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TO THE MEMBERS OF THE BAR.

This volume is issued in advance of those which will contain the cases decided prior to the January Term, 1875, in obedience to the rules of the Court adopted at the last June Term. Volume 68 will follow this in a few days. Volume 75, containing cases of the September Term, 1874, in which opinions were filed in June last, is in press, and will follow 68—then volume 69, which is also in press. Volume 77, which will contain a few remaining cases of January Term, 1875, and cases of the June Term, 1875, is ready to go to press as soon as the cases of the latter term come to my hands.

Springfield, January, 1876. *N. L. FREEMAN.*

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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 LXXVI.

CONTAINING A PORTION OF THE CASES SUBMITTED AT THE JANUARY TERM, 1875.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

PINKNEY H. WALKER, CHIEF JUSTICE.

JOHN M. SCOTT, SIDNEY BREESE,

WILLIAM K. McALLISTER, BENJAMIN R. SHELDON,

JOHN SCHOLFIELD, 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.

TABLE OF CASES

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CASES

IN THE

SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION.

JANUARY TERM, 1875.

JAMES T. COOPER *et al.*

v.

JOHN W. ASH.

1. TAXATION — *whether city charter exempts citizens from road and bridge tax.* The tenth section of the charter of the city of Alton, which makes it the duty of the city to keep the public roads and bridges in repair, and provides that all persons who shall perform the road labor therein authorized, or shall commute the same by paying one dollar for each day's labor required, shall be exempt from any other taxation under the power and authority of the county authorities, under the general road law, can not be regarded as providing for a commutation of county taxes for road and bridge purposes within the city. It is but an attempt to commute with the individuals who shall perform street labor or pay in lieu thereof, which is not within the legislative power.

2. SAME—*incorporated cities or towns in counties not under township system are exempted from county road taxes.* Under section 39 of the road law of 1873, incorporated cities and towns in counties which have not

adopted the township organization system are made road districts, and the property therein is exempted from all taxes for road purposes, except such as may be levied by such bodies themselves, to keep the roads and bridges within their limits in repair. And such law is valid, and a tax levied by the county court for such purposes on property within their limits may be enjoined.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was a bill in chancery, by John W. Ash against James T. Cooper, sheriff and *ex officio* collector of Madison county, and the county court of said county, to restrain the collection of a county road tax of ten cents on each $100 valuation of property, which was extended on the complainant's property, on the ground that he was a resident of the city of Alton, where his property was situated, and that the property situate in such city was exempt from county levy for road and bridge purposes. The defendants filed a demurrer to the bill, which the court overruled, and they abiding by their demurrer, the court entered a decree perpetually enjoining the collection of $13.43 of the taxes levied upon his taxable property within the city of Alton, as a road tax for county purposes. From this decree the defendants appealed.

Messrs. IRWIN & KROME, for the appellants.

Mr. CHARLES P. WISE, for the appellee.

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

It is contended, that by receiving and acting under the charter of the city, and assuming the burthen of making and keeping the streets, alleys and ways of the city in repair, and the provisions of the tenth section of the charter, the people residing within the city limits are exempt from the payment of all road and bridge taxes levied by county authority. That section imposes it as a duty upon the city authorities to keep

the public roads and bridges in the city in repair. It authorizes the city to call upon male citizens between certain ages to perform three days labor, each, on the roads and bridges, annually, or to pay into the city treasury one dollar for each day they shall refuse to so labor. And it provides that on payment of the money or the performance of the labor, "such residents shall be exempt from any other taxation under the power and authority of the county commissioners of Madison county by virtue of the provisions of the general road law of the State of Illinois."

It is contended that this is a commutation with the tax-payers of the citizens of Alton, for an exemption from the county road tax. We do not regard this as a commutation. If so, it is but partial and very unequal in its operation. It would only be a commutation for all road taxes levied on able bodied males, between the ages of twenty-one and fifty, who should perform the labor, or pay its equivalent in money. It would still leave all female tax-payers, all male minors, and males over the age of fifty, who are inhabitants of the city, to pay their road tax. This would not be equality as to persons or property within the municipality.

