook*, 19 id. 415; *Martin* v. *Hargardine*, 46 id. 322.

The principle underlying all the decisions on this subject was the want of legal capacity in a married woman to contract in regard to, and her consequent inability to release her interests in lands except by the enabling laws of the state. A mere contract either in relation to her own or her husband's lands could not be enforced against her. Nor was the execution of a deed by signing, sealing and delivering sufficient. To make it valid and effectual to pass her interest in the lands, it was indispensable it should be acknowledged before an officer designated in the statute. Otherwise her deed was inoperative. Accordingly, where the officer certified he had examined her separate and apart from her husband, touching her willingness to relinquish her dower, homestead or other interest in a tract of land, the court could not afterwards take that relinquishment and apply it to another tract, although it was the intention of all parties it should be embraced in the deed, and was omitted by mutual mistake. She was bound by no contract in relation to her own or her husband's lands, unless acknowledged in the manner provided in the statute. *Martin* v. *Hargardine*, 46 Ill. 322.

While the act of 1869, cited, may enumerate more instruments a married woman may execute in relation to her interests in lands by joining with her husband, it only differs materially in the provision in regard to the proof of the execution of such instruments, viz.: "the acknowledgment or proof of such deed, "mortgage, conveyance, power of attorney, or other writing may be the same as if she were sole." Under this latter act we can readily conceive the execution of any deed or mortgage or other writing in relation to the sale or other disposition of lands, about which a married woman may legally contract, is valid by signing, sealing and delivering without being acknowledged before any particular officer. The proof "may be the same as if she were sole." Proof of her signature would be sufficient evidence of the execution of the deed in like manner as that of a person under no disabilities.

But under our law, as it then was, a married woman could only contract in regard to her separate estate or property. All other contracts were absolutely void as at common law. The statute of 1869, which we are considering, in relation to conveyances, did not remove the disabilities resting upon her in this regard. It does not purport to do so and we ought not by judicial construction to hold that it did. So far as a married woman could contract in regard to her separate property, since the passage of that act no reason exists why her contract, as well as that of a *femme sole*, may not be reformed according to the agreement of the parties. The proof of the making of the contract is the same, and it would be inequitable to permit her to retain the consideration and still refuse to perform the contract as she had made it. She would be liable upon such a contract at law, and equity may compel a specific performance. As we have seen, however, all contracts of a married woman in relation to her interests in her husband's land, such as dower and homestead, being void for want of legal capacity in her to contract, cannot be enforced against her. It is for the simple reason such contracts are absolutely void. She could only relinquish such rights by joining with her husband in the execution

of the deed or mortgage in the manner provided by law. *Bressler* v. *Kent*, 61 Ill. 426. It may be such a deed would be good upon proof of signature of the maker without acknowledgment. Whoever deals with a party under disabilities does so at his peril, and although an error may occur by mutual mistake of all parties in the description of the lands not her separate property, to be embraced in the deed of a married woman, the court possesses no power to reform it.

In the case at bar the lands which it is alleged should have been embraced in the mortgage belonged to the husband, at least it is not charged they were the separate property of the wife. It is not alleged in the bill she ever agreed to release her dower or homestead in the lands. But waiving that point, and conceding she had agreed to do so, her contract in relation thereto was absolutely void, and of course no court could compel a specific performance. *Russell* v. *Rumsey*, 35 Ill. 362. If she chose to relinquish her dower and homestead in lands of her husband, either absolutely, as in a deed of bargain and sale, or for the benefit of his creditors by mortgage, according to the forms of the law, she had that privilege, if above the age of eighteen years, by joining with her husband in the execution of the deed or mortgage, but not otherwise. It is only by joining with her husband in the execution of the deed or mortgage, she could be concluded at all in regard to such rights. That is the plain meaning of this statute, and we are not authorized to enlarge its provisions by construction. That is the business of the legislative and not the judicial department. *Martin* v. *Hargardine*, *supra*; *Rogers* v. *Higgins*, 48 Ill. 211.

So far as the decree purports to reform the mortgage as to Mrs. Knox it is erroneous and must be reversed and the cause remanded.

Decree reversed.

HENRY YOUNG

v.

WILLIAM ADAM.

COUNTY COURT —*jurisdiction in contested election for city office.* The county court has no jurisdiction to try a contested election respecting a city office unless the city is incorporated under the general law of the State.

APPEAL from the County Court of Will county; the Hon. BENJAMIN OLIN, Judge, presiding.

Mr. GEORGE S. HOUSE, for the appellant.

Messrs. BRECKINRIDGE & GARNSEY, for the appellee.

Per CURIAM: This was a proceeding to contest an election for the office of alderman for one of the wards of the city of Joliet.

The only question discussed is, had the county court of Will county jurisdiction to try the contest? It is agreed if that court had jurisdiction the judgment is to be affirmed, and if not, it shall be reversed.

In *Brush* v. *Lemma*, 77 Ill. 496, which was a contest for the office of mayor of the city of Carbondale in Jackson county, and which was twice argued — the first time at the June term, 1874, and the last time at the June term, 1875, we held that a contest for the office of mayor of a city could not be prosecuted by proceedings in the county court, unless it appeared that the city was incorporated under the general law relating to the incorporation of cities.

The city of Joliet is incorporated, as appears from the record, under a special charter, and the case is, therefore, governed by *Brush* v. *Lemma*. The judgment is reversed.

Judgment reversed.

DEIDRICH EHRICH

v.

WARREN WHITE.

NEW TRIAL — *finding against evidence.* When the verdict of the jury in an action on the case for selling intoxicating liquor to a minor is clearly against the weight of evidence, a new trial should be granted.

APPEAL from the Circuit Court of Kankakee county; the Hon. N. J. PILLSBURY, Judge, presiding.

This was an action on the case, by Warren White against the appellant, to recover damages for an alleged injury to plaintiff's minor son by the sale of intoxicating liquors to him. A trial was had, resulting in a verdict and judgment in favor of the plaintiff for $25.

Mr. JAMES N. ORR, for the appellant.

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

PER CURIAM: This was an action brought by Warren White to recover for an injury sustained by his minor son, H. W. White, alleged to have been caused in consequence of the sale to the latter of intoxicating liquors. Plaintiff in the court below recovered, and defendant appealed.

The evidence was insufficient to show that the defendant furnished to the son the liquor wherewith it was claimed he became intoxicated.

The only evidence of the fact was that of the son, who testified that he bought and drank at the saloon kept by the defendant four glasses of whisky or brandy, and had a pint flask filled; that he got the liquor of a son of defendant; that he treated and drank there with another son of defendant, and that defendant was at the same time in the saloon or store kept in connection with the saloon.

The sons of defendant testified, the one that he did not let the witness White have any liquor whatever, the other that he did not drink with White, and both that White was not in the saloon on that day; and the defendant testified that he was not in the saloon that day, but was on his farm engaged in work there. In addition, two other witnesses testified to young White's admission to them that he did not get his liquor at defendant's, but at another place. We think the verdict was clearly against the weight of evidence. The judgment must be reversed, and the cause remanded.

Judgment reversed.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIAM F. TOMPKINS *et al.*

1. SURETY — *undertaking construed strictly.* The contract of a surety is construed strictly and his liability will not be extended by implication.

2. SAME — *bond of grain inspector.* The sureties of a chief inspector of grain in a city, appointed under the "act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to article thirteen of the constitution of this State," are not responsible for moneys collected by him for inspection, in a suit upon his bond, where the duty of collecting and taking care of such fund is not imposed on him before the execution of his bond.

WRIT OF ERROR to the Circuit Court of Cook county.

This was an action of debt by the People of the State of Illinois against William F. Tompkins, as grain inspector, and Aquilla H. Pickering, John B. Lyon, Wiley M. Egan, George H. Sidwell and David H. Lincoln, his sureties upon his official bond.

The following is a copy of the declaration, omitting the formal parts:

Statement of the case.

"For that, whereas, the said Tompkins heretofore, to wit, on the 3d day of July, A. D. 1871, was duly appointed and commissioned by the then governor of said State of Illinois, by and with the advice and consent of the senate of said State, to the office of chief inspector of grain in and for the city of Chicago, in said Cook county, and that he, the said Tompkins, then and there accepted the said appointment and commission to said office, and entered upon the duties thereof; and that the said Tompkins as principal, and the said Pickering, Lyon, Egan, Sidwell and Lincoln as sureties, afterward, to wit, on the 31st day of July aforesaid, and upon the entering of him, the said Tompkins, upon the duties of said office, executed and delivered to the said plaintiffs, as the official bond of said Tompkins as such chief inspector, the bond hereinafter described; and that he, the said Tompkins, on the day and year last aforesaid, upon entering upon the duties of said office, took and subscribed in due form of law an oath of office as such chief inspector of grain; and that on the day and year last aforesaid, in the county aforesaid, the said defendants, by their writing obligatory, bearing date of that day, and sealed with their seals, did acknowledge themselves to be held and firmly bound to the said plaintiffs in the sum of $50,000, to be paid to said plaintiffs; which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting, to the extent that the said Tompkins had been appointed and duly commissioned chief inspector of grain for said city of Chicago, it was provided that if he, the said Tompkins, should faithfully and strictly discharge the duties of said office of chief inspector according to law and the rules and regulations prescribing his duties; and pay all damages to any person or persons who might be injured by reason of his neglect or failure to comply with the law and the rules and regulations aforesaid, then said writing obligatory was to be void, otherwise to be and remain in full force and effect, as by the said writing obligatory and by the said condition thereof appears.

"And the said plaintiffs further complain and say that the

said Tompkins, on the day and year last aforesaid, in said county, entered upon the discharge of the duties of said office, and continued to discharge the same up to and till the 8th day of April, A. D. 1873; and that, to wit, on the day and year last aforesaid, said Tompkins was lawfully removed from said office by the governor of said State, and one William H. Harper was then and there duly and lawfully appointed and commissioned to said office of chief inspector by the said last-named governor in place and instead of said Tompkins; and that the said Tompkins then and there surrendered the said office of chief inspector to said Harper as his successor, and ceased to act as such chief inspector; and that the said Harper then and there entered upon the duties of said office as he lawfully might, and has ever since continued to be and act as such successor to the said Tompkins.

"And the plaintiffs aver that before the performance of the acts and commission of the grievances hereinafter mentioned, to wit, on the 2d day of August, A. D. 1871, and from time to time subsequently thereto, the board of railroad and warehouse commissioners fixed and regulated the charges for the inspection of grain in such manner as would, in the judgment of said commissioners, produce sufficient revenue to meet the necessary expenses of the service of inspection, and no more; and, also, to wit, on the 2d day of August, A. D. 1871, fixed and regulated the manner in which such charges for inspection should be collected, in pursuance of the statute in such case made and provided; that is to say, the board of railroad and warehouse commissioners then and there adopted certain rules and regulations whereby the said chief inspector of grain was authorized to collect such charges for the inspection of grain as might be established from time to time by the said commissioners, and therewith to pay for the services of all persons employed in such inspection service or department, monthly, together with such other additional expenses of office, rent, stationery, etc., as might be necessary, etc.

"And said plaintiffs further complain and say that it became

and was the duty of said Tompkins, as such chief inspector of grain, during his continuance in said office, to faithfully, strictly and impartially inspect, or cause to be inspected, grain in the city of Chicago, and collect and receive the lawful fees for such inspection, in accordance with the rules and regulations of said board of railroad and warehouse commissioners; and that the said Tompkins did, during his continuance in said office of chief inspector, inspect or cause to be inspected large quantities of grain in said city of Chicago, and did then and there lawfully collect and receive as lawful fees for such inspection a large sum of money by virtue of said office of chief inspector; and that it was his duty, on his removal from said office as aforesaid, to deliver and pay over to the said Harper, the said successor of him, the said Tompkins, in office, all the fees which he, the said Tompkins, then and there had in his possession, arising and accruing from the inspection of grain, by and under said Tompkins, as such chief inspector; and that he, the said Tompkins, at the time of his removal from said office as aforesaid, had in his custody and possession, in his official capacity as such chief inspector, a large sum of money, to wit, the sum of $1,666.98, arising and accruing from the said fees for such inspection of grain, collected and received by him as such chief inspector; which said sum of money said Tompkins has not at any time paid out to defray the expenses of said inspection service; and which sum of money it was then and there the duty of said Tompkins to deliver and pay over to said Harper on demand therefor. Yet the said plaintiffs complain and say that the said Tompkins did not then and there, and has not yet delivered and paid over to said Harper said sum of $1,666.98, or any part thereof, although he, the said Tompkins, was then and there duly and lawfully required so to do by the said railroad and warehouse commissioners, and requested so to do by the said Harper, but hath converted the same to his own use. By means whereof, and by reason of which said premises, an action hath accrued to the said plaintiffs to demand, have and receive of said defendants the said sum of $50,000 above demanded.

Yet the said defendants have not paid to said plaintiffs the said last-named sum of money, or any part thereof, but refuse so to do, to the damage of said plaintiffs of the sum of $1,666.98, and therefore do said plaintiffs bring this suit," etc.

The court sustained a general demurrer to the declaration and rendered judgment against the people for costs.

Mr. JAMES K. EDSALL, Attorney General, for the People, made the following points:

1. That it was the duty of the chief inspector to receive the fund in question.

2. That it was his duty, upon removal from office, to pay the same over to his successor.

3. The sureties upon an official bond are liable for the discharge of duties germane to the office which are subsequently enjoined upon their principal, by competent authority, citing *Smith* v. *Peoria County*, 59 Ill. 412, 425; *Governor* v. *Ridgway*, 12 id. 14.

4. The court erred in rendering judgment against the People for costs, citing *The People* v. *Cloud*, 50 Ill. 439; *The People* v. *Pierce*, 1 Gilm. 555.

Mr. S. K. DOW, and Mr. FRANK J. SMITH, for the defendants in error:

The words of an official bond must be construed with reference to its recitals, and to the nature of the office or appointment, and the nature and duties of the office must be learned from the statute itself.

The liability of a surety cannot be extended by implication beyond the terms of the contract.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Unless the collection and custody of the fund involved in this controversy can be held to have been fairly within the contemplation of the parties at the time of the execution of the bond, there can be no recovery, for no principle of law is

better settled than that the contract of a surety is to be construed strictly, and his liability cannot be extended by implication beyond the terms of his obligation. As observed by STORY, J., in *Miller* v. *Stewart et al.* 9 Wheat. 680: "To the extent, and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further." *Reynolds* v. *Hall et al.* 1 Scam. 35; *People, etc.*, v. *Moon*, 3 id. 123; *Governor, etc.*, v. *Ridgway*, 12 Ill. 14; *C. & A. R. R. Co.* v. *Higgins et al.* 58 id. 128; *Smith* v. *Peoria County*, 59 id. 425.

By the fourteenth section of the "act to regulate public warehouses, and the warehousing and inspection of grain, and to give effect to article thirteen of the constitution of this State," in force July 1, 1872, Laws of 1872, pp. 767–8, it is made the duty of the governor, by and with the advice and consent of the senate, to appoint a person having the qualifications therein prescribed chief inspector of grain for every city in which is located a warehouse of class A, who shall hold his office for the term of two years, unless sooner removed. It is the duty of the inspector thus appointed to have a general supervision of the inspection of grain, as required by the act or the laws of the State, under the advice and immediate direction of the board of commissioners of railroads and warehouses. He is authorized to nominate to the commissioners of railroads and warehouses assistant inspectors, and such other employees as may be necessary to properly conduct the business of his office, and the commissioners are authorized to make the appointments. Upon entering upon the duties of his office the chief inspector is required to execute a bond to the people of the State in the penal sum of $50,000, with sureties to be approved by the board of commissioners of railroads and warehouses, conditioned that "he will faithfully and strictly discharge the duties of his said office of inspector according to law, and the rules and regulations prescribing his duties, and that he will pay all damages to any person or persons who may be injured by reason of his neglect, refusal or failure to comply with the law and the rules

and regulations aforesaid." The assistant inspectors are required to execute bonds in the penal sum of $5,000, in form the same as that of the chief inspector, and it is provided that suits may be brought upon all such bonds for the use of *any person injured*, but there is no provision expressly authorizing suits to be brought thereon for the use of successors in office.

The bond follows the language of the statute, but neither in its condition nor in any part of the statute is there language referring directly to the anticipated collection and custody of money by the chief inspector, on any account. True, power is conferred by the statute upon the commissioners of railroads and warehouses to fix the rate of charges for the inspection of grain and the manner in which it shall be collected, but it does not designate the chief inspector, nor require that he shall be selected as the collector and custodian of the fund thus to be raised. The duty expressly enjoined upon the chief inspector is to have a general supervision of the inspection of grain, as required by the act or the laws of the State, which is to be discharged under the advice and immediate direction of the board of commissioners of railroads and warehouses, who are empowered to make all proper rules and regulations for the inspection of grain. The sureties of the chief inspector, when executing the bond, must have within their contemplation whatever may relate to the supervision of inspection, but the collection of the charges for inspection, and the custody of the fund thus to be raised are distinct and independent acts, and the duty to perform them cannot be necessarily implied from the duty to have supervision over inspections, for manifestly they might be performed by some person other than the chief inspector, with equal propriety. Undoubtedly, the chief inspector may be selected to perform these acts, but it is impossible to foresee that he will be selected until the board of commissioners of railroads and warehouses have so indicated by their action.

When the bond of Tompkins was executed therefor, his sureties were not chargeable with knowledge by the law that he would be required to collect and have the custody of the

fund in controversy, and since the declaration shows that the commissioners of railroads and warehouses did not, until after the execution of the bond, adopt the rules and regulations by virtue of which he did collect and obtain the custody of that fund, it follows it cannot be held within the contemplation of the parties in executing the bond that they were assuming any liability on that account, and that the demurrer was properly sustained.

Had the duty been enjoined upon Tompkins, as chief inspector, when the bond was executed, to collect this fund and retain its custody, a different and much stronger case in favor of the plaintiffs would have been presented. It is sufficient for the present, however, that no such case is presented by this record, and its merits need not be discussed.

The judgment against the People for costs was erroneous, but this will be modified and the proper judgment rendered in this court, the error being purely formal and incapable of producing substantial injury to the people.

The judgment below is modified and affirmed.

Judgment affirmed.

SCOTT and CRAIG, JJ., dissenting.

PETER KELLER

v.

ERNST FOURNIER *et al.*

PRACTICE—*bill of exceptions; trial out of order.* If a party assigns for error, that the cause is advanced on the docket and tried out of its regular order, the bill of exceptions should show that the objection was made in the court below, and exception taken to trying the case out of its order.

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

Syllabus.

This was an action of assumpsit, brought by the appellees against the appellant, upon a promissory note.

Mr. THOMAS SHIRLEY, for the appellant.

Messrs. MCCLELLAN & HODGES, for the appellees.

Per CURIAM: This is an appeal from the Superior Court of Cook county.

The error assigned is, that the cause was advanced under the "five-day" rule of the court below, and tried by the court out of its order on the docket, contrary to the provision of the general practice act. It is sufficient to remark that the bill of exceptions does not show that objection was made and exception taken to the trying of the case out of its order on the docket. The bill of exceptions should show that to have been done, in order to avail of the error assigned. The judgment is affirmed.

Judgment affirmed.

GEORGE E. PURINGTON *et al.**

v.

JAMES H. AKHURST.

1. MORTGAGE — *or a sale.* Where a bill of sale is made of vessels, absolute on its face for one-half interest therein, it will require evidence of the clearest character to show that it was intended only as a mortgage to secure a loan, or advances.

2. EVIDENCE — *contract not signed.* A contract prepared by a party, though not executed by either party, is entitled to great weight as evidence in showing what was the real contract between them.

3. PRACTICE IN SUPREME COURT — *as to errors assigned.* If a party desires to urge a ground of reversal he should state the same in his opening argument, so as to give the other party a chance to reply. But if it is specially assigned for error, this court cannot disregard it.

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*This case was submitted at the Sept. Term, 1871, and by inadvertence omitted from its proper place in the reports.

APPEAL from the Superior Court of Cook county.

This was a bill in chancery, filed by George E. Purington and Abner R. Scranton against James H. Akhurst, on the grounds stated in the opinion, where the material and leading facts appear.

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

Messrs. RICH & THOMAS, for the appellee.

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

In August, 1868, the defendant, Akhurst, was in partnership with one Clary, and the joint owner with him of certain canal boats and two steamers plying on the Illinois river. Their business became embarrassed and their boats were subject to heavy liens for debts. Akhurst opened a negotiation with the complainants, Purington and Scranton, who were partners as ship chandlers, in Chicago, the result of which was that the partnership of Akhurst and Clary was dissolved. The latter executed to Purington and Scranton a bill of sale of his one-half of the boat stock, and they formed a partnership with Akhurst, in the transportation business, and agreed to advance the funds necessary to pay the liens upon the boats. The new partners did not agree, and in October, 1869, although the business had made a profit estimated in the bill at $6,000, the boats, in common with all property of that kind, had greatly depreciated in value, and the complainants filed their bill asking a dissolution of the partnership, a statement of the account, and that Akhurst be decreed to take the vessels and re-imburse to complainants the amount of their advances. This decree is asked upon the ground that the agreement between the parties was, that the money should be advanced by complainants as a loan, to be secured by the transfer of one-half the boat stock; that the business should be prosecuted for one year, and that at the end of that period, if complainants were not satisfied, the

defendant should take back the property and refund the advances of complainants, who were to have one-half the profits for the use of their money.

They claim to have had the option, for a year, to treat the transfer of the boat stock either as an absolute sale or a mortgage, as they might elect, and that they exercised that option within the year by giving notice to the defendant.

The defendant denies this agreement, and asserts that the sale of the boat stock was absolute. Testimony was taken, and the court found the sale absolute, and decreed an account to be taken on this basis. By consent of parties the complainants prosecuted an appeal upon this interlocutory decree.

The oral testimony is that of the two complainants and their clerk on the one side and of the defendant on the other. Other persons testify as to collateral matters, but these are the only witnesses whose testimony is of any importance as to the real question in controversy. The two complainants and their clerk swear positively to the agreement set forth in the bill, and the defendant, with equal positiveness, testifies that the sale was absolute.

The oral testimony preponderates in favor of appellants, but there is certain documentary evidence in the record upon the strength of which we presume the superior court based its finding and which constrains us, though with a good deal of hesitation, to substantially affirm the decree. We refer to the bills of sale, which are absolute in their character, containing nothing to indicate that the property was taken merely as security for a debt, and to the instrument indicated in the record as Exhibit E. This was an agreement of co-partnership drawn by Purington himself, with the approval of Scranton, soon after the new firm began business, and submitted to Akhurst, but for some reason never executed by the parties. The reason why this agreement was not signed is stated by the defendant to have been that after it was read to him and approved it was agreed, as it contained interlineations and erasures, that two

fair copies should be made and signed, each party keeping one. That agreement was as follows:

Articles of Agreement entered into this fifth day of September, A. D. 1868, between James H. Akhurst, Geo. E. Purington and Abner R. Scranton, all of the city of Chicago, and State of Illinois, witnesseth: That the said Akhurst, Purington & Scranton have and by these presents do agree to enter into and prosecute the business, under the name or style of trading and freighting on canal and rivers, by steam and canal boats, and such other business as may be deemed mutually advantageous. And the said Akhurst agrees to contribute to the capital stock the sum of Twenty Thousand dollars ($20,000), and the said Purington & Scranton, agree to contribute to the capital stock the sum of Twenty Thousand dollars ($20,000), making the capital stock Forty Thousand dollars ($40,000); and the said co-partners hereby mutually agree that they will use their best efforts to advance their joint interests, and that they will use the moneys and credits of their said firm, for their mutual profit and for no other purpose. And it is hereby expressly agreed that neither of the said co-partners shall indorse or otherwise become security for any person or firm during the continuance of this agreement. The gains or losses accruing to the business of said co-partners shall be divided equally, one-half to J. H. Akhurst and one-half to Purington & Scranton, and all liabilities of every nature shall be borne in like manner. The foregoing articles of agreement shall be in force for the full term of one year.

It will be observed that this agreement comprises all that is necessary to a complete contract of co-partnership, even providing for such matters of detail as that neither co-partner shall become security for third persons, and yet contains not a syllable in reference to the refunding by the defendant of the money advanced by complainants, though providing for the distribution of the profits. The original instrument was left by complainants in a drawer of their office-desk, and a copy was subsequently taken by the defendant without their knowledge.

It was thus brought out upon the hearing. Some five or six months thereafter another agreement, containing the disputed provision, was prepared by complainants and submitted to defendant, but he refused to sign it.

If the instrument first prepared by complainants had been executed by the parties, it would have been undeniably conclusive against the claim now made by complainants. They would not have been permitted to incorporate into the written articles of co-partnership, by parol evidence, a new stipulation so materially changing their terms. Although this instrument was not executed, and is not therefore an estoppel upon complainants, yet as it was prepared by them on consultation with each other, and as it shows upon its face that it was a completed instrument, with the exception of dates and signatures, we are constrained to give it very great weight as evidence, and to regard it as showing the understanding of the parties, at the time it was drawn, as to the terms of the partnership. In view of this instrument and of the absolute bills of sale, which could only be changed into mortgages by evidence of the clearest character, showing, by collateral facts, that they were designed merely as securities, we cannot say that the court below erred in its decree.

Appellants' counsel, in their printed argument, in reply to that of appellee, suggest a minor error in the finding of the court as to the canal boat "Harry." If appellants desired to urge this as ground for reversal they should have made the point in their opening argument, and thus have given appellee an opportunity to answer. Error, however, was specially assigned upon this part of the decree and we must therefore notice it. The court finds that the complainants have no title, ownership, or interest, whatever, in said boat. We are of opinion the evidence shows an agreement by defendant to procure the execution of a bill of sale for the Harry, by Douglass, a joint owner, and himself, and in the further prosecution of the case and final statement of the account, the complainants should be treated as the equitable owners of one-half the Harry. The

agreement to convey one-half the Harry, one-half the Storm and one-half the Rockward was subsequent to the original arrangement, and was made in consideration of further advances by complainants. The Storm and Rockward have been transferred by proper bills of sale and the Harry should have been.

The decree is reversed in order to be modified as to the canal boat Harry and the cause remanded.

Decree reversed.

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ABATEMENT.

VARIANCE BETWEEN WRIT AND DECLARATION.

A variance between the writ and declaration is a matter pleadable in abatement, and where no attempt is made in the court below to avail of it, it cannot be assigned for error in this court. *Fonville et al.* v. *Monroe et al.* 126.

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FOR OBSTRUCTING RACEWAY TO A MILL.

Liability of municipal corporation. Where it is made the duty of a corporation to keep a raceway leading to its works in repair, though it does not own the way itself, if a city so constructs a sewer as to deposit dirt and gravel in the raceway and obstruct the flow of water therein, and the corporation is compelled to expend money to remove such obstruction, an action lies in its favor against the city to recover the money so expended. *Elgin Hydraulic Co.* v. *City of Elgin*, 433.

ADMINISTRATOR'S SALE.

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ADMISSION.

BY A DEMURRER. See PLEADING AND EVIDENCE, 4.

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1. *Cannot bind principal beyond the scope of his agency.* An agent of a railroad company, appointed for the purpose of transacting some limited or specified business for the company, cannot bind the company outside of its legitimate business, or make contracts for it which the company never authorized any one to make. *Taylor* v. *Chicago & Northwestern Railway Co.* 86.

2. *Passenger agent cannot bind principal by contract to look after freight.* The agent of a railway company, who is employed for the sole purpose of soliciting passengers to patronize the road of the company, and who is not held out by the company as their agent for

AGENCY. POWERS OF AGENT. *Continued.*

any other purpose, has no power to bind the company by a contract to receive freight from another road, and transport it to the depot of, and ship it on the road for which he is such agent. Ibid. 86.

TORTS OF AGENT.

3. *Liability of principal.* If a tort is committed by an agent in the course of his employment while pursuing the business of his principal, and is not a willful departure from such employment and business, the principal is liable although done without his knowledge. *Noble et al.* v. *Cunningham*, 51.

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4. *After his trust is ended.* While it is true that a trustee or agent cannot be interested in a sale made by himself, yet when he has fully discharged his trust and sold property to a third person in good faith, having no interest in the same at the time, he may afterward acquire the title from the purchaser, and such fact, or the fact that his wife acquires the title, will not afford ground for avoiding his sale. *Walker* v. *Carrington et al.* 446.

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WHO MAY PROSECUTE.

2. *As to one not named a party to the suit.* Where, on a creditor's bill, the cause is referred to the master in chancery to take proofs of

APPEALS AND WRITS OF ERROR. WHO MAY PROSECUTE. *Continued.*

all claims against the estate of the defendant which may be presented to the receiver, and a claim is sought to be proved before the master by a creditor who is not a party to the bill, and the master reports to the court that he has disallowed the claim, and upon exceptions taken to the report the court overrules the exceptions and sustains the report, an appeal on behalf of such claimant will lie to the Supreme Court. *Derrick* v. *Lamar Insurance Co.* 404.

APPEALS FROM JUSTICES.

3. *Variance between complaint and the proofs, before justice of the peace, not material.* On the trial of an appeal from a judgment of a justice of the peace, upon a prosecution for violating a city ordinance, it is not a matter of any consequence whether the original complaint is technically correct or not, the only question being whether the ordinance was violated or not, without regard to whether the evidence corresponds with the complaint. *Harlaugh* v. *City of Monmouth*, 367.

4. *Appeal perfected less than ten days before court.* An appeal perfected before a justice of the peace less than ten days before the next term of court, or whilst the appellate court is in session, must be continued over to the next succeeding term for trial. *Hayward* v. *Ramsey*, 372.

5. *Setting aside dismissal, discretionary.* Where an appeal is dismissed for want of prosecution, it is discretionary with the court to allow or deny a motion to vacate the order of dismissal, and this court will not interfere with the exercise of that discretion, except in case of its flagrant abuse. *Nispel* v. *Wolff*, 303.

6. *Negligence ground for refusal.* On motion to set aside an order dismissing an appeal, when the affidavit in support of the motion fails to show diligence in prosecuting the appeal, as, that the attorney was absent when the cause was called in its order, trying a case before a justice of the peace, on the information of one of the clerks that there was a trial pending, which would be likely to last the whole day, there will be no error in refusing to vacate the order and reinstate the case. Ibid. 303.

7. *What is negligence.* Where an appeal suit is set for trial on a particular day, it is negligence for the appellant's counsel to leave the court because there is a trial pending likely to occupy the whole day, and no relief can be granted against the consequence of such neglect. Ibid. 303.

APPEAL FROM COUNTY TO CIRCUIT COURT.

8. *How tried.* An appeal from the county to the circuit court can

APPEALS AND WRITS OF ERROR. Appeal from county to circuit court. *Continued.*

be tried alone on the record. The circuit court cannot try the case *de novo*, either in whole or in part, but takes the record as presented. *Hulett* v. *Ames*, 253.

9. *Transcript of county court, matter of record in circuit court on appeal.* When a record of the proceedings is filed in the circuit court, it becomes a matter of record in that court, and being a matter of record then no bill of exceptions is necessary to get it before this court, but only a certified transcript. Ibid. 253.

APPEARANCE.

What constitutes.

1. Where a defendant, not served with process, files a demurrer to a special count and the general issue to the common counts, and the demurrer is overruled and the plea stricken from the files, and defendant, afterward, on his own motion, obtains an extension of time to file a plea with an affidavit of merits, there is a full appearance, and a judgment against such defendant is not erroneous. *Fonville et al.* v. *Monroe et al.* 126.

Of a general appearance.

2. *Entry of motion to set aside default.* An appearance in the entry of a motion by a defendant in an attachment suit, who has not been personally served, to set aside a default entered against him upon notice by publication, is not such a general appearance as will authorize a personal judgment. If any judgment is authorized in such case it is *in rem* only. *Jones* v. *Byrd*, 115.

ASSIGNMENT.

Liability of assignor.

1. *Where suit is not brought against the maker.* In order to hold the indorser of a promissory note liable to the indorsee when no suit is brought against the maker, it must be proved that the institution of such a suit would have been unavailing. *Kelly* v. *Graves*, 423.

2. The assignor of a promissory note is under no legal obligation to give information of the maker's property when requested by the assignee, and his failure to do so will create no liability. The assignee must ascertain at his peril, the fact of the insolvency of the maker. Ibid. 423.

ASSUMPSIT.

When the action will lie.

1. *An action for money had and received* will lie whenever a defendant has received money which in justice belongs to the plaintiff, and

ASSUMPSIT. When the action will lie. *Continued.*

which he should, in justice and right, return to the plaintiff. *Allen* v. *Stenger*, 119.

2. Where the mortgagor in a chattel mortgage sells the mortgaged property on a credit, the proceeds of which sale are to belong to the mortgagee when collected, and after the death of the mortgagor, his administrator collects the purchase money and deposits it with one who is at the time apprised of these facts, an action for money had and received will lie at the suit of the mortgagee against the party so receiving the money on deposit. Ibid. 119.

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As to loss or non-delivery of goods by carrier. See CARRIERS, 7.

CARRIERS.

Who is a common carrier.

1. One who for hire carries passengers and their baggage, and also baggage alone, for all persons choosing to employ him, from, to, and between railroad depots and hotels, and other places in a city, is a common carrier of goods. *Parmelee* v. *Lowitz*, 116.

CARRIERS. *Continued.*

EXTENT OF LIABILITY.

2. *Generally.* A common carrier of goods, who receives and undertakes to carry a trunk from a railroad depot to the owner's residence, is answerable for all losses, except such as are inevitable, that may occur whilst the trunk is in his possession, and until it is delivered to the owner. Ibid. 116.

3. A common carrier of goods who receives and undertakes to carry a trunk for one not a passenger with such carrier, is responsible for the delivery of the trunk and its contents, notwithstanding the contents consist of articles not usually carried as baggage, unless the owner has been guilty of some fraud or deception. Ibid. 116.

AS BETWEEN CONNECTING LINES.

4. *Duty as to transfer of freight.* A common carrier by railroad is not bound by law to watch for and ascertain the arrival of freight at the depots or wharves of other common carriers, and transport the same to its own depot, and is not bound by any agreement to do so, made by an agent employed by it for the sole purpose of soliciting passenger business. *Taylor* v. *Chicago & Northwestern Railway Co.* 86.

5. *As to place of delivery.* The rule in this State is, that where goods are delivered to a railway company marked to a place not upon the line of its road, but beyond the same, with no other directions or without any express contract as to the place of delivery, the law will imply an undertaking on the part of the carrier to transport and deliver the goods at the place to which they are marked. *Milwaukee & St. Paul Railway Co.* v. *Smith*, 197.

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6. Where goods are delivered to a carrier in Wisconsin, the contract to be performed there, the laws of that State will govern as to the construction of the contract, and determine the extent of the carrier's undertaking. Ibid. 197.

BURDEN OF PROOF.

7. *As to loss or non-delivery.* In an action against a carrier, where the loss or non-delivery of goods is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character, but slight evidence will be sufficient. *Chicago & Northwestern Railway Co.* v. *Dickinson et al.* 249.

8. *Plaintiff not required to show non-delivery by a preponderance of evidence.* In an action against a carrier for failing to deliver goods shipped, the plaintiff is not bound to show non-delivery by a preponderance of testimony. Slight evidence of that fact will be sufficient to shift the burden of proof upon the carrier. Ibid. 249.

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9. *For loss of goods by carrier.* See MEASURE OF DAMAGES, 2.

CHANCERY.

OF THE RIGHT TO DISMISS A BILL.

1. A complainant has the right, at any time before the decree is rendered, to dismiss his bill, unless a cross-bill has been filed. After decree he cannot, except upon consent. *Mohler et al.* v. *Wiltberger*, 163.

2. The effect of a reversal of a decree being to leave the cause pending for hearing precisely as if no decree had been rendered, the complainant may dismiss his bill after such reversal. Ibid. 163.

PROOF TO OVERCOME ANSWER.

3. *When two witnesses required.* Where an answer in chancery, though sworn to, states the material facts upon information and belief, the rule requiring the testimony of two witnesses to overcome it does not apply. *Cunningham* v. *Ferry et al.* 426.

PROOF IN CASE OF DEFAULT.