Even if it were conceded, which it is not, that the legislature may commute county or local taxes for some other consideration in lieu thereof, such commutation should operate with fairness and uniformity upon the tax-payers of the corporation with which it should be made. If this section of the charter were enforced, and all persons who performed the labor or paid the money in lieu of it were exempted from the road tax levied under the 35th section, it would leave all other property holders liable to pay the tax under this latter section. This would not be a commutation of the taxes that persons living in the city were liable to pay for road purposes levied by the county. It can amount to no more than an attempt to commute with individuals, which we are clear never was contemplated by the framers of the constitution, and is not within legislative power.

When cities, towns and villages receive charters, it is upon the theory, and of its correctness we have no doubt, that the benefits conferred on the citizens therein are equal to all the burthens imposed. That they have power to control the police of the municipality, preserve order, protect their citizens from nuisances, and adopt and enforce sanitary provisions, are, no doubt, equal to the enhanced expense in improving their streets and maintaining the city government. These are privileges and benefits not shared by citizens beyond the municipal limits. Citizens of these bodies do not cease to be citizens of the State and the county, nor do they cease to owe duties to the State and county. They, by becoming incorporated, are released from no obligation to the State or county; they still remain liable to discharge every duty to them, precisely as they did before. They should, in justice, be required to pay taxes for the support of the State and county governments, as though they did not reside in a city. Why should citizens beyond the city limits be required to assume all of the burthens of the county government, because the inhabitants of the city have agreed with the State that if certain powers of local self government shall be granted to them they will assume and discharge the duties annexed to and imposed upon the right to exercise the powers conferred? Is there any injustice in requiring them to pay their due proportion of the cost of building a county court house, common jail, or in making other county improvements?

No one has the right to complain of injustice because his property is taxed to build a county bridge, although it may be in a remote part of the county and distant from his property taxed or from his residence. Taxes may be collected of a resident of Jo Daviess county, paid into the State treasury, and expended in Cairo for State purposes, and the taxpayer has no right to complain that it is unjust. The mere fact that he may never use or see the improvement, does not enter into the justice or injustice of the tax. He has a right

to insist that the tax be levied for a constitutional and legitimate purpose, and that the burthen be imposed in the mode prescribed by the constitution and under the law; and whilst he has a right to complain if his and other representatives expend it improvidently, or for purposes of doubtful utility, still he is without power to prevent its waste, if it only be appropriated for a purpose allowed by the fundamental law. But a small portion of the State revenue is ever expended at the places where it is collected; but, in theory at least, it is so expended as to promote the interest of the people in the aggregate. And the same is true of counties and smaller local divisions.

The 34th section of the road law of 1873, p. 158, for counties not under township organization, provides that county courts which adopt the system of keeping up their roads by taxes in part and labor in part, shall fix the number of days each able bodied man between the ages of twenty-one and fifty, not exceeding three, shall perform on the public roads within the county during the year. And the 39th section of the same act provides, that in any city or town which shall be incorporated under a general or special law, no requisition in labor or money from the citizens thereof on property within the corporate limits shall be required, to improve roads in the county, different from the grant in the charter; but they shall be required to work and pay a tax to improve the streets and roads, and such improvements as shall be required by the charter or within the limits of the corporation, so long as the charter remains in force. The 29th section of the same law requires the county commissioners to lay out and divide their respective counties into such road districts as they may deem convenient and proper.

This is the policy of the General Assembly for repairing roads in counties which have failed to adopt township organization. Under this system, the county courts are intrusted with the power to establish road districts, and the appointment of supervisors to superintend the repair of roads therein.

Had the General Assembly deemed it advisable, they could have created the several districts, and authorized the citizens in each district, by the levy of taxes and labor therein, to keep up the roads of their several districts, thus relieving them from the control of the county authorities. And in the creation of such districts, incorporated towns and cities might be designated as districts, or the legislature might have created such cities and towns districts, and have left the county commissioners to divide the balance of their respective counties into such districts. And when thus divided, the principle of uniformity in taxation would not be violated, notwithstanding the rate of taxation in the various road districts might differ.

Such is the operation of the law in the various school districts in the State. It may be, if the General Assembly were to adopt such a system, it would be necessary to create each district a body politic for road purposes, as are the school districts for educational purposes.