4. Where an adult defendant is in court and is defaulted for failing to answer in pursuance of a rule of court, a decree may be rendered against him without evidence; but when the decree recites that the cause was heard upon the pleadings and proof, and also upon the agreement of the parties filed, the recital of a hearing upon proofs is conclusive in a collateral proceeding. *Mason et al.* v. *Patterson et al.* 191.

SPECIFIC PERFORMANCE.

5. *As to contract respecting personalty.* The general rule is that equity will not entertain jurisdiction for the specific performance of contracts respecting personalty. *Pierce et al.* v. *Plumb*, 326.

6. *For mere payment of money.* Equity will not decree specific performance unless something more is to be done by it than mere payment of money, or any thing which ends in the mere payment of money, because the law is adequate to this. Ibid. 326.

TO PRESERVE USE OF STREET.

7. Where lots are sold with reference to a street abutting the same, a court of equity will interfere to prevent a party claiming under the original owner and grantor from destroying the full use of such street as originally designed. *Zearing* v. *Raber*, 409.

ADMINISTRATOR'S SALE OF LAND TO PAY DEBTS.

8. *Jurisdiction in chancery.* A court of equity has no original juris-

CHANCERY. Administrator's sale of land to pay debts. *Continued.*

diction to order the sale of real estate of a deceased person to pay debts, or for any other purpose, so as to bind the infant heirs' legal estate. The power is derived from legislative authority, and does not exist except in cases where the statute expressly confers it. *Whitman* v. *Fisher*, 147.

Construction of wills.

9. *In equity.* When purely legal titles are involved, and no other relief is sought, a court of equity will not assume jurisdiction to construe a will, but will remit the parties to their remedies at law; but if any trust is reposed in the executors, they may seek the aid and direction of a court of equity in the management or execution of the trust. Ibid. 147.

10. Where, by the terms of a will, the executors are charged with the administration of the assets of the estate differently from that directed by the statute, this will create in them a special trust, and in case of doubt as to the mode of its execution, a court of equity will assume jurisdiction on application by the executors for a construction of the will. Ibid. 147.

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1. The courts of this State cannot enforce the criminal or penal laws of another State, or of the United States. *Missouri River Telegraph Co.* v. *First National Bank of Sioux City*, 217.

2. The courts of this State will not entertain jurisdiction in a suit by a corporation created and doing business in another State, against a National bank organized under the laws of the United States, for the recovery of a penalty under an act of congress for receiving interest over and above the rate allowed by the laws of the State where the bank is located and transacts its business. Ibid. 217.

When the lex loci governs.

3. Where goods are delivered to a carrier in Wisconsin, the con-

CONFLICT OF LAWS. When the lex loci governs. *Continued.*

tract to be performed there, the laws of that State will govern as to the construction of the contract, and determine the extent of the carrier's undertaking. *Milwaukee & St. Paul Railway Co.* v. *Smith*, 197.

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1. It is essential to every contract or promise that it be founded upon a good consideration. *McLean* v. *McBean*, 134.

Whether there is a consideration.

2. *Promise to pay devisor's debt.* The devise of real estate to a party, not creating any liability to pay the devisor's debt, it not being shown there was no personal estate left, a promise to pay the same by the devisee, without any other consideration, is void, and cannot be enforced. Ibid. 134.

3. But even if the devise had created a legal liability to pay the devisor's debt, a verbal promise by the devisee to pay the same, without being released from liability under the statute, will be without consideration, and void. Ibid. 134.

4. *Where the signature of another was to be procured.* Where a note was signed by two persons as sureties for their father, and delivered to the payee who undertook to get the father's signature but failed to do so, it was held that the note was given without consideration and could not be collected by the payee. *Knight* v. *Hurlbut et al.* 133.

Forbearance to sue.

5. *Whether a sufficient consideration.* To make forbearance to sue a good consideration for a promise to pay, there must be a well-founded claim in law or in equity forborne, or there must be a compromise of a doubtful right. *Mulholland* v. *Bartlett*, 58.

6. When a person in a strange city, on being threatened with suit upon the acceptance of a draft by a firm as a partner therein, when in fact he was not a partner, and had no connection with such firm, and so informed the holder of the draft, to avoid suit and to gain time gave the holder his written promise to pay the draft, it was held that there was no valid consideration for the promise. Ibid. 58.

CONSTITUTIONAL LAW.

Corporate taxation.

Limitation in respect thereto. See TAXES AND TAXATION, 1, 2.

Municipal subscription.

Construction of clause on that subject. See MUNICIPAL SUBSCRIPTION, 1.

CONSTITUTIONAL LAW. *Continued.*

EXTRA COMPENSATION TO A JUDGE.

When holding court out of his circuit. See FEES AND SALARIES, 1.

CONTEMPT.

RETAKING PROPERTY REPLEVIED.

A party from whose possession personal property has been taken by an officer by virtue of a writ of replevin, is guilty of a contempt of court if he forcibly retakes the possession thereof after the goods have been by the officer delivered to the plaintiff in replevin. *The People ex rel.* v. *Neill et al.* 68.

CONTRACTS.

CONTRACT FOR SERVICES.

1. *Care and skill required.* Where a person engages to work for another he impliedly undertakes that he has a reasonable amount of skill in the employment, and engages to use it and a reasonable amount of care, and a failure to do so will prevent him from recovering the contract price, and limit him to what the work is reasonably worth, or the employer may recoup all the damage he may sustain for the want of reasonable skill and care in executing the work. *Parker et al.* v. *Platt et al.* 430.

CONTRACT BETWEEN VILLAGE OFFICERS.

2. *Of its legality.* An officer of a village incorporated under the act of July, 1872, in relation to cities and villages, is prohibited from making any contract with the trustee to do work for the village, to be paid for out of the treasury, and any such contract is void, and such officer will be entitled to no compensation for any thing he may do under such contract. *Village of Dwight* v. *Palmer*, 295.

3. Where a clerk of the board of trustees of an incorporated village contracted to publish certain ordinances for $300, which was rescinded before any work was done under it, and such officer then resigned his office, but the contract was never renewed after acceptance of his resignation: *Held*, that he was not entitled to compensation for any ordinances he may have published afterward, as it was done without authority. Ibid. 295.

TO EXTEND TIME OF PAYMENT.

4. *Whether availing.* A contract to extend the time of payment of notes upon giving other notes secured by mortgage on good real estate, is not a defense to a suit on the original notes when the mortgage is objected to as upon land of no value and for want of title in the mortgagor, where these objections are not obviated or shown to be unfounded. *Nispel et al.* v. *Laparle et al.* 306.

CONTRACTS. *Continued.*

BUILDING CONTRACT.

5. *Right to damages for delay caused by the party claiming them.* Where a written contract for the building of a stable provides that the work shall be completed by a specified day, and that the contractor shall pay the sum of thirty dollars a day for each day's delay after the date mentioned, the employer will have no right to exact damages for a delay caused by his own act in stopping the work. *Marsh* v. *Kauff*, 189.

CONTRACTS CONSTRUED.

6. *To pay certain indebtedness of another — when a right of action accrues.* Where a party enters into a bond conditioned to pay certain indebtedness of the obligee therein, and save and keep him harmless from such indebtedness, the obligee is not bound to pay off such indebtedness in case the obligor fails to do so in order to maintain a suit on the bond, but he may sue upon the bond and recover the amount of such indebtedness as soon as it has matured, if not paid by the obligor in the bond. *Pierce et al.* v. *Plumb*, 326.

7. *Agreement to work on railroad — as to place.* Where a person is employed to labor on the track of a railroad, generally, it will be presumed that it shall be at any place the company may designate within a reasonable distance from the place of employment, and the company should not, for that reason, be liable for an injury received whilst at work at a place different from that at which he had been accustomed to work. *Pittsburg, Fort Wayne & Chicago Railway Co.* v. *Powers*, 341.

8. *As to sale of buffalo robes, construed as to quality.* A contract for the sale and delivery of a lot or collection of buffalo robes, which provides for the payment of half price for fifteen hundred, and that no more than two hundred headless and mismatched robes shall be contained in the collection, and that the assortment shall be of good quality, does not mean that the quality shall be determined merely by comparison with other collections of the place where the vendors and vendees expected the robes were to be obtained, but that it shall be an average good collection as known to the trade, in the market. *Boskowitz et al.* v. *Baker et al.* 264.

9. Where a contract for the sale and delivery of an entire collection of buffalo robes by an Indian trader provides for the payment of $6 for each robe on delivery, except fifteen hundred, for which $3 each is to be paid, they "being supposed to be of an inferior quality," and further provides that the "assortment" shall be of good quality, those of inferior quality will be limited to fifteen hundred, and a tender of

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

a greater number of inferior ones will not be a compliance with the undertaking of the vendors. Ibid. 264.

10. *Whether of sale or bailment.* Where grain is received by a dealer, into his warehouse, under a contract to pay the owner the market price on any day he may choose to call for it, and such grain is mixed with other grain in bins, from which shipments are being made every day, the dealer becomes the owner of the grain and liable to pay for it whenever called on, and is not a mere bailee. *Richardson et al.* v. *Olmstead*, 213.

11. Where grain has been delivered to a dealer at his warehouse under a contract on his part to pay the market price for it when called for, and he mixes it with other grain in bins, from which he is constantly shipping, and after such grain has all been delivered, the party delivering it not needing the money, and believing the price will be higher, proposes to leave the grain in the warehouse of the dealer until a specified time, to which the dealer agrees for a consideration to be paid him, the title of the grain is in the dealer, and the effect of the last contract is simply to give the party delivering until the time specified to name the day on which he will take the market price. Ibid. 213.

CONTRACTS OF MARRIED WOMEN.

12. *Of their power to contract.* See MARRIED WOMEN, 1 to 4.

CONVEYANCES.

WHAT ESTATE PASSES.

1. *Whether in fee or for life only.* A conveyance of land to an unmarried woman, to have and to hold unto her and the heirs of her body forever, vests in her an estate for life only, and creates a contingent remainder in favor of the heirs of her body who, when born, will take the absolute fee. *Frazer* v. *Board of Supervisors of Peoria Co.* 282.

DEFEATING CONTINGENT REMAINDER.

2. *By tenant for life.* A grantor who conveys to an unmarried woman real estate, to have and to hold to her and to the heirs of her body forever, thereby deprives himself of all estate but a contingent reversion, dependent upon the grantee dying without having had issue, and it is not in the power of the grantee, by a reconveyance before issue born, to defeat the contingent remainder in favor of such issue. Ibid. 282.

BOUNDARY.

3. If land is conveyed as bounded on a street, this is not merely

CONVEYANCES. Boundary. *Continued.*

a description, but an implied covenant that there is such a street, and the grantor and those claiming under him are forever estopped from disputing the existence of such street. *Zearing* v. *Rebar*, 409.

CORPORATIONS.

Municipal corporations.

Limitation on power of taxation. See TAXES AND TAXATION, 1.

Devoting funds to payment of debts. See same title, 3.

COSTS.

As against infants.

On bill for a reconveyance of land, against the minor heirs of a grantee to whom the land was conveyed as security or indemnity, it is error to decree costs against the infant defendants. *Tuttle* v. *Garrett et al.* 444.

COURTS.

Of the courts of Cook county.

1. *Judges must sit separately.* Each of the judges of the circuit and superior courts of Cook county, under the constitution, is invested with all the powers of a circuit judge, and may hold court in a branch thereof, and it is error for more than one to preside at the same time during the trial of any case, or to participate in any decision. The record should show that but one judge presided. *Hall* v. *Hamilton*, 437.

2. But if the record shows more than one judge present, this is only an error which does not affect the jurisdiction of the court, and may be waived or released. Ibid. 437.

3. *Judges of other circuits may preside.* Judges of other circuits may hold branches of the Cook county circuit and superior courts, and the statute authorizing this is not in conflict with any constitutional provision. Ibid. 437.

4. Under the statute the judge of any circuit court in this State is authorized to hold a branch term of the superior court of Cook county, and the statute infringes no constitutional provision. *Bradley* v. *Barbour*, 475.

County courts.

5. *Jurisdiction in contested election for city office.* See JURISDICTION, 5.

COVENANTS FOR TITLE.

When action accrues for breach.

1. Where the owner of land conveys it to another and the heirs of

COVENANTS FOR TITLE. When action accrues for breach. *Continued.*

her body forever, and the grantee, before having issue, reconveys to the grantor, he only acquires a life estate during the life of the grantee in the first deed, and if he again conveys the land with covenants that he is seized of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law, in fee simple, his covenant is broken when made, and his grantee may sue and recover upon such breach, notwithstanding he may have been put into possession of the land under his deed. *Frazer* v. *Supervisors of Peoria County*, 282.

2. *Measure of damages.* See that title, 1.

Boundary.

3. *Implies covenant from conveyance of land as bounded by a street.* See CONVEYANCES, 3.

CRIMINAL LAW.

Indictment.

1. *Of its sufficiency, generally.* Although an indictment may not state the offense in the language of the statute creating the same, yet, if it is stated so plainly that it may be easily understood by the jury, it will be sufficient. *Plummer* v. *The People*, 361; *Warriner* v. *The People*, 346.

Commission merchants.

2. *Commission of proceeds of sales.* On an indictment against a commission merchant for converting the proceeds of goods intrusted to him to sell on commission, to his own use, it is not a sufficient defense that the agreement was that the commission merchant was to send the consignor his check for the proceeds, and that he did send his check, when it appears that there were no funds in the bank on which the check was drawn, to pay it, and that the check was promptly presented and not paid. *Warriner* v. *The People*, 346.

3. In such case, if the defendant had funds in the bank at the time of drawing the check, the burden is on him to prove it, and also to explain why there were no funds there when the check was presented. Ibid. 346.

Accessory.

4. When one defendant shoots a person with a revolver, deliberately and intentionally, a co-defendant present at the time, who in any way or manner aids or advises, or encourages such shooting, when not necessary, or apparently necessary, to save the defendants' lives, or prevent their receiving great bodily harm, is equally guilty with the one who does the shooting. *Smith* v. *The People*, 144.

CRIMINAL LAW. *Continued.*

OF A REASONABLE DOUBT.

5. If the jury have a reasonable doubt of the guilt of one tried for crime, they must acquit him. But this doubt must spring from the evidence, and cannot be searched for outside of it. Ibid. 144.

6. An instruction "that a reasonable doubt means in law a serious, substantial and well founded doubt, and not the mere possibility of a doubt," and that "the jury have no right to go outside of the evidence to search for, or hunt up doubts in order to acquit the defendant, and arising out of evidence," or for the want of evidence, was *held* free from any well founded objection except that the word "*serious*" might have been omitted, as not improving it. Ibid. 144.

OF THE LAW OF SELF-DEFENSE.

7. To justify one in shooting at another in self-defense, it is essential that his apprehension of serious or great bodily injury be reasonable. It is not proper to say in an instruction, if he had *any* such apprehensions. *Lawlor* v. *The People,* 228.

8. The use of the words "serious bodily injury," instead of the words "great bodily harm," employed in the statute, in instructing the jury as to the law of self-defense, will not render the instruction objectionable or erroneous. Ibid. 228.

VERDICT OF GUILTY AS TO PART.

9. *Is an acquittal as to balance of the counts in the indictment.* A verdict of guilty as to a part of the counts in the indictment is an acquittal as to the other counts, and in such case it is necessary that the verdict should specify upon which of the counts the defendant is guilty. *The People ex rel.* v. *Whitson,* 20.

OF THE JUDGMENT.

10. *Second judgment — whether allowable.* Where a defendant in a criminal case has suffered punishment according to a legal sentence, a second judgment in the same case, even if rendered at the same term of court, is void. Ibid. 20.

11. *Only upon counts on which found guilty.* It would be error to sentence a prisoner upon counts other than those upon which he is found guilty. Ibid. 20.

WITNESSES NOT NAMED ON INDICTMENT. See WITNESSES, 3.

DAMAGES.

MEASURE OF DAMAGES. See MEASURE OF DAMAGES.

EXEMPLARY DAMAGES. See same title, 4, 5, 6, 7.

EXCESSIVE DAMAGES. See NEW TRIALS, 4, 5.

DECREE.

DECREE ON DEFAULT — ESTOPPEL.

1. Where a creditor's bill is filed to subject to sale the equitable title of A and B in real estate, owned by them under a contract of purchase from C, and the cross-bill filed in the cause, C being a party duly served, alleges full payment of the purchase money by A and B to C, and C suffers a decree against him by default, and the interests of A and B are sold under the decree, on bill by the purchaser against C to compel a conveyance of the legal title, the latter will be estopped by the default from asserting that he has any claim on the land for purchase money, or for any other cause. *Mason et al.* v. *Patterson et al.* 191.

DECREE OF SALE CONSTRUED.

2. *As to whether sale under, passed title of one or two defendants.* Where a creditor's bill sought to subject the equitable interest of A and B in land to sale for the payment of their debts as members of a firm, and the decree ordered the sale of the property as prayed for, and directed, that the master "upon the sale of said premises, or any part thereof, make, execute and deliver to the purchaser or purchasers thereof a deed of conveyance, conveying to the purchasers thereof all the right, title and interest in said premises conveyed by the said A, in and by the several trust deeds set forth in said original and cross-bills herein," etc.: *Held*, that the direction to the master could not have the effect to make the decree for the sale of A's interest only, but that the reference to the deeds of trust was simply to identify the property to be sold, and that a purchaser under said decree acquired the interest of both A and B, and succeeded to their equitable right to enforce the execution of a deed from the party holding the legal title. Ibid. 191.

3. *Whether made in term time or in vacation.* Where a decree is entitled as of a certain term of court, and is so certified in the record, this will be conclusive evidence that the decree was made in term time and not in vacation, and the record cannot be impeached. Ibid. 191.

DEDICATION.

WHAT CONSTITUTES A DEDICATION.

1. *Sale of lots with reference to a street.* Where the owner of land has the same platted, showing a street, and sells a part with reference to such street, which is mentioned in the description in the deed, although the street is not opened, or the map thereof acknowledged or recorded, this will be an immediate dedication of the street as to such purchaser, and the grantor and all persons claiming under him

DEDICATION. What constitutes a dedication. *Continued.*
will be estopped from denying the existence of the street. *Zearing* v. *Raber*, 409.

Acceptance.

2. A dedication of land to public use as a highway must be accepted and appropriated to the uses intended, and until there is such acceptance the owner may withdraw his offer and appropriate the land to any other purpose he may choose. *Forbes* v. *Balenseifer*, 183.

3. An acceptance of a dedication of a highway may be evidenced by the public officers taking charge of the road and repairing it at public expense; or, where it needs no repair, by placing it on the map of roads for the proper district, and by its being used by the public, but mere travel by the public is not evidence of acceptance. Ibid. 183.

4. An instruction that if land was laid out as a public highway by the owner, and the public recognized and accepted it, it would, in law, be a public highway, is erroneous in not telling the jury what is necessary to constitute an acceptance. Ibid. 183.

DEFAULT.

Setting aside default.

Discretionary. Setting aside of default is a matter of discretion that this court will not control except in extreme cases, and where it is manifest the discretion has been abused to the great wrong and injury of the party complaining. *Peoria and Rock Island Railway Co.* v. *Mitchell*, 394.

DEMURRER.

As an admission of facts. See PLEADING AND EVIDENCE, 4.

Judgment on, is an estoppel. See JUDGMENTS, 3.

DESCENTS AND DISTRIBUTION.

Of intestate's property.

As affected by his domicile. See DOMICILE, 1, 2, 3.

DOMICILE.

Defined.

1. In a strict legal sense, the domicile of a person is where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Actual residence is not indispensable to retain a domicile after it is once acquired, but is retained by the mere intention not to change it and adopt another. *Hayes et al.* v. *Hayes et al.* 312.

DOMICILE. *Continued.*

CHANGE OF DOMICILE.

2. To effect a change of domicile there must be an actual abandonment of the first, coupled with an intention not to return to it, and there must be a new one acquired, with actual residence in another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. Ibid. 312.

3. A domicile in this State, within the meaning of the statute respecting the descent and distribution of personal property, is not lost or changed by the party residing in another State owing to domestic troubles, and by his voting in such other State when its laws authorize him to vote on a residence of six months, or by his purchasing property on speculation in such State, when there is no intention of making a final home there. Ibid. 312.

EASEMENT.

OVER THE LAND OF ANOTHER.

Can be acquired only by grant or prescription. An easement, being connected with and appurtenant to real estate, so far partakes of the character of land that it can only be acquired by grant, or prescription, which implies a previous grant. *Forbes* v. *Balenseifer*, 183.

EJECTMENT.

NEW TRIAL UNDER THE STATUTE. See NEW TRIALS, 1.

ELECTIONS.

CLOSING POLLS TOO SOON.

Effect thereof. If an election has been in other respects fairly and properly conducted, the votes cast will not be rejected simply because the judges closed the polls an hour before the time prescribed by law, when it does not appear that any voter offered to vote after the polls were closed and before the lawful time for closing them, or was prevented from voting by reason thereof. *Cleland* v. *Porter*, 76.

ESTOPPEL.

BY JUDGMENT ON DEMURRER. See JUDGMENTS, 3.

BY DECREE ENTERED BY DEFAULT. See DECREE, 1.

EVIDENCE.

PAROL EVIDENCE.

1. *To prove the fact of the execution of a writing.* On the trial of an action for a false arrest, it is competent to prove, by the justice of the peace who issued the warrant upon which the arrest was made,

EVIDENCE. PAROL EVIDENCE. *Continued.*

the fact that a written affidavit was made before him on which he issued the warrant. *Ashley* v. *Johnson et al.* 392.

2. *To show sale of land when the written contract is avoided by alteration.* Where one party fraudulently alters a contract in a material matter, without the consent of the other, so that it is not admissible in evidence, the other party may prove the original contract by parol, when the statute of frauds is not pleaded, and have a specific performance decreed. *Kelley* v. *Trumble*, 428.

SECONDARY EVIDENCE.

3. *When contents of an affidavit may be proved by oral evidence.* Where a justice of the peace, who issued a warrant for the arrest of a plaintiff in an action for false imprisonment, testifies to the fact that an affidavit in writing was made before him, upon which the warrant was issued, and the loss of the affidavit is proved, it is competent to prove its contents by oral evidence. *Ashley* v. *Johnson et al.* 392.

OF A CONTRACT NOT SIGNED.

4. *As evidence.* A contract prepared by a party, though not executed by either party, is entitled to great weight as evidence in showing what was the real contract between them. *Purington et al.* v. *Akhurst*, 490.

COMMON LAW OF ANOTHER STATE.

5. *How shown.* The unwritten or common law of another state may be proved by the testimony of competent witnesses instructed in its laws. *Milwaukee and St. Paul Railway Co.* v. *Smith*, 197.

WEIGHT AND SUFFICIENCY OF EVIDENCE.

6. On a question whether a piano was sold or leased, one party introduced in evidence a printed form of a lease which he had partly filled, and which he testified was a copy, except as to numbers, which fact was denied in the testimony of the other party, he insisting that the printed form used was changed by striking out, and interlineations, before its execution. The court instructed the jury that they were not bound to take the copy of the agreement as conclusive upon the point whether a sale or lease was made of the piano, but in determining that question should consider the entire evidence in the case. *Held*, that the instruction was unobjectionable, as a mere copy made from recollection was not conclusive. *Bauer et al.* v. *Bell*, 223.

7. On bill by one partner against his copartner for an account, the complainant, during the defendant's life-time, proved by a third party who had examined the firm books, the amount of the profits and the amount he found due the complainant. This the defendant never attempted to explain or deny, though he had ample time, and after his

EVIDENCE. Weight and sufficiency of evidence. *Continued.*

death his administrator failed to explain or rebut it by testimony. It also appeared that the complainant had no access to the books, which the defense never proved. *Held*, that although the evidence was somewhat unsatisfactory, yet, under the circumstances, it was sufficient *prima facie*, to uphold a decree in complainant's favor. *Albee* v. *Wachter*, 173.

To prove residence of pauper. See PAUPERS, 4, 5.

Declarations of third parties.

When admissible. See PAUPERS, 5.

Burden of proof.

Prosecution for selling liquor. See INTOXICATING LIQUOR, 1.

To show death of principal in recognizance. See SCIRE FACIAS, 2.

As to loss or non-delivery of goods by carrier. See CARRIERS, 7.

To exempt telegraph companies from liability. See TELEGRAPHY, 3.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

Exceptions.

1. *When necessary to be taken.* When the record does not show that exception was taken to the giving of instructions in the court below, such objections come too late, and cannot be considered when made in this court for the first time. *Harbaugh* v. *City of Monmouth*, 367.

2. When a cause is, by consent, tried by the court without the intervention of a jury, and no exception is taken to the finding of the court and the judgment thereon, error cannot be assigned on such finding and judgment, in the Supreme Court. *David M. Force Manufacturing Co.* v. *Horton et al.* 310.

Bills of exceptions.

3. *When necessary, and what they should contain.* It is not sufficient for the order allowing an appeal to the Supreme Court from a judgment of the circuit court, to state that exceptions were taken to the judgment appealed from. Such exceptions should appear in the bill of exceptions. Ibid. 310.

4. Affidavits, notices, etc., made in the county court are not a part of the record, unless made so by bill of exceptions, and cannot be considered in the circuit court, nor is it proper for the judge of the circuit court to make them a part of the record of that court by bill of exceptions. *Hulett* v. *Ames*, 253.

5. *Trial of cause out of its order.* If a party assigns for error, that the cause is advanced on the docket and tried out of its regular order, the bill of exceptions should show that the objection was made in the

EXCEPTIONS AND BILLS OF EXCEPTIONS. BILLS OF EXCEPTIONS. *Continued.*

court below, and exception taken to trying the case out of its order. *Keller* v. *Fournier et al.* 489.

6. *Not required, to preserve transcript of county court on appeal.* See APPEALS AND WRITS OF ERROR, 9.

EXECUTION.

AS AGAINST AN ADMINISTRATOR.

It is error to award an execution against an administrator upon a decree against the estate of his intestate. The decree should require the administrator to pay the sum found to be due, in the due course of administration. *Albee* v. *Wachter*, 173.

ON ASSESSING DAMAGES FOR RIGHT OF WAY.

When awarded. See RIGHT OF WAY, 1.

FAILURE OF CONSIDERATION.

PLEADING SAME. See PLEADING, 3, 4.

FEES AND SALARIES.

EXTRA COMPENSATION TO CIRCUIT JUDGE.

When holding court out of his circuit. So much of the act entitled "Courts" as provides for compensation being paid to a judge holding a branch court out of his circuit, in addition to his salary, is unconstitutional and void. *Hall* v. *Hamilton*, 437.

FORECLOSURE. See MORTGAGES.

FRAUD.

DECREE OF PROOF REQUIRED.

1. *To show fraud by false representations of an agent.* Where a conveyance of land is sought to be set aside, as having been induced by fraudulent representations of an agent, whose duties were advisory only, with no power to sell, the burden of proof lies upon the complainant to establish by clear and satisfactory proof that the agent acted in bad faith, and made material statements to the grantor to influence the sale, which he knew to be false, and that such statements influenced the sale. *Walker* v. *Carrington et al.* 446.

SUFFICIENCY OF PROOF.

2. Where an agent advised his principals, in the winter of 1850-51, of an offer of five dollars per acre for land, and stated that was the best offer that could be had, and advised a sale, proof that he was offered ten dollars per acre in 1848 will not, after the lapse of twenty

FRAUD. SUFFICIENCY OF PROOF. *Continued.*

years from the sale, be sufficient evidence to show actual fraud on the part of the agent. Ibid. 446.

PRESUMPTION — LAPSE OF TIME.

3. Although the acts and conduct of a party may be suspicious, yet if they can as well be attributed to honest motives, and may be as well consistent with fair dealing as with the reverse, they will be attributed to the former, especially after a great length of time, when it is extremely difficult to give a full and explicit explanation. Ibid. 446.

WHETHER PARTY AFFECTED BY THE FRAUD.

4. *False representations must be relied on.* Where the representations of an agent, which are relied on to avoid a sale and conveyance, relate to the quality and value of the land sold, and it appears that the grantors, who were trustees, had actual knowledge of the facts from a personal inspection of the land, and by information from the husband of one and the father of the beneficiaries, it will not be presumed that the representations of the agent had any material influence upon their conduct as inducing the sale. Ibid. 446.

ASSIGNMENT OF INSURANCE POLICY.

5. *Set aside if obtained by misrepresentation.* Where a policyholder who had sustained a loss of property insured, was induced, by false representations of the officers of the company issuing the policy as to the ability of the company to pay its debts, to assign his policy for less than was due on it, to one who was acting for the company in settling its losses, in concurrence with the officers making the false representation, it was held that the assignment should be annulled and the policyholder entitled to recover on his policy in a court of equity. *Derrick* v. *Lamar Insurance Co.* 404.

FRAUDULENT CONVEYANCES.

PRESUMPTION.

1. Fraud as against creditors on a conveyance by the debtor of his property, cannot be presumed, but must be proved. *Hatch et al.* v. *Jordon*, 414.

BOTH PARTIES MUST PARTICIPATE.

2. It is not sufficient to vitiate a sale of property that it was made by the vendor to hinder, delay or defraud his creditors, but the purchaser must also have participated in the fraudulent intent or purpose. *Miller et al.* v. *Kirby*, 242; *Hatch et al.* v. *Jordon*, 414.

FRAUDULENT CONVEYANCES. *Continued.*

GENERALLY, WHETHER CONVEYANCE IS FRAUDULENT.

3. *Debt subsequently created by a firm — effect of prior sale by one of the partners.* Where a person not in debt sells his interest in land to another and receives payment in full, and after debts are contracted by the firm of which he is a member, he conveys the land to the purchaser, neither he nor his grantee having any knowledge of the indebtedness, the conveyance cannot be impeached for fraud as to the creditors. *Hatch et al.* v. *Jordon*, 414.

4. *Party indebted may sell.* A party, though in debt, may sell his property to whom he pleases, if no lien exists to prevent it, and if the transaction be an honest one, made in good faith, and for an adequate consideration, it matters not how many creditors may thereby be prevented from reaching the property. *Miller et al.* v. *Kirby*, 242.

5. *Sale on credit, etc.* In case of an absolute and unconditional sale of goods, the fact that the vendor was indebted at the time, that the sale was on a credit, and that the notes taken for the unpaid price were to be used in the payment of his debts, will not establish fraud in the sale as to creditors. Ibid. 242.

6. *Conveyance by father to daughter to defraud creditors.* Where a father transfers his property and notes to his daughter after incurring indebtedness, it is immaterial whether it is a voluntary settlement or founded on good consideration. In either case it will be void as to existing creditors. *Guffin et al.* v. *First National Bank of Morrison*, 259.

7. Where a father, in consideration of the past services of his daughter, who remained with him many years after becoming of age, and kept house for him, and of her mere verbal promise to support and take care of him the rest of his days, transferred to her all his notes amounting to six or seven thousand dollars, it was *held* that the transaction could be regarded in no other light than a voluntary settlement, and fraudulent in law as to existing creditors, and that if a secret trust was reserved in favor of the donor, it could be assailed by subsequent as well as by then existing creditors. Ibid. 259.

8. And where the proof showed that the father, after such transfer, collected the interest and renewed notes as before, and really depended upon the property so transferred for his future support, and that the transfer was for his benefit to defraud creditors, it was *held* that the transaction was void, both as to existing and subsequent creditors. Ibid. 259.

SETTLEMENT UPON WIFE.

9. *Whether fraudulent as to creditors of the husband.* See MARRIED WOMEN, 6.

GUARDIAN AD LITEM.

WHETHER NECESSARY.

Where a person is sued with certain minor defendants in chancery, as their guardian, and he appears, answers and defends in that capacity, and procures a reversal of the decree against the minors, a second decree against the minors will not be reversed because the record shows no appointment of a guardian *ad litem*, or proof that such person was in fact guardian. *Tuttle* v. *Garrett et al.* 444.

GUARDIAN'S SALE.

NOTICE OF APPLICATION.

Where the statute requires notice of the application of a guardian to sell real estate to be published in a newspaper at least once in each week for three successive weeks, or to be posted in three public places at least three weeks before the session of the court at which the application is to be made, it is sufficient if the notice is published for three successive weeks in a newspaper, and the first publication is made three weeks before the session of the court. *Fry* v. *Bidwell*, 381.

HABEAS CORPUS.

WHEN PARTY ENTITLED TO DISCHARGE.

Effect of mere error in order of commitment. If the judgment upon which a prisoner is held in custody is merely erroneous and subject to be reversed on writ of error, he will not be discharged upon *habeas corpus*. But if the court had no power or jurisdiction to render such judgment, the prisoner should be discharged on *habeas corpus*. *People ex rel.* v. *Whitson*, 20.

HEIRS.

LIABILITY FOR AN ANCESTOR'S DEBTS.

An heir or devisee is under no legal liability to discharge the debt of his ancestor or the devisor from whom he takes real estate, except when the personal estate of such ancestor or devisor is insufficient to pay the same. *McLean* v. *McBean*, 134.

HIGHWAY.

DEDICATION. See DEDICATION, 1 to 4.

HOMESTEAD.

OF ITS EXTENT.

1. The intention of the legislature, in enacting the homestead exemption law, was not to save a mere shelter for the debtor and his

HOMESTEAD. Of its extent. *Continued.*

family, but it was to give him the full enjoyment of the whole lot of ground exempted, to be used in whatever way he might think best for the occupancy and support of his family, whether in the way of cultivating it, or by the erection of buildings upon it, either for carrying on his own business or for deriving income in the way of rent. *Stevens* v. *Hollingsworth et al.* 202.

2. When a debtor owns a lot upon which he resides, and upon which he has a mill, shop or other building, the whole property is his homestead, and as such exempt from execution to the extent of one thousand dollars. Ibid. 202.

3. Where the homestead of a debtor is sold on execution without any division, although it may be worth more than one thousand dollars, yet the purchaser acquires no title to any part of it which he can make available in an action of ejectment, either as plaintiff or defendant, whatever may be the rule in equity. Ibid. 202.

INDEMNITY.

To surety.

His rights and deed of trust. See SURETY, 3.

INDICTMEMT. See CRIMINAL LAW, 1.

INJUNCTIONS.

Enjoining suit at law.

1. The indispensable basis upon which a defendant to an action at law may resort to a court of equity to restrain the prosecution of such action is, that he has some equitable defense, of which a court of law cannot take cognizance, either by reason of want of jurisdiction, or from the infirmity of legal process. *Bishop of Chicago* v. *Chiniquy et al.* 317.

2. An application to enjoin a suit at law concedes the plaintiff's strict legal right to recover, but is based upon the fact that the defendant has equities calling for the interference of the court, as clear as the legal right it seeks to control. Ibid. 317.

3. Where an action of ejectment is sought to be enjoined on the ground that the plaintiff's deed was never delivered and accepted so as to pass the legal title, a court of equity cannot be invested with jurisdiction to so declare by an allegation that the deed was subject to a trust which the plaintiff is attempting to pervert. Ibid. 317.

4. A court of equity has no jurisdiction to enjoin the prosecution of an action of ejectment on the ground that the conveyance relied on by the plaintiff is absolutely void for want of delivery and acceptance, or if delivered, it was procured through threats and duress, the defense being complete at law. Ibid. 317.

INJUNCTIONS. *Continued.*

After long acquiescence.

5. *Where owners of land which is overflowed by a dam* acquiesce in the erection of the dam, and permit the party erecting the same to make large expenditures in the same and in building and maintaining a mill, and suffer the dam to be kept up for twenty-four years, their acquiescence for so great a time will preclude them from enjoining the rebuilding and repair of a part of the dam carried away. *Vail et al.* v. *Mix et al.* 127.

To prevent a nuisance.

6. For a threatened injury to the public health, as by the erection of a dam and the consequent overflow of lands, a court of equity will not interfere at the suit of a few private individuals, unless it be shown in the bill that their health is or will be directly affected by the nuisance. Ibid. 127.

INSTRUCTIONS.

Of their requisites.

1. *Assuming facts.* There is no error in refusing an instruction which assumes the existence of a material fact which should be left to the jury to find, or when its substance is contained in others given. *Morehouse* v. *Moulding et al.* 322.

2. But if an instruction assumes the existence of facts not controverted on the trial and which, under the circumstances, if assumed, could not prejudice, there will be no error. *Miller et al.* v. *Kirby*, 242.