The question presents itself, whether or not the General Assembly has made each incorporated city and town in counties not under township organization a road district, with the power to raise money and labor necessary to keep the streets and roads in repair. Although such corporations are not called road districts, they are virtually such. They are required to keep the streets and roads in repair, and are empowered to employ the necessary means for the purpose; and the law is general, as it applies to all incorporated cities and towns in counties not organized under the township law. We have no hesitation in saying, that these incorporations are, under the law of 1873, made road districts, with the uniform power of keeping their streets and roads in repair, by taxation and labor.

But it is urged that the case of *O'Kane* v. *Treat*, 25 Ill. 560, announces a rule repugnant to the views here expressed. We think clearly not, but that it is in harmony with them.

Under the township organization law each township is created a road district, in fact if not in name. The roads in the township are under the control of three road commissioners, who superintend and direct the expenditure of money and labor on all public roads in the township, and levy the tax for road purposes. And inasmuch as the city of LaSalle was, for road purposes, a part of the township, its citizens, under the constitution, could not escape their ratable share of the road tax of the district; but when, under the general law, it and all other cities and towns which were incorporated became road districts, by it being enacted that the road tax levied in their limits should be paid to their treasurers, to be expended on the streets, under the direction of the city authorities, they became road districts, not under the control of the road commissioners beyond levying the road tax. See Sess. Laws, 1873, p. 168, sec. 16. This virtually makes such an incorporation a road district, distinct from the township. So of such corporations in counties under the jurisdiction of county commissioners. The one is as much a road district as the other, and no reason is perceived for adopting different rules for the two systems of county government, so far as applies to incorporated towns and cities. The fact that the corporations in counties not under township organization levy their own taxes, it being general, can not change the construction.

Perceiving no error in the record, the decree of the court below is affirmed.

Decree affirmed.

THOMAS W. WALKER *et al.*

v.

JANE S. MULVEAN *et al.*

ESTOPPEL—*as a release of errors.* Where minor heirs, whose lands were sold on partition, after coming of age, with full knowledge of the facts, received their just proportion of the proceeds of the sale when collected, it was *held*, that they were estopped from asserting title to the lands so sold, and from denying the validity of the sale upon any ground, either as to the jurisdiction of the court to pronounce the decree, or for any irregularity that intervened, and that they were properly restrained from proceeding to assert title.

WRIT OF ERROR to the Circuit Court of Clark county; the Hon. HIRAM B. DECIUS, Judge, presiding.

Mr. J. P. BARLOW, and Mr. S. S. WHITEHEAD, for the plaintiffs in error.

Mr. J. C. ALLEN, for the defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This bill was to quiet title, and for relief. The title to the land in controversy was in James C. Walker at the time of his death. In 1858, his widow, Mary A. Walker, and George C. Walker, filed a petition for partition of the lands belonging to the estate, making the other heirs defendants. Commissioners appointed by the court to make partition, reported the tract of land consisting of 110 acres was not susceptible of division without injury to the rights of the parties interested. Thereupon the court decreed a sale of the premises in accordance with the provisions of the statute. At the special master's sale, Sutherland became the purchaser for $2400, to secure which he executed his promissory notes with personal security, together with a mortgage on the premises. The right land was in fact sold, but in taking the mortgage an error intervened, occasioned by the mistake of the master.

The description given located the land in a quarter section where the intestate owned no land.

Sutherland having failed to make his payments as they became due, the mortgage was regularly foreclosed. At the sale under the decree of foreclosure, Mrs. Walker became the purchaser of the entire tract of land, at $1200. Afterwards she assigned the certificate of purchase to Andrew Mulvean, since deceased, in consideration he would pay the debts of her deceased husband, $525.62, make her a deed for a certain forty acres of land valued at $400, and to her children a deed for eighty acres, valued at $600. Sutherland having failed to redeem the land within the time limited by the statute, the master conveyed it to Mulvean. Throughout all the subsequent proceedings and conveyances, the land was described by the erroneous description contained in the mortgage. But Mulvean, upon the completion of his purchase, entered into possession of the right land, continued to occupy it up to his death, and since that time his heirs, the complainants, have held it, paying all taxes and treating it as their own property.