3. *Assuming a paper to be conditional.* An instruction which assumes that a paper or writing in evidence is conditional, when it is not, is properly refused. *Biggs et al.* v. *Clapp et al.* 335.

4. *Must be based on evidence.* Where there is no evidence on which to base an instruction, it is not error to refuse the same, but a judgment will not be reversed for giving an instruction containing an abstract proposition of law, which this court can see did not mislead the jury. *Pittsburg, Fort Wayne & Chicago Railway Co.* v. *Powers*, 341.

5. It is not error to refuse an instruction stating a correct abstract principle of law, when there is no necessity for it under the facts of the case. *Rupley et al.* v. *Daggett*, 351.

6. *On a state of facts which the evidence tends to prove.* Where the evidence tends to prove a certain state of facts, the party in whose favor it is given has the right to have the jury instructed on the hypothesis of such state of facts, and leave it to the jury to find whether

INSTRUCTIONS. OF THEIR REQUISITES. *Continued.*

the evidence is sufficient to establish the facts supposed in the instruction. *Kendall* v. *Brown*, 232.

7. *When based upon a wrong theory of the case.* Where a trial in trespass against parties not present at the time and place where the wrongful acts were committed, is conducted by the plaintiff on the theory that the trespass was committed by the servants of the parties by their direction and procurement, instructions on the part of such parties defendant, based upon a subsequent ratification of the acts done, are incorrect. *Bauer et al.* v. *Bell*, 223.

8. *As to matters not in issue.* An instruction embracing matters not in controversy on the trial, and which cannot enlighten the jury on the questions before them, is irrelevant and properly refused. *Smith* v. *The People*, 144.

INSTRUCTION CONSTRUED.

9. An instruction in a suit to enforce a mechanic's lien, that if the petitioner was hindered and prevented by the defendant from finishing and completing the work which had been entered upon, the petitioner was not precluded from recovering because the work was not completed entirely by him, is not open to the objection that it authorized a recovery for all the work contracted to be done, and for work not done by the petitioner. *Heiman* v. *Schroeder*, 158.

INSURANCE.

DESCRIPTION OF PROPERTY INSURED.

1. *Variance between application and policy.* Where an application is for insurance "on hay in the stack and in the field," and the policy issued upon the application is upon "hay in stack within fifty feet of stable," the discrepancy is not such as to entitle the insured to rescind the contract of insurance. *Edwards* v. *Farmers' Insurance Co.* 84.

CONSTRUCTION OF POLICY.

2. Where a policy of insurance refers to an application, and by apt words makes the application a part of the policy, the two instruments will be construed together. Ibid. 84.

LIMITATION AS TO SUIT IN POLICY.

3. *Waived by fraud on part of company.* A clause in an insurance policy limiting the right of action on the policy to a specified period of time is waived if the company, by fraud, or by holding out reasonable hopes of an adjustment, prevent the assured from bringing suit within the time limited. *Derrick* v. *Lamar Insurance Co.* 404.

ASSIGNMENT OF POLICY.

Set aside for fraud. See FRAUD, 5.

INTEREST.

When recoverable.

1. *On value of stock killed.* The owner of stock killed by a railway company on its track, for want of a fence, is not entitled to interest on its value from the time of the killing. *Toledo, Peoria and Warsaw Railway Co.* v. *Johnston*, 83.

2. *On money due for work done under contract.* Where specific sums of money are agreed to be paid for work by an agreement in writing, the several sums will, under the statute, carry interest from the times they become due. *Heiman* v. *Schroeder*, 158.

3. *May be recovered without being claimed in pleading.* Where interest is an incident to a debt, it may be recovered though not claimed as such in the petition or other pleading, if the sum claimed is large enough to include the same. Ibid. 158.

INTOXICATING LIQUORS.

Suit under ordinance.

Proof as to excepting. Under an ordinance prohibiting the sale of intoxicating liquors, except for certain purposes, it is not incumbent on the prosecution to prove that the sale complained of was not for the excepted purposes, but when a sale is proved, the burden of proof is on the defendant to show that such sale was lawful. *Harbaugh* v. *City of Monmouth*, 367.

JUDGE OF CIRCUIT COURT.

Extra compensation.

When holding court out of his circuit. See FEES AND SALARIES, 1.

JUDGMENTS.

Sufficiency of judgment.

1. *In action on penal bond — whether sufficiently certain as to amount.* When the verdict in debt upon a penal bond is for the debt and $949.40 damages, and the plaintiff remits $54.50 of the damages, and a judgment for the debt, to be fully satisfied upon the payment of $894.90, the damages assessed by the jury, except amount remitted together with costs, is sufficiently certain, as the exception will be referred to the sum found by the jury and not to the sum of $894.90. *Hanson et al.* v. *Rounsavell*, 238.

2. *On assessment of damages as to right of way — certainty as to land taken.* A judgment against a railroad company, on an appeal from an assessment of damages for land taken by it, which refers to the verdict wherein the land taken is properly described, is sufficiently

JUDGMENTS. SUFFICIENCY OF JUDGMENT. *Continued.*

definite and certain, as to the land for the taking of which the judgment is rendered. *Peoria and Rock Island Railway Co.* v. *Mitchell*, 394.

JUDGMENT ON DEMURRER.

3. *Its conclusiveness.* A judgment on a demurrer is equally conclusive, by way of estoppel, of the facts confessed by the demurrer, as a verdict finding the same facts, and facts thus established can never afterward be contested between the same parties, or those in privity with them. *Nispel et al.* v. *Laparle et al.* 306.

AS TO AMOUNT.

4. *Limited to amount claimed in justice's summons.* In action originating before justices of the peace, the plaintiff's recovery is limited to the amount of his demand indorsed on the summons. *Peoria and Rock Island Railway Co.* v. *McClenahan*, 435.

JUDGMENT IN FAVOR OF ONE NOT NAMED IN PLEADINGS.

5. It is not error to render a judgment in favor of a plaintiff named in the summons, although he is not named in the declaration, if no question is raised in the court below on the variance. *Fonville et al.* *Monroe et al.* 126.

JUDGMENT BY CONFESSION.

8. *What constitutes.* Where the docket of a justice of the peace shows that the defendant agreed that plaintiff should have judgment for a given sum, and that the plaintiff accepted the judgment tendered, this will be sufficient to show a confession of judgment by the defendant, and no appeal will lie from the judgment. *Borttcher* v. *Bock et al.* 332.

7. *Waiver of technical objections.* A defendant, by confessing judgment in a suit before a justice of the peace, waives all formal objections, such as, that the docket, or transcript thereof, does not show the nature of the plaintiff's demand. Ibid. 332.

8. *Release of errors.* Where a defendant, by his attorney in fact duly authorized, confesses judgment and releases any and all errors, this will preclude him effectually from assigning any error in the proceedings. *Hall* v. *Hamilton*, 437.

OF A SECOND JUDGMENT.

9. *In a criminal case.* See CRIMINAL LAW, 10.

JURISDICTION.

OF THE STATE COURTS — GENERALLY.

1. *From what source derived — foreign corporations.* The courts of this State derive all their power from the constitution and laws of

JURISDICTION. Of the State courts—generally. *Continued.*

this State, and do not, nor can they derive any power from the laws of the United States or other source. *Missouri River Telegraph Co.* v. *First National Bank of Sioux City*, 217.

2. Under the constitution of the United States congress cannot confer jurisdiction upon a State court, or any other court which it has not ordained and established. Ibid. 217.

3. The courts of this State have jurisdiction, under the power conferred by our constitution, over all persons and things within its borders, and when persons or corporations, without reference to where or when the latter are created, come into this State, they are within the jurisdiction of our courts, which is then exercised by virtue of such power, and not by virtue of any congressional action or Federal grant of power. Ibid. 217.

4. Our courts will exercise jurisdiction in suits by or against corporations, whether created by act of congress or by the laws of another State, and whether doing business in this or some other State, in all cases except where they will refuse to entertain jurisdiction in a suit between natural persons. Ibid. 217.

County courts.

5. *In contested election for city office.* The county court has no jurisdiction to try a contested election respecting a city office unless the city is incorporated under the general law of the State. *Young* v. *Adam*, 480.

Application by executor to sell land.

6. *As to the day appointed.* Where an executor gave notice of an application to the circuit court, on a certain day in the next term, being the fourth day, for an order to sell lands to pay debts, etc., and filed his petition before the first day of such term, but no court was held at such term, it was held that the proceeding was continued by law, and the court had jurisdiction at a succeeding special term to render a decree. *Whitman* v. *Fisher*, 147.

Effect of finding as to due publication.

7. The finding of a court in favor of its jurisdiction is not conclusive, especially when the record discloses the evidence of jurisdiction upon which the court acted. *Senichka* v. *Lowe*, 274.

Presumption in favor of jurisdiction.

8. *After the lapse of over twenty years* from a sale and conveyance of land by an executor made under a decree of a court of competent jurisdiction, for a full consideration to one buying in good faith, every reasonable intendment will be indulged in favor of the jurisdiction of the court making the decree, rather than to hold the sale invalid, and

JURISDICTION. PRESUMPTION IN FAVOR OF JURISDICTION. *Continued.*

the action of the court will be referred to its statutory or general jurisdiction, as may be necessary to maintain its jurisdiction. *Whitman* v. *Fisher*, 147.

JURY.

RIGHT OF TRIAL BY JURY.

1. *In the matter of fixing boundaries of lands.* Upon objections being filed to the report of surveyors in fixing disputed boundaries of land, denying its correctness, it is error in the court to refuse a trial by jury when demanded to try the issues made. *Huston et al.* v. *Atkins*, 474.

COMPETENCY.

2. *Party to suit pending, etc.* The fact that a juror, whether of the regular panel or not, has a suit at law or in equity pending, for trial in the same court, at the same term, whether the same is actually tried or not at such term, is a good ground of challenge, and it is error to disallow the same. *Plummer* v. *The People*, 361.

3. *Opinion from reports.* The fact that a juror has formed an opinion or impression based upon newspaper statements or rumors, about the truth of which he has expressed no opinion, will not disqualify him, if it shall appear from his statement, under oath, that he believes he can render a fair and impartial verdict in accordance with the law and the evidence. Ibid. 361.

4. But if the juror is unable to state that he can sit as an impartial juror in the case, he is incompetent. If exposed to influences the probable effect of which is to create a prejudice in his mind against one charged with crime, and which it will take evidence to overcome, he is not competent. Ibid. 361.

EXEMPTION FROM SERVICE.

5. *A mere gratuity to the citizen.* The duty of serving on juries is one of the inseparable incidents of citizenship, and can be exacted whenever and however the sovereign authority shall command, and all exemptions from such service are mere gratuities, which may be withdrawn at the pleasure of the law-making power. *In appeal of Scranton*, 161.

6. *Only active members of fire companies are exempt from service.* Under the general law in force February 11th, 1874, the only exemption from service on juries on account of service in the fire department is of active members of that department. Ibid. 161.

7. The general law on the subject of juries in force February 11th, 1874, repealed all local and special laws on the subject. Ibid. 161.

JURY. *Continued.*

CANNOT DISREGARD EVIDENCE.

8. A jury has no right to disregard the testimony of three witnesses as to a fact, in opposition to that of one only, from mere caprice, but are bound to give it its just weight. *Carney* v. *Sully et al.* 375.

LACHES. See LIMITATIONS, 4.

LANDLORD AND TENANT.

LIABILITY OF LANDLORD TO TENANT.

1. *For damage caused by tenant's own negligence.* Where the water pipes in a building are of the proper size and properly constructed, a tenant occupying a room and having the use of the pipes and water, and access to a crank by which to turn off the water to prevent freezing, and who neglects to turn off the same, whereby it freezes and bursts the pipe and damages his goods by leakage, cannot maintain an action against the landlord for damage, on account of his own negligence and want of ordinary care in not turning off the water when likely to freeze. *Tayler* v. *Bailey*, 178.

2. *Lease construed as to liability for leakage.* A clause in a lease, exempting the landlord from liability for damage to the tenant by leakage of water, will not only be held to apply to leakage in the story or room occupied by the tenant, when it appears that the water pipes are in a room on a floor above and to which the tenant has access and agrees to keep in order, but will also apply to leakage from the pipes in such upper room. Ibid. 178.

LAW AND FACT.

FACTS TO INVALIDATE A WILL.

A question of law, and not to be left to a jury. What acts of fraud or improper conduct in procuring the execution of a will, will invalidate it, is a question of law, and a jury should not by an instruction be left at liberty to invalidate a will for what according to their own notions may be improper conduct sufficient for that purpose. *Yoe* v. *McCord*, 33.

LEX LOCI.

AS GOVERNING CARRIER'S CONTRACT. See CARRIERS, 6.

LICENSE.

AS BETWEEN INDIVIDUALS.

1. *What constitutes, and whether revocable.* A verbal agreement between the several owners of several tracts of land, by which each

LICENSE. As between individuals. *Continued.*

gives to the others a right of way over his land, amounts to a mere license, revocable at the will of either of the parties. *Forbes* v. *Balenseifer*, 183.

2. A verbal license to pass over the land of another may be revoked either by express notice, by obstructing the land licensed to be used, by appropriating it to any use inconsistent with the enjoyment of the license, or by a sale of the land without reserving the privilege to the licensee, and in all such cases the rights of the licensee are terminated. Ibid. 183.

3. A license does not become executed and irrevocable merely because the licensee has availed himself of the privileges of a license and entered upon their enjoyment, but cases may arise where to provoke would be a great wrong and oppression, and amount to a fraud on the part of the licensor, and in such case a court will, to prevent the fraud, hold the licensor estopped from revoking the license. Ibid. 183.

LIENS.

Lien of money decree.

1. Where a decree finds a specific sum of money due from one party to another, and orders a sale of specific property, and in case not enough is realized from such sale to pay the amount, that an execution issue, such decree is a money decree, within the meaning of the fourteenth section of the chapter entitled Chancery, of the Revised Statutes of 1845, and becomes a lien upon the real estate of the party against whom it is rendered, the same as a judgment at law. *Eames et al.* v. *Germanie Turn Verein*, 54.

2. The lien of a money decree, like that of a judgment at law, only continues for one year after it is rendered, unless an execution is issued within that time. Ibid. 54.

Mechanics' lien.

3. *Rule of construction.* The statute in relation to mechanics' liens, being in derogation of the common law, those claiming its benefits must bring themselves clearly within its provisions. *Carney* v. *Tully et al.* 375.

4. *Under implied contract.* Where the proof shows that the petitioner for a mechanics' lien furnished the owner of a lot lumber for building a house thereon, that it was so used, and that it was furnished within one year from the commencement of the work, this will entitle him to a lien as upon an implied contract. *Cunningham* v. *Ferry et al.* 426.

LIENS. MECHANICS' LIEN. *Continued.*

5. *Where title is in trustee with power to build.* Where a deed by which land is conveyed to a trustee, to be held for the use of others, gives authority to build upon and improve the land, and to borrow money and mortgage the premises to secure it, for the purpose of building it, it follows that the power to make contracts for building exists with the statutory incident belonging to such contracts, that of a mechanics' lien. *Taylor et al.* v. *Gilsdorff et al.* 354.

6. A wife conveyed her real estate to a trustee in trust for herself during the joint lives of herself and husband, with remainder over to the heirs or devisees of the husband, and to the husband's heirs if he survived the wife and their children. In the deed was a provision that the property might be built upon and improved for the purpose of providing a revenue, and giving the husband and wife the general management of the premises, acting in concurrence and with the approval of the trustees; and for the purpose of so building or improving, power was given to sell any portion of the premises, or to mortgage the same to secure any loan for that purpose. The husband, in his own name, made contracts for the erection of buildings on the premises, and the buildings were so erected, with full knowledge of the wife and trustees, and without any objection on their part. *Held*, that the persons performing labor and furnishing materials were entitled to enforce a mechanics' lien against the whole estate. Ibid. 354.

7. *Payment made by consent of sub-contractor.* Where a sub-contractor, after serving notice of his lien upon the owner of a building, signs a writing, authorizing such owner to pay a certain other installment, referring to it as due when certain work is done, this will not be held conditional, but as indicating a particular installment, and the owner may rightfully make such payment before it is due, without becoming liable to the sub-contractor. *Biggs et al.* v. *Clapp et al.* 335.

8. *Notice by sub-contractor.* The notice provided in the mechanics' lien law, to be given by a sub-contractor to the owner of the property, to hold him liable, must be in writing, and must be served personally. Service by mail is insufficient to charge him. *Carney* v. *Tully et al.* 375.

9. *Payments after notice by sub-contractors.* After notice to the owner, of the claims of sub-contractors, the owner cannot rightfully pay the original contractor so as to defeat the demands of the sub-contractors, nor can he pay one sub-contractor in full and another nothing, as his caprice or partiality may determine. *Morehouse* v. *Moulding et al.* 322.

LIENS. MECHANICS' LIEN. *Continued.*

10. *When balance due must be paid pro rata.* When there is not enough to pay all sub-contractors and materialmen after deducting all payments rightfully made, the balance is to be divided between the several claimants entitled to liens in proportion to their respective interests. Ibid. 322.

11. *Right to retain payment to complete work.* The owner of a building has not the right to retain the balance due on the original contract remaining in his hands, with which to enable the contractor to complete the work, after notice of the claims of sub-contractors. Ibid. 322.

12. *Liability of owner to sub-contractors on failure to complete contract.* If the contractor for any cause fails to complete his contract, the owner will be liable to the persons entitled to a lien under the act of 1869 for so much as the work and materials are reasonably worth according to the contract price, first deducting all payments rightfully made, and damages, if any, occasioned by the non-performance of the contract, giving to each his ratable share, and the balance he can retain with which to finish the work. Ibid. 322.

13. *Right of sub-contractors to payment when work is abandoned.* The mechanics' lien law does not require that the owner shall pay any thing to a sub-contractor, when he is compelled to exhaust the original contract price, taking into account what he has rightfully paid the contractor, to complete the building, in case of abandonment by the contractor. *Biggs et al.* v. *Clapp et al.* 335.

VENDOR'S LIEN.

14. *Waived by taking security.* When the vendor of land takes the purchaser's promissory note with personal security for the unpaid purchase money, and afterward, by direction of the purchaser, conveys the land to a third person, and assigns the note, the presumption of a lien will be repelled, especially after the lapse of several years. *Wilson* v. *Sawyer et al.* 473.

LIMITATIONS.

WHEN STATUTE BEGINS TO RUN.

1. *Against suit to recover money paid on voidable contract.* In a suit to recover back money paid on a voidable contract, the statute of limitations begins to run from the time the contract is terminated by one party or the other, and not before. *Collins et al.* v. *Thayer*, 138.

2. A verbal contract for the sale of land is voidable at the will of either party, but not absolutely void, and the parties have a right to

LIMITATIONS. When statute begins to run. *Continued.*

rely upon each other to perform it, until some act is done by one or the other manifesting an intention to terminate it. Ibid. 138.

3. But when any thing is done by either party, manifesting an intention to terminate a contract voidable under the statute of frauds, the statute of limitations will begin to run against an action to recover money paid on such contract from that time. Ibid. 138.

Laches aside from the statute.

4. *To set aside deed for fraud.* Where bill was filed to set aside a conveyance of land, twenty years after the deed was made, on the ground of fraud in the agent advising the sale, it was *held* that the claim was a stale one, on the ground of laches, and that this was a good defense in itself. *Walker* v. *Carrington et al.* 446.

Under clause in insurance policy.

5. *Waived by fraud.* See INSURANCE, 3.

MANDAMUS.

When it will lie.

1. *Will not be awarded in doubtful cases.* The writ of mandamus is one of the extraordinary remedies provided by law, and should never be awarded unless the party applying for it shows a clear right to have the thing sought by it done, and by the person or body sought to be recovered. In doubtful cases it should not be granted. *Springfield & Southeastern Railway Co.* v. *County Clerk, etc.* 27.

Of the petition.

2. *Its requisites.* The petitioner in an application for a mandamus, like a plaintiff in an ordinary case, is bound to state a case *prima facie* good. Ibid. 27.

3. When the law requires the trustees of a township to certify the result of an election on the question of a donation to a railroad company, to the county clerk, a petition for a mandamus to compel the county clerk to extend a tax to pay such donation, which alleges that a majority of the votes cast were in favor of such donation, and that that fact was certified by the town clerk to the county clerk, and that the town clerk was the proper officer to certify, is bad on demurrer. Ibid. 27.

MARRIED WOMEN.

Power to make contracts.

1. *Engaging in trade and creating debts.* The right of a married woman to engage in business in her own name with a separate property necessarily implies the right to purchase goods with which to carry it on, and to bind herself by contract to pay for such purchases,

MARRIED WOMEN. Power to make contracts. *Continued.*

and the law that authorizes this will compel her to abide by and perform such contracts. *Nispel et al.* v. *Laparle et al.* 306.

2. *Notes by, when binding.* If a married woman gives her promissory notes with her husband for goods bought by her as her own property, for her own use, in her own business as a saloon keeper, carried on by her in her own name, with her own means, and which were used by her in such business for her own benefit, without the interference of her husband, she will be liable to an action on the note, notwithstanding her coverture. Ibid. 306.

3. *Mortgage with power of sale upon husband's land.* The statute which provides that "any married woman, being above the age of eighteen years, joining with her husband in an execution of any mortgage, conveyance, power of attorney or other writing, of or relating to the sale, conveyance or disposition of her lands or real estate, or any interest therein, shall be bound and concluded by the same," etc., gives to a married woman, by her husband joining with her in its execution, power to execute a mortgage or deed of trust containing a power of sale, and a sale under such a power will effectually bar her equity of redemption. *Barnes* v. *Ehrman*, 402.

4. *Release of rights on conveyance of husband's land.* A married woman can only relinquish her rights of homestead and dower in her husband's lands by joining with him in the execution of a deed or mortgage. All other contracts in relation thereto are void for want of capacity. *Knox et ux.* v. *Brady*, 476.

Husband as agent of the wife.

5. Where property is clearly that of a wife, her husband may act as her agent in its management, either by the appointment of her trustee, or, since the married woman's act of 1861, by her own appointment, and while his receiving the rents of her land may be viewed with suspicion, it is not conclusive evidence of fraud. *Walker* v. *Carrington et al.* 446.

Settlement by husband upon wife.

6. *Whether good as against creditors.* A husband out of debt, or when it does not injure existing creditors, may settle property on his wife, either by having it conveyed directly to her, or to another in trust for her, and subsequent creditors cannot reach it, and money realized from the sale of such property will be hers. *Lincoln* v. *McLaughlin*, 11.

MASTER AND SERVANT.

Injury to servant.

1. *Liability of master — duty to adopt reasonable rules and regula-*

MASTER AND SERVANT. Injury to servant. *Continued.*

tions to protect employees. It is the duty of a railway company to make all reasonable and proper regulations for the safety of its employees. And this being an affirmative fact, it devolves on the company to show an observance of the duty when sued by a servant for an injury received while in its service, and negligence is shown. On such a showing the presumption will be that the negligent act was done in violation of its rules, and the company will not be liable for the act of its servants, disobeying such regulations, unless the servant inflicting the injury was incompetent, and the company knew of it, or had reasonable and proper means of knowing it. *Pittsburg, Fort Wayne & Chicago Railway Co.* v. *Powers*, 341.

2. *Liability to servant for acts of co-servant.* It has been repeatedly held by this court that a servant of a railway company may recover of the company for an injury occasioned by the negligence of a fellow-servant, where the two are not employed in the same line of business, or their employment is wholly separated and disconnected. Ibid. 341.

3. *Whether servants are in same line of employment.* Where a servant of a railway company employed to work on the track was run over and injured by an engine through the carelessness of the engineer of the company, it was *held* that the servant injured was not engaged in the same line of employment as the engineer, and might recover of the company for the injury the same as any other person not in its service, if he acted with prudence on his part. Ibid. 341.

MEASURE OF DAMAGES.

For breach of covenant for title.

1. Where there is a covenant in a deed of conveyance of real estate, that the grantor, at the time of making the deed, was seized of a good, sure, perfect and absolute and indefeasible estate of inheritance in the law in fee simple, and the grantor has in fact only a life estate and a contingent reversion in the land, the grantee may, upon reconveying or tendering a reconveyance, sue and recover for breach of covenant, and in such case the measure of damages is the amount of the consideration named in the deed, together with taxes paid on the land, and interest, less the value of rents received or which could have been received by the grantee from the land. *Frazer* v. *Board of Supervisors of Peoria Co.* 282.

Failure of carrier to deliver goods.

2. The measure of damages in case of the failure of a carrier to deliver goods according to contract, and which are lost, is their market value at the time when and the place where they should

MEASURE OF DAMAGES. FAILURE OF CARRIER TO DELIVER GOODS. *Continued.*

have been delivered, and such value is purely a question of fact for the jury. *Chicago & Northwestern Railway Co.* v. *Dickinson et al.* 249.

INJURY TO SERVANT FROM NEGLIGENCE OF MASTER.

3. In a suit by a servant of a railway company against the company to recover damages for a personal injury received while in the company's service, it is error to admit evidence that the plaintiff had a family and was unable to support them by his labor since the injury. To admit such evidence is virtually to impose upon the company the duty of supporting the plaintiff's family, which the law does not require in the case of a servant injured in its employ even by the negligence of the company. *Pittsburg, Fort Wayne & Chicago Railway Co.* v. *Powers*, 341.

EXEMPLARY DAMAGES.

4. *Generally.* Vindictive or exemplary damages should not be awarded unless the injury complained of was done wantonly or willfully. *Miller et al.* v. *Kirby*, 242.

5. *Trespass for levying on strangers' property.* In trespass by the purchaser of goods, for levying upon and selling a part thereof, under an execution against his vendor, when there was no violence used, and no unusual noise or demonstration made, and the levy was a reasonable one, and it appeared that the contest of the fairness of the sale was not made in bad faith, it was *held* that exemplary damages could not be allowed. Ibid. 242.

6. *Stock killed by negligence.* The damages for stock killed by a railway company through negligence merely, as a neglect to fence their track, is compensatory only. To authorize more, circumstances of aggravation must be shown. *Toledo, Peoria and Warsaw Railway Co.* v. *Johnson*, 83.

7. *In trespass.* Where a landlord takes his tenant's corn under an honest belief that he has the right to sell the same and divide the proceeds, without any notice of a division by the tenant, exemplary damages should not be given against him in an action of trespass by the tenant. *Scott* v. *Bryson*, 420.

MISTAKE.

REFORMING DEED OF MARRIED WOMAN.

The deed or other contract of a married woman respecting her separate property since the passage of the act of 1869, in relation to conveyances, may be reformed for mistake, the same as if

MISTAKE. Reforming deed of married woman. *Continued.*

she were sole, and their execution may be proved, and her contracts respecting her separate property specifically enforced in equity; but as to the lands of her husband her contracts are void, and a mistake in the same conveyance cannot be reformed as against her. *Knox et ux.* v. *Brady*, 476.

MORTGAGES HAD AND RECEIVED.

When action lies therefor. See ASSUMPSIT, 1, 2.

MORTGAGES.

Foreclosure — part of debt not due.

1. On foreclosure of mortgage the court may direct the whole mortgaged premises to be sold, if most conducive to the ends of justice in reference to the equitable rights of all parties, although a part only of the mortgage debt has become due; but the fact that the premises are a meager and scant security, and are going to ruin and decay, does not justify their sale for a debt not due. *Blazey et al.* v. *Delius et al.* 299.

2. On bill to foreclose two mortgages, one of which embraces land not included in the other, and where the whole debt is not due, the decree found that the mortgagor was insolvent and the premises could not be sold in parcels without prejudice to the parties, when there was no allegation in the bill to admit such proof, and authorized a sale *en masse* for the whole debt due and to become due. *Held*, that the decree was erroneous. Ibid. 299.

3. If a sale of mortgaged premises is ordered for the entire debt, a part of which is not due, the decree should protect the rights of the mortgagor, so that in redeeming he will not be compelled to pay money before it is due under the contract. Ibid. 299.

Of several mortgages.

4. *But not wholly upon same lands.* Where two mortgages are partly upon the same premises, but one including land not in the other, it is error to decree the sale of the land not embraced in one mortgage for its satisfaction, and thereby increase the burden upon the premises in the other mortgage. Ibid. 299.

Whether a mortgage or a sale.

5. When a bill of sale is made of vessels, absolute on its face for one-half interest therein, it will require evidence of the clearest character to show that it was intended only as a mortgage to secure a loan, or advances. *Purington et al.* v. *Akhurst*, 490.

Mortgage with power of sale.

6. *By a married woman joining with her husband in mortgage upon his land.* See MARRIED WOMEN, 3.

MUNICIPAL SUBSCRIPTION.

OF VOTE PRIOR TO NEW CONSTITUTION.

1. *As to donations and subscriptions.* The object of the proviso to the section of the new constitution relating to municipal subscription, was, to save such subscriptions and donations voted in aid of railroads and private corporations prior to its adoption. The saving clause, by a reasonable construction, embraces donations as well as subscriptions, and places them upon the same footing. *Chicago & Iowa Railroad Co. et al.* v. *Pinckney et al.* 277.

NOTICE OF ELECTION.

2. *Of its sufficiency.* Where the petition filed with the town clerk for an election upon the question of the town donating its bonds in aid of a railroad, stated the time the bonds were to run and the interest they were to bear, as required by law, it was *held*, that an omission in the notice of the election to state these facts, when the notice recited that the petition was filed in the clerk's office, would not vitiate the election, as the petition was subject to inspection of any voter desiring to learn the facts. Ibid. 277.

IDENTITY OF PROPOSITION VOTED ON.

3. Where the petition shows that two propositions were submitted to the people of a town upon the question of a donation to a railroad company, one for the levying of a tax, and the other for issuing bonds to pay such donation if made, and that a majority of the votes cast were in favor of "said proposition," a mandamus to compel the county clerk to extend the tax mentioned in the first proposition will not be awarded. *Springfield & Southeastern Railway Co.* v. *County Clerk, etc.* 27.

NEGLIGENCE.

NEGLIGENCE IN RAILROADS.

1. *Injury resulting from want of outlook on railroad cars being pushed.* Where a person driving a team in a city on a very cold and blustering day, being muffled up to protect himself from the severity of the cold, while driving across a track near a public elevator, was struck by a car being propelled by an engine in the rear, and severely injured, and there was no one stationed on the car or on the ground to give warning, and it appeared, if there had been, the injury might have been avoided, it was *held*, that as the injury was the result of negligence on the part of the company, it was liable in damages to the injured party. *Illinois Central Railroad Co.* v. *Ebert*, 399.

2. *Putting car in motion without means of stopping it.* It is negligence for persons engaged in loading cars on a railroad track to put a car in motion without making any provision for stopping it, or

NEGLIGENCE. NEGLIGENCE IN RAILROADS. *Continued.*

examining to see whether the brakes are in order, or examining to see whether any person is on or about other cars on the same track with which the one put in motion will necessarily collide, and if injury results to one who is guilty of no negligence himself, the parties putting the car in motion will be liable. *Noble et al.* v. *Cunningham*, 51.

OF CONTRIBUTORY AND COMPARATIVE NEGLIGENCE.

3. *General rule.* Where a party killed was guilty of contributory negligence, his personal representative cannot recover unless the neligence of the defendant contributing to cause the death, was gross, in comparison with which the negligence of the intestate was slight. *Chicago, Burlington & Quincy Railroad Co.* v. *Van Patten*, 91.

4. *Contributory negligence on approaching a crossing.* Where a person is riding in a wagon drawn by a team under his control, and is familiar with a railroad crossing, and from the point where the wagon road turns to cross the track, distant about four rods, an approaching train is plainly visible for a distance sufficient to enable him to check his team before crossing, and he does not look in the direction of the approaching train, but keeps his head averted to an opposite direction, and drives upon the track, where he is killed, he will be guilty of contributory negligence. Ibid. 91.

5. *Presumption as to care or negligence.* In an action against a railway for causing the death of a person through negligence, where the proof clearly shows negligence on the part of the deceased, it is error to instruct the jury that the law presumes that he exercised proper care and caution on the occasion. If there was no proof of his negligence, such an instruction might be proper. Ibid. 91.

6. *Negligence in suffering stock to be at large.* In an action by the owner of stock against a railway company for killing the same, no contributory negligence is chargeable to the owner in letting the stock run at large when it breaks out of its pasture without his fault. *Toledo, Peoria & Warsaw Railway Co.* v. *Johnston*, 83.

NEW TRIALS.

IN EJECTMENT UNDER THE STATUTE.

1. *When granted after the year.* When a motion is made by a party for a new trial, in open court, on the same day a judgment is rendered in an ejectment suit, and he pays all the costs within two days thereafter, and during the same term of court, he has done all he is required to do to entitle him to a new trial under the statute, and the court has power to vacate the judgment and award a new trial in such case, even after the expiration of the period limited by

NEW TRIALS. In ejectment under the statute. *Continued.*

the statute, and should do so at the request of the party. *Stole et al.* v. *Drury*, 107.

Verdict against the evidence.

2. When the verdict of the jury in an action on the case for selling intoxicating liquor to a minor is clearly against the weight of evidence a new trial should be granted. *Ehrich* v. *White*, 481.

3. *Duty of court below.* A circuit judge who tries a case and sees the witnesses on the stand, has superior opportunities of estimating the value of the evidence, and the principal responsibility for the correctness of the verdict is upon him, and if the verdict is against the weight of the evidence, it is his duty to award a new trial. *Teutonia Life Insurance Co.* v. *Beck*, 165.

Excessive damages.

4. *For expulsion of passenger from cars.* In trespass against a railway company for ejecting the plaintiff from a passenger coach near a station, where no extreme violence was used, and no maliciousness or wanton recklessness was manifested, and the plaintiff was not seriously and permanently injured, it was *held* that $2,500 damages were excessive, and a new trial was awarded. *Chicago, Rock Island & Pacific Railroad Co.* v. *Riley*, 70.

5. *Personal injury from negligence on railroad.* A verdict of $10,000 damages in favor of one severely injured by negligence of a railway company, when the plaintiff was only a day laborer, and not wholly disabled, and the negligence was not reckless, was held so excessive as to justify the inference the jury were actuated by prejudice and passion, and should have been set aside. But a remittitur of $6,000 having been entered, and judgment entered for $4,000, it was *held* that this was not so excessive as to justify a reversal. *Illinois Central Railroad Co.* v. *Ebert*, 399.

Newly discovered evidence.

6. When newly discovered evidence is merely cumulative, and not of a decisive character, and the party has shown no diligence in finding it before the trial, a new trial will not be granted. *Bowers* v. *The People*, 418.

NUISANCE. See INJUNCTION, 6.

ORDINANCE.

Effect of exceeding authority.

May be good in part. Even if a city ordinance prohibiting sale of intoxicating liquors, embraces a class of sales which the city has

ORDINANCE. Effect of exceeding authority. *Continued.*

no power to prohibit, it may still be enforced as to such sales as the city does possess the power to prohibit. *Harbaugh* v. *City of Monmouth*, 367.

PARENT AND CHILD.

Right of child to recover of parent.

Services after majority. No principle is better settled than that a son or daughter, after becoming of age, in the absence of a contract, can recover nothing for services rendered thereafter as a member of the family; and whatever the father may choose to give in after years is nothing more than a mere gift. He is under no legal obligation to make any recompense. *Griffin et al.* v. *First National Bank of Morrison*, 259.

PARTNERSHIP.

Books as evidence on accounting.

1. *Presumed to be correct.* Partnership books of account are presumed to contain a true history of the business and a true record of the transactions between the partners. In the absence of proof to the contrary, reliance is properly placed on such books in stating the partnership account. *Stuart* v. *McKichan*, 122.

Rights as between partners.

2. *Credit for interest paid.* Where one is taken as a partner in a business on account of his financial credit, and to raise money to prosecute the business, and he is credited by the book-keeper for the interest paid by him in procuring loans, and the other partner, having examined the books, makes no objection to such entries, they may properly be allowed in stating the partnership account. Ibid. 122.

Application of partnership property.