A writ of error was sued out in the original partition suit, to the June term, 1868, of this court. The errors having been confessed, the decree was reversed and the cause remanded. The heirs at law of James C. Walker had commenced further proceedings to partition the lands in controversy when this bill was filed by the heirs at law of Andrew Mulvean to restrain the further prosecution of the suit, and to have corrected the error in the description of the land which runs through their ancestor's evidences of title from the Sutherland mortgage. The court decreed relief as against all the heirs of James C. Walker, except John A. Walker. Only two of the heirs, however, have joined in this writ of error.

Numerous objections have been taken to the validity of the proceedings under which Andrew Mulvean derived his title to the land, but we do not deem it necessary to discuss them. In the view we have taken, plaintiffs in error are estopped to deny the validity of the sale upon any ground, either as to

the jurisdiction of the court to pronounce the decree, or for any irregularity that intervened.

Upon failure to make his payments for the land, the special master obtained a judgment against Sutherland for the first installment of the purchase money, being one-third of the entire amount. Steps were subsequently taken to collect the amount due on that judgment for the benefit of the estate. A compromise was effected, by which a considerable sum of money was realized. The present plaintiffs in error, after they became of age, received their just proportion. It is shown they sold the land conveyed to them by Mulvean in consideration of the assignment to him of the certificate of purchase, and received the proceeds to their own benefit. These acts were deliberately done with a knowledge of all the facts and circumstances. The parties were under no disabilities, and must be held by their acts estopped to assert any title to the land itself. The case of *Davidson* v. *Young*, 38 Ill. 147, is an authority exactly in point.

Having appropriated to themselves the proceeds of the sale of their land after they became of age, it would be most inequitable to allow them to reclaim the land also. Especially is this true after having acquiesced in the sale so many years since reaching their majority.

Upon the whole record, the decree is eminently just, and must be affirmed.

Decree affirmed.

JOHN ALSOP

v.

DUNCAN MCARTHUR, EXR., *et al.*

TRUST — *note taken payable to wife.* Where the husband, his wife having separate property, sold his land, the wife claiming no dower or homestead, and the wife refused to execute the deed unless one of the

notes of $1000, given for the purchase money, was made payable to her, which was done, under an agreement that she was to have the interest on the same during her life for support, and the principal sum to remain the property of the husband, and on payment of the note, the wife loaned the same, taking the note and security of the borrower in her name, and afterwards, by will, bequeathed this last note to her daughter by a former husband, it was *held*, on bill by the husband, filed, after his wife's death, against the executor and legatee, for the surrender of the note to him, that he was entitled to the relief sought, and that the loaning of the money by the wife, and taking the note in her name, did not change or affect his right to the same.

APPEAL from the Circuit Court of DeWitt county; the Hon. LYMAN LACEY, Judge, presiding.

This was a bill in chancery, by John Alsop against Duncan McArthur, executor of the last will of Hannah Alsop, deceased, George Armstrong, Eliza Armstrong, Robert H. Cox, and Mary L. Cox, his wife. The object of the bill and facts of the case are fully stated in the opinion of the court.

Messrs. DONAHUE & KELLY, for the appellant.

Messrs. MOORE & WARNER, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, in the circuit court of DeWitt county, in which John Alsop, the complainant, prayed that a certain note and mortgage executed by one Robert H. Cox and wife to Hannah Alsop, for one thousand dollars, be decreed to be the property of complainant, and that the same be delivered to him by the executor of Mrs. Alsop, Duncan McArthur, or by her legatee, Eliza Armstrong, to whom, by her last will and testament, Mrs. Alsop had bequeathed the same.

The executor of the will, Mrs. Armstrong and her husband, and Robert H. Cox and wife, were made defendants. The principal allegations in the bill are, the marriage of complainant to Hannah Wilkinson, then a widow having two children,

the defendant Mrs. Eliza Armstrong, and Martha A., intermarried with one Honville; that complainant was, at the time of this marriage, a widower with one child, a son, Levi Alsop; that at this time Mrs. Wilkinson had separate property, real and personal, of the value of three to five hundred dollars; that complainant had real estate, a part of which was a ninety-eight (98) acre tract; that the several parties managed their own separate property without interference of each other; that complainant sold this 98 acre tract to one Garret Stoutenborough, for four thousand nine hundred dollars, on the 18th of July, 1870; that to this sale his wife assented until the deeds were prepared by the notary for signature, when she refused to sign and acknowledge the deed, assigning as a reason that she was apprehensive complainant would abandon her without means of support. She refused to sign the deed unless complainant would agree to give her one thousand dollars. Complainant refused to do this. That it was finally agreed, if Mrs. Alsop would execute the deed, she should have the interest on one thousand dollars during her life, and to support and maintain her in case complainant should abandon her; and to secure her in this, one of the Stoutenborough notes for one thousand dollars should be made payable to her; that it was the intention to give her the interest merely, the note remaining the property of complainant. This note was paid, before due, to Hannah Alsop, the same having been put in her possession by complainant, he having great confidence in her, and for the only purpose of securing to her the interest on said sum during her life; that on November 16, 1871, Mrs. Alsop loaned this money without the consent or knowledge of complainant, taking note and mortgage in her own name; that becoming sick thereafter, she made her will, by which she bequeathed this note and mortgage to her daughter, Eliza Armstrong, whose insolvency is alleged. The bill of complaint was sworn to and an injunction prayed.

The answer of Eliza Armstrong denies the principal allegations of the bill, insisting that the note was given to Mrs. Alsop as her sole and separate property forever, and that she had a right to bequeath it in the manner she did, by her last will and testament.

The answer of the executor, McArthur, is mainly to the same purport.

The cause was set for hearing on the bill, answers and exhibits, and oral testimony, and a decree passed dismissing the bill. To reverse this decree the complainant appeals.

The case turns upon the single point, on what terms Mrs. Alsop received the Stoutenborough note. If the absolute property in this note was in her, she had an undoubted right to collect the money due by it, and loan the same to Cox or any one else, and the securities thus obtained would be her property.

This fact is to be determined by the testimony.

The principal witness, capable of explaining the whole transaction, was Mr. Kelly, the notary, who gives a clear, consistent and reasonable statement, by which it would appear that the design of complainant and his wife, Mrs. Alsop, was, and it appears to have been the sole design, that Mrs. Alsop should enjoy the annual interest of the note, the note itself being the property of complainant. It would appear from this testimony, and from all the testimony, that Mrs. Alsop did not claim any right of dower or homestead in this land; she expressed her apprehensions, as it was the only real estate complainant had, if the notes were executed to him he might transfer them to his son Levi, who lived in a distant State, and then she would be left without support. After much altercation, several plans having been suggested by which the interest could be secured to her, none of which met Mrs. Alsop's concurrence, it was finally agreed Stoutenborough should execute one of the notes for a thousand dollars to her, bearing an annual interest of ten per cent, she to enjoy the interest, it being then distinctly understood and agreed that

the principal sum was to be the property of complainant. She insisted she should have the interest, and that was the extent of her claim, the principal to go to complainant at her death, by will, or in some other way.

We think it is clearly proved that Mrs. Alsop was to enjoy the interest on this note during her life, and no longer, the reversion belonging to the complainant. We can come to no other conclusion. Mrs. Alsop, when the controversy was going on, insisting that one of the notes should be made payable to her, that she might enjoy the interest, and at her death, the principal should go to complainant, appealed to him by saying, "You ought to trust me; I have lived with you so long, and never deceived you."

It was under this confidence and trust Mrs. Alsop obtained the note which was the foundation of the note and mortgage of Cox and wife, bequeathed to Mrs. Armstrong. The land sold was the property of complainant, and he was entitled to the proceeds of the sale. But it is said Mrs. Alsop had a dower interest in the land, and her conveyance of that was a sufficient consideration flowing from her to support the note.

But at the time of the transaction and sale, and execution of the deed, nothing was claimed on this score by Mrs. Alsop. She asserted no claim to dower, but with the persistence of her sex when in possession of an idea which, being carried out, will benefit her, she insisted upon the note being made payable to her, that she might control and enjoy the interest, making no claim whatever to the principal sum, which she constantly affirmed was, and should remain, the property of complainant.