3. *First to the payment of firm debts.* Where a merchant sells an interest in his stock of goods to another who becomes a partner in the business, debts contracted by the new firm must first be paid out of goods afterward purchased before any portion of them can be taken for debts of the former, and only his interest in such of the old stock as remains on hand until levied upon, can be appropriated to the payment of his prior debts. *Hurlburt et al.* v. *Johnson et al.* 64.

4. On a bill to subject partnership funds to the payment of partnership debts, if it appears that any portion of the property on hand had belonged to one of the partners before the formation of the partnership, and was at that time put into the partnership business by

PARTNERSHIP. APPLICATION OF PARTNERSHIP PROPERTY. *Continued.*

him, his individual prior creditors will be entitled to have his interest in such property as is still on hand, and can be identified, appropriated to the payment of executions against him, which have been levied on the entire stock before the filing of the bill, but nothing more. Ibid. 64.

PAUPERS.

UPON WHAT TOWN OR COUNTY A CHARGE.

1. A person who goes into a county or town and makes no arrangement for a home, and who has no home or fixed actual residence, but hires out and is employed by one or more persons, and so continues for six months, and then becomes a pauper, comes within the second class of persons named in the 15th section of the Pauper act of 1845, and is a charge upon such town or county. *Town of Dore* v. *Town of Seneca*, 101.

RESIDENCE.

2. Actual residence is determined by intention and acts, whilst apparent residence consists of acts without intention coupled with them. Ibid. 101.

3. A person being unmarried and employed away from his former home, without any intention of returning, or of making the place where employed his actual, fixed and permanent residence, has no actual place of residence, but he has a residence at the place of such employment within the meaning of section 15 of the Pauper law of 1845. Ibid. 101.

EVIDENCE TO PROVE RESIDENCE OF PAUPER.

4. In a suit where the question is as to the place of residence of a pauper, under the act of 1845, it is not improper to prove the statements of the pauper as to where she considered her home previous to the time she became a town charge. Ibid. 101.

5. Nor is it error in such case to prove what was said by the brothers-in-law of the pauper, in reference to their making a bargain for her wages with those who employed her, as tending to show the relation of the parties, and whether the brothers-in-law regarded their houses as her home. Ibid. 101.

PAYMENT.

APPLICATION OF PAYMENTS.

1. A direction as to the application of a payment may be implied from circumstances. An agreement before payment, or even the expression of a wish on the part of the debtor as to how payment

PAYMENT. Application of payments. *Continued.*

shall be applied, will amount to a direction to that effect. *Hansen et al.* v. *Rounsavell*, 238.

2. Where there is evidence tending to show a previous agreement as to the application of payments, an instruction that if the debtor gave no direction as to the application of certain payments, then the creditor had the right to apply them on the oldest account due at the time, is not so faulty as to justify a reversal. It would be better to have used the word "agreement" than the word "instruction." Ibid. 238.

3. *As to rights of surety.* Where an obligor makes a general payment to his obligee, to whom he is indebted not only on a bond upon which there is security, but otherwise, the surety of the obligor cannot require that the payment shall be applied to the bond, unless aided by circumstances which show that such application was intended by the obligor. Ibid. 238.

Proof of payment.

4. *Under the general issue.* See PLEADING AND EVIDENCE, 3.

PLEADING.

Of the declaration.

1. *In suit against devisee for debtor's debt.* Where an action is brought against an heir or devisee, under the statute, for the debt of his ancestor or devisor, the facts authorizing such action must be distinctly set forth in the declaration. No recovery can be had under the common counts for work and labor performed, etc. *McLean* v. *McBean*, 134.

2. *Interest recoverable without being claimed in the declaration.* See INTEREST, 3.

Pleas.

3. *Plea of failure of consideration — its requisites.* A plea of total failure of consideration must show all the elements entering into the consideration, and a failure of each and every part of it distinctly averred with as much precision as the allegations of a declaration. *Hough* v. *Gage*, 257.

4. A plea that the consideration of a note was the sale of an interest in a certain patent right, which has wholly failed, the patent being void, because the result therein claimed to be accomplished could not be accomplished, is bad on demurrer as failing to show what the result claimed to be accomplished was, and wherein it had failed. Ibid. 257.

5. *Plea to scire facias on recognizance.* See SCIRE FACIAS, 1.

PLEADING. *Continued.*

REPLICATION.

6. *De injuria sufficient replication to plea of justification in trespass.* In an action by a married woman for trespass to her separate property against an officer who levied upon it as the property of her husband, and justifies under his writ, averring that the property belonged to the husband, a replication *de injuria* is sufficient. *Lincoln* v. *McLaughlin*, 11.

DEFECTIVE PLEADING AFTER VERDICT.

7. Where the statements in a pleading, although imperfect and insufficient in themselves, are yet of such a character as force the conclusion that all must have been proved on the trial, which ought to have been stated in the pleading to procure the verdict, then the defective pleading is aided by intendment after verdict, and the court may render judgment. *Heiman* v. *Schroeder*, 158.

VARIANCE BETWEEN WRIT AND DECLARATION.

8. *Must be pleaded in abatement.* See ABATEMENT, 1.

PLEADING AND EVIDENCE.

REPLICATION DE INJURIA.

1. *Proof as to abuse of authority by officer.* Where a plea of justification to an action of trespass sets up that the supposed trespass was committed under and by virtue of an execution against one who owned an interest in the goods taken, if the defendant in execution had in fact no interest in the goods, a replication *de injuria* is sufficient, but if he had some interest and the plaintiff desires to rely upon an abuse of authority in making the levy, he should reply specially setting up such abuse. *Lincoln* v. *McLaughlin*, 11.

2. Where a defendant, in an action of trespass for levying on goods, justifies under an execution against the husband of plaintiff, alleging that he owned the goods or an interest in them, if the plaintiff replies *de injuria*, she takes the hazard of proving title to the goods wholly in her own self, and if she does so she must recover. Ibid. 11.

EVIDENCE UNDER GENERAL ISSUE.

3. Evidence tending to prove payment may be introduced under the general issue. *Kassing et al.* v. *International Bank*, 16.

ADMISSION BY DEMURRER.

4. *Obviating necessity of proof.* By demurring to a pleading, such as a replication, the party admits the substantial facts alleged in the pleading demurred to, and no proof of them is necessary on a trial upon other issues. *Nispel et al.* v. *Laparle et al.* 306.

PRACTICE.

RULES OF COURT.

1. *Must conform to the statute.* A circuit judge is absolutely powerless to repeal or abrogate any provision of the statute by rule of court. *Hayward* v. *Ramsey*, 379.

BILL OF PARTICULARS.

2. *What so considered.* When the plaintiff, in a suit against a bank for a balance of deposit, attaches to his affidavits the bank-book, containing the entries made by the bank, and showing the balance due, this will be a bill of particulars, notwithstanding its being sworn to, so as to prevent a continuance. *Bank of Chicago* v. *Hull*, 106.

AFFIDAVIT OF MERITS.

3. *By whom to be made.* The statute does not require the affidavit accompanying the plaintiff's declaration to be made by the plaintiff. If an affidavit is filed by any one showing the nature of the plaintiff's demand and the amount due, the defendant is required to file an affidavit of merits with his pleas. Ibid. 106.

4. *Striking plea without affidavit from files.* Where the statute is complied with by the plaintiff, if the defendant files a plea without affidavit of merits, it is proper to strike the same from the files. Ibid. 106.

FILING ADDITIONAL PLEAS.

5. *Discretionary with the court.* It is purely discretionary with the court, whether to allow a defendant to file an additional plea or not, after he has pleaded in bar to an action, unless it be a plea *puis darrein continuance*, and it is not only no error for a court to refuse such leave after a jury has been impaneled to try the cause, but it would be almost an abuse of discretion to grant it. *Lincoln* v. *McLaughlin*, 11.

SPECIAL VERDICT.

6. *Extent of the power of the court.* If the court exercises its discretion in instructing the jury to find specially in answer to certain interrogatories, its power is exhausted, and it is error to say to them that if they are unable to answer interrogatories because of the uncertainty of the evidence, they can so report. *Chicago, Burlington & Quincy Railroad Co.* v. *Van Patten*, 91.

PRACTICE IN SUPREME COURT.

WHAT MAY BE ASSIGNED AS ERROR.

1. *The failure or refusal of a judge to sign a bill of exceptions* cannot be assigned for error, nor considered in the Supreme Court. The remedy, where a judge wrongfully refuses to sign a bill of exceptions, is by mandamus. *Hulett* v. *Ames*, 253.

PRACTICE IN SUPREME COURT. *Continued.*

OF THE ARGUMENT.

2. *Ground of alleged error should be stated.* If a party desires to urge a ground of reversal he should state the same in his opening argument, so as to give the other party a chance to reply. But if it is specially assigned for error, this court cannot disregard it. *Purington et al.* v. *Akhurst*, 490.

DISMISSAL OF APPEAL.

3. *Unless proper judgment be shown.* Where the record does not show any such judgment as the appeal professes to be taken from, the appeal will be dismissed. *Armstrong* v. *The People ex rel.* 178.

ERROR WILL NOT ALWAYS REVERSE.

4. *Improper evidence.* Even though evidence not strictly admissible is introduced, yet if the court can see that such evidence could not have misled the jury, and that their verdict is right, independent of such evidence, the judgment will not be reversed. *Teutonia Life Insurance Co.* v. *Beck*, 165.

5. *Erroneous instructions.* Where the right is so clearly with the successful party that the result would have followed had the jury been properly instructed, the judgment will not be reversed, but where the right of the party is not clear, and there is error in the instructions which may have influenced the jury, a reversal will be had, and the cause remanded. *Chicago, Burlington & Quincy Railroad Co.* v. *Van Patten*, 91.

PRESCRIPTION.

RIGHT TO OVERFLOW LAND.

How acquired. A right to overflow land, like easements in general, may be acquired by an uninterrupted and adverse enjoyment for twenty years, or for the period of time fixed by the statute of limitations for the right of entry upon lands. *Vail et al.* v. *Mix et al.* 127.

PRESUMPTIONS.

OF LAW AND FACT.

1. *Not adverse to proofs.* Where there is clear proof of a fact, no presumptions can be indulged except such as arise upon the proof. *Chicago, Burlington & Quincy Railroad Co.* v. *Van Patten*, 91.

2. *As to correctness of partnership books on settling partners' accounts.* See PARTNERSHIP, 1.

3. *As to negligence of plaintiff, in suit for alleged negligence of defendant.* See NEGLIGENCE, 5.

PROCESS.

SERVICE AND RETURN.

In chancery cases. An indorsement of service of a chancery summons, "executed by leaving copy with A, B, and C (the defendants), this," etc., is sufficient to confer jurisdiction of the persons of the defendants, its obvious meaning being that the officer delivered a copy to each of the defendants. *Whitman* v. *Fisher*, 148.

PROMISSORY NOTES.

PAYABLE ON A CONTINGENCY.

1. An instrument in writing for the payment of money six months after date, on condition its amount "is not provided for as agreed by C D," not being payable absolutely and unconditionally, is not a negotiable promissory note, and suit cannot be maintained on it in the name of an assignee. *Baird* v. *Underwood*, 176.

BY WHOM TO BE SIGNED.

2. *On condition that others should sign.* The defendants, under an agreement with the plaintiff, that they would sign their father's note to the plaintiff as sureties, executed a note and delivered it to the plaintiff, who agreed to get the signature of the father of the defendants, who was to be the principal in the note. The plaintiff never presented the note to defendants' father for his signature, nor did the father ever sign it. *Held*, that as between the parties, the note was not obligatory, not being signed by the father. *Knight* v. *Hurlbut et al.* 133.

WHEN EXECUTED BY MARRIED WOMAN.

3. *Whether binding.* See MARRIED WOMEN, 2.

PURCHASERS.

WHO MAY BECOME PURCHASERS.

1. *Brother-in-law of agent.* The fact that a purchaser of land is a brother-in-law of an agent, even if the agent has power to sell, does not imply that confidence as to preclude him from becoming the purchaser of land, and much less so when the power of the agent is simply advisory. *Walker* v. *Carrington et al.* 446.

2. *When agent selling property may afterward buy.* See AGENCY, 4.

REVERSAL OF DECREE.

3. *Effect on rights of purchaser.* The reversal of a decree construing a will as authorizing the executor to sell and convey land at private sale, for mere error in the proceedings, will not avoid a sale made by the executor to a *bona fide* purchaser for value, this court rendering the decree having jurisdiction of the subject-matter and of the persons of those interested. *Whitman* v. *Fisher*, 147.

PURCHASERS. *Continued.*

As to application of purchase money.

4. *On sale by executor—purchaser need not look to it.* Where power is given by will to executors to sell real estate to raise funds with which to pay legacies, as the legatees become of age, a sale and conveyance made after one of them arrives at majority, being in the due execution of the trust created, will be valid, even though the proceeds are applied in the payment of the testator's debts. The purchaser is not required to see to the proper application of the purchase money. Ibid. 147.

Right of purchaser to possession.

5. *Under contract of purchase.* See VENDOR AND PURCHASER, 1, 2, 3.

RAILROADS.

Care required as to excavations.

1. *To keep them free from water or ice.* The law does not require a railway company to keep the excavations along the sides of its track free from water and ice, and it will not be liable for stock killed in consequence of ice therein, so as to prevent escape from the track, over the same. *Peoria & Rock Island Railway Co.* v. *McClenahan*, 435.

Power to agent.

2. *To bind the company.* See AGENCY, 1, 2.

Liability for negligence.

3. *Generally.* See NEGLIGENCE, 1 to 6.

RECOGNIZANCE.

Of its validity.

1. *Does not depend upon the original charge being the one for which the indictment is found.* It matters not whether the principal in a recognizance was examined on the charge for which he is indicted or some other, provided it was for a bailable offense. If examined for any offense which is bailable, the recognizance will be good. *The People* v. *Meacham*, 292.

2. *Certificate of justice.* The certificate of a justice of the peace to a recognizance that it was taken, entered into and acknowledged before him is sufficient. Ibid. 292.

RECOUPMENT.

As between vendor and purchaser.

In a suit by a purchaser of land, under a verbal contract which has been terminated at the option of either party, to recover payments

RECOUPMENT. As between vendor and purchaser. *Continued.*

made on such contract, the vendor may recoup the value of the use and occupation of the land, if it has been occupied by the purchaser, unless he has been compelled by law to pay the same to the owner of a paramount title. *Collins et al.* v. *Thayer*, 138.

RELEASE OF ERRORS.

On confession of judgment. See JUDGMENT.

RES ADJUDICATA.

Decision of Supreme Court.

When case again comes before it. When on error to this court certain facts are found from the evidence, and the cause reversed, and remanded merely to supply proof of a particular fact, the facts found by this court must be regarded as settled and not open to be questioned on a second writ of error. *Tuttle* v. *Garrett et al.* 444.

RESIDENCE.

Under the pauper act. See PAUPERS, 2 to 5.

REVERSAL OF DECREE.

Effect upon rights of purchaser. See PURCHASERS, 3.

RIGHT OF WAY.

Award of execution.

For damages assessed. Where the verdict of a jury, on an appeal in a case of assessment of damages for land condemned by a railroad company, finds that the land has been taken by the company, and not merely that it is proposed to be taken, it is proper to award execution on the judgment. *Peoria & Rock Island Railway Co.* v. *Mitchell*, 394.

RULES OF COURT.

Must conform to the statute. See PRACTICE, 1.

SALES.

Mistake as to price.

1. *Its effect on the contract.* Where there is a mutual mistake in regard to the price of an article of property, there is no sale and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. *Rupley et al.* v. *Daggett*, 351.

2. Thus, where the owner of a mare asked $165 for her, and the purchaser understood the price asked to be $65, and took her home

SALES. Mistake as to price. *Continued.*
with him and refused to pay more than the latter-named sum, there being a clear misunderstanding between the parties, it was *held* that there was no sale, and consequently no title passed. Ibid. 351.

SCIRE FACIAS.

On recognizance.

1. *Plea denying official character of justice.* In a *scire facias* upon a recognizance, a plea that the committing magistrate was not a justice of the peace amounts to nothing. By entering into the recognizance, the cognizor admits the official character of the person making the commitment, which cannot be inquired into collaterally. *The People* v. *Meacham*, 292.

Burden of proof.

2. *To show death of principal in recognizance.* On a plea of the death of the principal in a recognizance, the burden of proof rests upon the defendant. Ibid. 292.

Sufficiency of proof.

On plea of nul tiel record to a *scire facias* upon a forfeited recognizance, if the recognizance, with the certificate of the magistrate attached and the indorsements on it, together with the indictment, and the record of its return into court, and the judgment declaring a forfeiture, are read without any specific objections, this will sustain the issue on the part of the people. Ibid. 292.

SELF-DEFENSE. See CRIMINAL LAW, 7, 8.

SET-OFF.

Whether allowable.

1. *Claim against factor in suit for goods bought of him.* Where a factor or agent has the property of another in his possession, and a person not having notice or chargeable with notice purchases the property, supposing it to belong to the factor, the purchaser may set off a claim he has against the agent. *Stinson* v. *Gould et al.* 80.

2. But where the property sold is not in the possession of the agent when sold, or if the purchaser has notice or is chargeable with notice that the person selling is not the owner of the property, then he cannot set off any claim he may have against the agent. Ibid. 80.

3. *Of joint claim against factors and others in suit for goods sold by factor.* Although a purchaser of property in the hands of a factor, supposed by the purchaser to be the owner, may set off any claim he may have against such factor, in a suit by the owner of the goods for the purchase money, yet he cannot set off any claim he may have against such factor and other parties jointly. Ibid. 80.

STATUTES.

OF THE PASSAGE OF LAWS.

1. *As to the title and change in the same.* Unless a change in the title to a bill in the two houses concurring in its passage is one of substance, and calculated to mislead as to the subject of the bill, it may be regarded as a clerical mistake in nowise affecting the validity of the law. *Plummer* v. *The People*, 361.

2. Where a bill passed the House entitled "a bill for an act to prevent the keeping of common gaming houses," but when introduced in the Senate it bore the title "a bill for an act to prevent the keeping of common gaming houses and to prevent gaming," by which title it passed that body and was reported back, enrolled and approved, the body of the bill being identified in both houses, it was *held* that the change in the title did not render the act void. Ibid. 361.