A circumstance may be adverted to as showing the good faith exercised by complainant in abiding by the agreement made with his wife—it is this: When Stoutenborough paid the note, it was in the presence of complainant, and he permitted her to receive it that she might control the fund which should produce interest. This money was loaned by Mrs. Alsop to

R. H. Cox on note and mortgage, and whether made with or without complainant's consent, they follow the condition of the original fund, and became, on the death of Mrs. Alsop, the property of complainant.

The bequest, therefore, of this property to Mrs. Armstrong was void and of no effect.

There was no special merit in the services rendered by her to her mother, nor was there any necessity of seeking shelter under her daughter's roof, as the proof is conclusive complainant provided for all the reasonable wants of his wife and for many that were fanciful merely.

We see no merit in the defense set up. The decree must be reversed, and the cause remanded, with directions to the circuit court to enter a decree vesting in complainant the title to the Cox note and mortgage.

Decree reversed.

The Chicago and Alton Railroad Company

v.

David Becker, Admr.

1. Presumption—*in support of verdict, not in opposition to record.* Where a bill of exceptions purports to contain all the evidence, this court can not presume other testimony was given to support the verdict. Such presumptions are indulged only when the bill of exceptions does not state that it contains all the evidence.

2. Negligence—*must be proximate cause of injury.* It is a principle of jurisprudence, under both the civil and common law, that, to entitle a party to recover for damages alleged to have been sustained in consequence of the negligence of another, there must not only be negligence in fact, but it must have been the proximate cause of the injury.

3. Same—*contributory.* Based upon the leading and governing principle that the defendant's negligence must be the proximate cause of the injury, is the common law rule, that, although there was negligence on the part of the defendant, yet, if there was also intervening negligence on

the part of the plaintiff, but for which latter the misfortune of the plaintiff would not have happened; or, if the plaintiff, by the exercise of ordinary care and caution, could have avoided the consequences of the defendant's negligence, and he fails to exercise that care and caution, he can not recover.

4. Same—*rule of contributory negligence subject to exceptions.* This general rule, like most others, admits of exceptions and qualifications, as, for instance, where the party injured might have avoided injury by the exercise of ordinary care and caution; but as a direct and immediate result of the defendant's negligence, he is placed in a position of compulsion and sudden surprise, bereft of independent moral agency and opportunity of reflection, the law will not hold the injured party responsible for contributory negligence.

5. Same—*contributory negligence will not prevent liability in all cases.* There must be a causal connection between the plaintiff's negligence and the injury to relieve the defendant from liability for his negligence. The plaintiff, as a general rule, must be a person to whom the alleged contributory negligence is imputable, excluding, therefore, persons distracted by sudden terror, persons of unsound mind, drunkards, and persons who, from their tender age, are wanting in the requisite capacity to exercise discretion.

6. Same—*capacity and discretion of children to exercise care, a question of fact.* There is no inflexible rule of law by which to determine the capacity of children for observing and avoiding danger, as affecting the question of contributory negligence in case of an injury to them, but it is a question of fact in each case for the jury, to be determined from the facts and circumstances in evidence, the law holding them responsible only for the exercise of such measure of capacity and discretion as they possess.

7. Same—*facts of particular case.* In this case, the deceased was a boy of the age of six or seven years, and it appeared that the defendant's train, which ran over and killed him, was not running at an unusual rate of speed, or at a rate prohibited by the ordinance of the town; that the whistle was sounded at the proper place, and a bell kept continuously ringing until the crossing was passed where the accident occurred; that the deceased heard the whistle, and, in company with two other boys, started for the crossing; that the other two crossed over the track, and the deceased, in attempting to follow, when the engine was but about sixty feet from him, stumbled and fell upon the track, and that those in charge of the train used every exertion to check the train, which was a heavy freight train, but could not in time to avoid the accident: *Held*, in an action by the administrator of the deceased against the company to recover damages for the killing, that a recovery by the plaintiff could not be sustained.

8. Measure of damages—*in action to recover for causing death of party through negligence.* In an action by the personal representative of one killed by a railroad train, against the company, to recover damages for the killing, the court instructed the jury, in case they found the defendant guilty, to assess such damages as they believed would be right: *Held*, that the instruction was erroneous, as by it the jury were at liberty to include damages for mental suffering and anguish of parents, while the statute limits the damages to compensation with reference to the pecuniary injuries resulting to the next of kin.