3. *Title need not express necessary results.* The constitutional requirement in respect to the passage of bills is not, that but one subject shall be expressed in the title, but that the act shall embrace but one subject, which shall be expressed in the title. It is not necessary to express in the title the incidental results expected to flow from the act, but if it does,.it will not render the act void. Ibid. 361.

CONSTRUCTION OF STATUTES.

4. If any part of a statute be intricate, obscure or doubtful, the proper way to discover the intention is to consider the other parts of the act, for the meaning of one part of a statute frequently leads to the sense of another; so that in the construction of one part of a statute every other part ought to be taken into consideration. *Biggs et al.* v. *Clapp et al.* 335.

STATUTES CONSTRUED.

5. *The provision in the statute relating to mills and millers*, which prohibits the erection of a dam, etc., which will injure the health of the neighborhood by the overflow of lands, has application only to proceedings had under that statute, and does not apply on bill for injunction to prevent the repair of a dam, long before erected. *Vail et al.* v. *Mix et al.* 127.

6. *Curing errors and informalities in assessment for taxation.* See TAXES AND TAXATION, 7.

STATUTE OF FRAUDS.

PAROL SALE OF LAND.

1. *Who may avail of the statute.* The vendor of land, under a verbal contract for the sale of real estate, may terminate it and recover possession of the land, or the purchaser may terminate it and recover payments he may have made, and this, too, without per-

STATUTE OF FRAUDS. PAROL SALE OF LAND. *Continued.*

formance or an offer to perform the contract. *Collins et al.* v. *Thayer*, 138.

SURETY.

CONTRACTS STRICTLY CONSTRUED.

1. The contract of a surety is construed strictly and his liability will not be extended by implication. *The People* v. *Tompkins et al.* 482.

SURETIES ON GRAIN INSPECTOR'S BOND.

2. The sureties of a chief inspector of grain in a city, appointed under the "act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to article thirteen of the constitution of this State," are not responsible for moneys collected by him for inspection in a suit upon his bond, where the duty of collecting and taking care of such fund is not imposed on him before the execution of his bond. Ibid. 482.

INDEMNITY TO SURETY.

3. *His right under deed of trust given to indemnify him.* Where a surety on a note deposits with the holder a deed of trust executed by the principal to indemnify him against his liability as surety, and afterward, upon proceedings in bankruptcy against him, compromises with the holder by giving other notes for a less amount, with personal security, or in discharge from his liability on the original note, he will be entitled to have the proceeds of a sale under the deed of trust applied to the payment of the notes so given in discharge of the original note. *Kassing et al.* v. *International Bank*, 16.

SURGEON.

LIABILITY FOR MALPRACTICE.

1. *Shortening of fractured limb.* Where a fractured limb is shortened by reason of the want of extension at the proper time, and the extension of the limb could not well and safely be effected, nor the means and appliances for that purpose be safely used before what is called the bony union commenced, and the defendant surgeon treating the case was discharged before such bony union, under proper treatment, would and did commence, and another surgeon was employed, it was *held* that the defendant was not liable in an action for the injury, there being no other charge of unskillful treatment on his part. *Kendall* v. *Brown*, 232.

DEFINING THE CARE REQUIRED.

2. There is no substantial difference in the use of the words "ordinary" and "reasonable" in defining the care and skill required of a surgeon or physician in his employment. Ibid. 232.

TAXES AND TAXATION.

MUNICIPAL TAXATION.

1. *Constitutional limitations.* Under the constitution of 1848, as well as that of 1870, the legislature is prohibited from authorizing the corporate authorities of counties, townships, school districts, cities, towns and villages to assess and collect taxes for any other than corporate purposes; and it is indispensable to the validity of all taxes levied and collected for corporate purposes, that they shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same. *Sleight et al.* v. *The People, for use, etc.* 47.

2. *What is a "corporate purpose."* A tax imposed for the payment of a debt not incurred by the authority imposing the tax, and for the payment of which it is in nowise responsible, is not for a corporate purpose. Ibid. 47.

3. *Devoting county taxes and township taxes to the payment of debt of a particular town.* A section in a railway charter provided that the taxes to be collected from the company for county and township purposes by the several counties and townships through which the railroad ran, should be set apart by the county treasurer as a sinking fund to redeem the principal of the bonds issued by any township or townships in such county. It was claimed that the county taxes and the township taxes levied upon the railroad by two townships, which had issued no bonds, should have been set apart to create a sinking fund for two townships which had issued railroad bonds, but the court *held* that this could not be constitutionally done, as its effect was to devote taxes levied for county and township purposes to the payment of the debt of the townships which had issued their bonds, and to that extent increased the taxes in the county and the other two townships to make up the deficiency thus caused in their revenue, and therefore the law was unconstitutional and void. Ibid. 47.

APPLICATION FOR JUDGMENT.

4. *Strict construction of the statute.* In summary proceedings to divest owners of title to their property, the law under which the same is sought is to be strictly construed, and nothing is allowed to be taken by intendment merely. This rule applies on application for judgment against real estate for taxes and assessments due thereon. *People ex rel.* v. *Otis*, 384.

5. *Report by collector, of delinquent list, as a pre-requisite to jurisdiction.* Under the city tax act of 1873, the county collector, in applying for judgment against real estate for unpaid taxes or special assessments, must make a report of the delinquent list, verified by his affidavit, the same as under the general revenue law, and if such

TAXES AND TAXATION. APPLICATION FOR JUDGMENT. *Continued.*

report and affidavit are substantially defective, or different from that required, the court will acquire no jurisdiction to render judgment. Ibid. 384.

6. *Sufficiency of collector's affidavit.* An affidavit of a county collector, on application for judgment against delinquent lands and lots, that his report shows a complete list, etc., "as shown by the returns made by the city collector," to him, all of which taxes and special assessments he has been "unable to collect for want of authority of law," is materially different from the one required by law, and the court will acquire no jurisdiction to render judgment. Ibid. 384.

7. *As to substantial requirements, and mere errors and informalities.* The 191st section of the revenue law, as amended by the act, approved May 30, 1873, authorizing amendments and obviating the effect of omissions, errors, etc., cannot be held to waive a substantial compliance with those steps which are essential to give jurisdiction. It aids and obviates defects of form, but not of substance. *The People ex rel.* v. *Otis*, 384.

8. The statement of the valuation of the property upon which a tax is extended, in the collector's report on return, and the oath or affidavit required to accompany it, are substantial requirements. Ibid. 384.

9. *Of the notice and certificate of publication.* A certificate of the publisher printed at the conclusion of the list of delinquent lands, and as a continuation of the same advertisement, without any separate certificate made since the publication, is insufficient to give the court jurisdiction to render judgment against lands for taxes. *Senichka* v. *Lowe*, 272.

TELEGRAPHY.

AS TO UNREPEATED MESSAGES.

1. *Exemption from liability for mistakes.* The usual regulations exempting telegraph companies from liability for errors in unrepeated messages, exempts them only for errors arising from causes beyond their own control. *Western Union Telegraph Co.* v. *Tyler et al.* 168.

2. *Requirements on blanks, no contract.* The regulation requiring messages to be repeated, printed on the blank on which a message is written, is not a contract binding in law, as the duty arises to send the same correctly upon payment of the charge required. Such regulation is void for want of consideration, and as being against public policy. Ibid. 168.

TELEGRAPHY. *Continued.*

BURDEN OF PROOF.

3. *To explain inaccuracy in transmission.* Where the inaccuracy in the transmission of a message is proved, the *onus* of relieving the telegraph company sending the same, from the presumption of negligence thereby raised, rests upon the company, by showing that the error was caused by some agency for which it is not liable. Ibid. 168.

TRESPASS.

WHEN THE ACTION WILL LIE.

1. Trespass is a possessory action, and the plaintiff must, at the time the injury is committed, have an actual or constructive possession as well as a general or special property in the chattel injured, carried away or destroyed, in order to maintain the action; and though the possession be tortious, yet trespass lies against a stranger who divests such possession. *Scott* v. *Bryson*, 420.

2. In trespass to personal property, the plaintiff must show that when the injury was committed he had an actual or constructive possession of the goods, and also a general or qualified title therein; but it is well settled that actual possession, though without the consent of the real owner, or even adverse to him, will be sufficient, as against a wrong-doer, or one who can show no better title. *Miller et al.* v. *Kirby*, 242.

3. If one gives a deed of trust upon goods to secure the payment of money, and it is provided therein that he shall have full right to carry on the business of the store in his own name, make sales and receive the proceeds, and have the management of the business, such party, being in the actual possession, can maintain trespass for the taking of any of the property, although the trustee also may have had a constructive possession for the purpose of seeing that the proceeds of the sales were applied on the debt. Ibid. 242.

4. *To make one liable for a trespass committed* by his direction, the place at which the direction was given is unimportant. It is not necessary it should be given at the place where the trespass was committed. *Bower et al.* v. *Bell*, 223.

VARIANCE.

BETWEEN WRIT AND DECLARATION.

Must be pleaded in abatement. See ABATEMENT, 1.

VENDOR'S LIEN. See LIENS, 14.

VENDOR AND PURCHASER.

As to possession of purchaser.

1. *Or of one by his permission.* Where land is sold and *in possession under* a contract to convey upon the payment of the purchase money, executed, and the purchaser let into possession, the purchaser is in equity the owner, subject only to the lien of the seller for the unpaid purchase money, and has a right to the free use and enjoyment of the rents, issues and profits, so long as he is not in default under the contract. *Baldwin et al.* v. *Pool*, 97.

2. A vendor of land having let a purchaser into possession under a contract to convey, cannot interfere with one having a privilege from such purchaser in the enjoyment thereof, where there is no default under the contract of purchase, and no lessening of the security for the purchase money occasioned thereby. Ibid. 97.

3. *As to right of possession.* A contract or bond for the future conveyance of land does not of itself necessarily imply that the present possession shall pass. It may pass by the express terms of such contract, but in the absence of appropriate language to indicate such intention, the right of possession remains with the legal title. *Kelley* v. *Trumble*, 428.

VENUE.

Change of venue.

Right lost by delay. An application for a change of venue should be made at the earliest opportunity, and where a party, knowing all the time of the ground relied upon for a change of venue, delays making his motion until toward the latter end of the term of court, and no reason is shown why the motion was not made on the first day of the term, a change of venue will not be granted. *Peoria & Rock Island Railway Co.* v. *Mitchell*, 394.

VERDICT.

Special verdict. See PRACTICE, 6.

WILLS.

Of the signing by the testator.

1. The statute does not require that a will should be *signed* in the presence of two or more credible witnesses. It is sufficient if two attesting witnesses heard the testator acknowledge that he signed it. *Yoe* v. *McCord*, 33.

Of the attestation.

2. *In the presence of the testator.* If the witnesses to a will, while signing their names thereto, as such witnesses, are in such a place that

WILLS. OF THE ATTESTATION. *Continued.*

the testator can see them if he chooses, they are to be regarded as in his *presence*, within the meaning of the statute; and it is not necessary that they shall be in the same room with the testator, or that he shall actually see them sign. *Ambree* v. *Weishaar*, 109.

3. Where a will was drawn and witnesses sent for at the request of a testator, and after signing by him at his request, the witnesses went from the bedroom where he was, into a dining-room to attest the same, on account of the want of conveniences for doing so in the bedroom, and he knew that the attestation was going on in the dining-room, and approved it, and from the position he occupied in the bed could have seen the witnesses while signing. *Held*, that the will was attested in the presence of the testator. Ibid. 109.

SOUND MIND AND MEMORY.

4. If the testator's mind is sound, although his memory may be impaired, he is of sound mind and memory, in the sense which the phrase is used in law, and, in order to destroy the capacity of a person to make a will on account of failure of memory, the failure must be total or extend to his immediate family and property. *Yoe* v. *McCord*, 33.

5. If the mind and memory of a testator are sufficiently sound to enable him to know and understand the business in which he is engaged at the time of executing his will, then he is of sound mind and memory within the meaning of the law. Ibid. 33.

6. On the trial of the question as to whether a will shall be admitted to probate, an instruction that if the jury believe, from the testimony of the subscribing witnesses, that the testator was of unsound mind *or* memory, they should find against the will, makes an unwarrantable distinction between "sound mind" and "sound memory," calculated to mislead the jury, and should not be given. Ibid. 33.

TESTAMENTARY CAPACITY.

7. *Instruction to jury should be general.* The question as to the capacity of a testator, when submitted to a jury, should be, had he the capacity to make *a* will, not had he the capacity to make *the will* produced. Ibid. 33.

UNDUE INFLUENCE OVER TESTATOR.

8. *Implies something wrongful.* It is not unlawful for one by honest advice or persuasion to induce a testator to make a will or influence the disposition of his property by will. To vitiate a will on account of *undue* influence it must appear that there was something wrongful, a species of fraud perpetrated. Ibid. 33.

WILLS. *Continued.*

PROOF ON PROBATE OF WILL.

9. The statute requires a party producing a will for admission to probate in the county court, to prove nothing but its formal execution, and that the testator was of sound mind and memory at the time of its execution. Ibid. 33.

10. An instruction that signing and acknowledging a will is not sufficient to entitle it to probate, but that it must further appear that it was the actual deed of the testator, requires more than the statute, and is for that reason wrong. Ibid. 33.

11. It is not necessary that a subscribing witness to a will should state on oath in so many words, that he believed the testator to be of sound mind and memory. It is sufficient if he so declares in legal effect. Ibid. 33.

WITNESS.

CREDIBILITY.

1. *An instruction may be based on statements made out of court* Where a party as a witness has made statements out of court different from those on the stand, an instruction that if he had been successfully impeached, or had willfully sworn falsely as to any matter or thing material to the issue, then the jury might disregard his entire evidence, unless corroborated by other unimpeached testimony, is not erroneous, as it is for the jury to say what statements amount to as grounds of impeachment. *Bowers* v. *The People*, 418.

2. *Rule for judging weight of testimony.* In weighing the evidence, it is the duty of the jury to take into consideration the deportment of the witnesses while testifying, as well as any interest they may have in the result of the suit, and it is not error to instruct them to consider these facts. Ibid. 418.

IN CRIMINAL CASE.

3. *Not on indictment.* On the trial of one for crime, the court, in the exercise of a sound discretion, may allow a witness whose name is not indorsed on the indictment to be sworn and testify for the prosecution, though his name has not been furnished the defendant before arraignment. *Smith* v. *The People*, 144.

WRITS OF ERROR. See APPEALS AND WRITS OF ERROR.

TABLE OF UNREPORTED CASES

SUBMITTED AT THE SEPTEMBER TERM, 1874.

Adams et al. v. *The People ex rel. Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Aiken v. *Rumsey.* APPEAL from the Circuit Court of Cook county Opinion Per CURIAM. *Decree affirmed.*

Appleby v. *Munson et al.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Bailey et al. v. *Seymour et al.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Barker v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Bowen et al. v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Burke v. *Gifford.* APPEAL from the Circuit Court of Cook county. Opinion by SCOTT, J. *Decree affirmed.*

Chicago City Railway Co. v. *Howison et al.* APPEAL from the Circuit Court of Cook county. Opinion by SCOTT, J. *Decree reversed.*

Chubley et al. v *Van Allen.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Judgment affirmed.*

Colehour v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Cooley v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Cushman v. *Thomas.* APPEAL from the Circuit Court of La Salle county. Opinion Per CURIAM. *Judgment affirmed.*

Downey v. *Carter.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Durham et al. v. *Dunn et al.* APPEAL from the Circuit Court of Kankakee county. Opinion by SCOTT, J. *Judgment affirmed.*

Dyche v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Judgment affirmed.*

Ellis v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Emerson v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Follansbee v. *The People ex rel. Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Gardiner v. *Hall.* APPEAL from the Circuit Court of Winnebago county. Opinion by SHELDON, J. *Judgment affirmed.*

Gaylord et al. v. *Chicago and Alton R. R. Co.* WRIT OF ERROR to the Circuit Court of Will county. Opinion by SCOTT, J. *Decree affirmed.*

Harmon v. *The People ex rel. Rumsey.* WRIT OF ERROR to the Circuit Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Harmon v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Henderson v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Herrmann v. *Bernhard.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Hoyt v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Kretsinger et al. v. *The People ex rel. Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Lach v. *Nichols et al.* APPEAL from the Circuit Court of Livingston county. Opinion by SHELDON, J. *Judgment affirmed.*

Leonard v. *Easterbrook et al.* APPEAL from the Superior Court of Cook county. Opinion by SHELDON, J. *Judgment affirmed.*

Loberg v. *Olson.* APPEAL from the Circuit Court of Cook county. Opinion by SCOTT, J. *Judgment affirmed.*

Moore v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Oneida, City of, v. *Voris et al.* APPEAL from the Circuit Court of Knox county. Opinion Per CURIAM. *Judgment reversed.*

The following seventeen cases were appeals from the County Court of Cook county. Opinions Per CURIAM, and judgments affirmed.

People ex rel. Miller v. *Allen.*
v. *Armstrong.*
v. *Beebe.*
v. *Clark et al.*
v. *Cooper.*
v. *Follansbee.*
v. *Gilmore et al.*
v. *Haaf.*
v. *Hardin.*
v. *Jarrett.*

People ex rel. Miller v. *Laflin et al.*
v. *Peacock.*
v. *Pittsburg, Fort Wayne and Chicago Railway Co. et al.*
v. *Smith.*
v. *Sweet et al.*
v. *Waite.*
v. *Wright.*

Ragor v. *Fisher.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Judgment affirmed.*

Ralph et al. v. *Trustees of Schools.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Rockford, Rock Island and St. Louis R. R. Co. v. *Hall.* APPEAL from the Circuit Court of KNOX county. Opinion by WALKER, C. J. *Judgment affirmed.*

Robinson et al v. *Russell.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Swett et al. v. *Clark et al.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Taylor v. *Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Decree affirmed.*

Tolman et al. v. *Daniels et al.* APPEAL from the Circuit Court of Du Page county. Opinion Per CURIAM. *Judgment affirmed.*

Volk v. *The People ex rel. Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Walker v. *Harris.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Walker v. *The People ex rel. Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

White v. *The People ex rel. Rumsey.* APPEAL from the Circuit Court of Cook county. Opinion Per CURIAM. *Judgment reversed.*

Wilder v. *Bouton et al.* APPEAL from the Superior Court of Cook county. Opinion Per CURIAM. *Judgment affirmed.*