Appeal from the Circuit Court of Logan county; the Hon. Thomas F. Tipton, Judge, presiding.

This was an action on the case, by David Becker, administrator of the estate of Frederick Becker, deceased, against the Chicago and Alton Railroad Company. The material facts of the case are stated in the opinion of the court.

Messrs. Williams, Burr & Capen, for the appellant.

Mr. J. T. Hoblit, and Messrs. Beason & Blinn, for the appellee.

Mr. Justice McAllister delivered the opinion of the Court:

Frederick Becker, being a boy of between six and seven years of age, was run over and instantly killed, September 30, 1872, at the city of Atlanta, in this State, by one of appellant's freight trains, at the time passing through from the north.

This action was brought under the statute of 1853, in the Logan circuit court, by appellee, as administrator, to recover such damages as might be deemed a fair and just compensation with reference to the pecuniary injuries resulting to the next of kin of deceased, as prescribed by the act giving the right of action. The basis of recovery made by the declaration is, that Frederick, being in the act of crossing appellant's track at a street-crossing, and in the exercise of due care, the train of appellant approached without ringing the

bell or sounding the whistle upon the locomotive, as required by law, and while running at a greater rate of speed than was permitted by the ordinance of the city of Atlanta, in that behalf, by means whereof he was run over by said train and killed.

On the trial upon the general issue, the jury returned a verdict of guilty, and assessed the damages at $2500. The court, overruling defendant's motion for a new trial, gave judgment upon the verdict, and the latter appealed to this court. Error is assigned upon the refusal of the court to grant a new trial, and for giving and refusing instructions.

Under the errors assigned, it is insisted, (1), that the evidence is insufficient to support the verdict; (2), that the court erred in giving the first and second instructions for plaintiff, and refusing the last one asked on behalf of defendant; (3), that the damages are excessive.

The bill of exceptions declares that it contains all the evidence in the case. The defendant's motion for a new trial raised the question as to the sufficiency of the evidence to support the verdict, and whether or not the damages were excessive.

Some of the witnesses observed circumstances which escaped the attention of others, but when the whole evidence is considered, there is really no conflict of any importance in it.

The accident occurred between nine and ten o'clock Sunday morning. There was a station at Atlanta. The train in question was coming from the north; it was a freight train, composed of some twenty cars and a caboose, but it was not the intention to stop the train at that station. It is clear, from the testimony, that the whistle was sounded at or near the whistle-post north of the station. Some of plaintiff's witnesses testify to having heard the bell ring, but could not say, with any degree of positiveness, whether it did or did not ring continuously while the train was coming through the town. There is no negative evidence of any force against the fact,

and there was affirmative testimony that it did ring continuously.

The deceased, being in company with his brother and another boy, both of the latter being older than deceased, were seen sitting on a box in front of a store. As the train approached the station, they left that place and commenced running towards the railroad. The two older boys, getting ahead of deceased some forty or fifty feet, crossed over the track on which the train was coming, and one of them got upon the steps or platform of one of the cars of the train. When deceased reached the track he was looking north, and could not have failed to see the train, which was then within about sixty feet of where he was. Instead of waiting until it passed, he attempted to cross, and, in doing so, stumbling, he fell upon the rail, was run over and instantly killed. The engineer, discovering him as he fell, instantly reversed his engine; and it is the concurrent testimony of those witnessing the exciting and distressing spectacle, that he did everything in his power, at the time, to avoid the boy's impending fate. He says he could not have stopped the train, it being so heavy, and the boy so near when discovered, so as to have avoided running on to him, if it had been going only at the rate of one mile per hour. He testifies it was, in fact, running only about six miles an hour. Appellee's witnesses give it as their judgment, the train was running at a higher rate, ranging from eight to fifteen miles an hour. None of them, however, give evidence tending to show that it was running at an unusually high and reckless rate of speed. There is nothing in the record to show what rate of speed was prescribed as permissible by any ordinance of the municipal corporation. The bill of exceptions, which purports to contain all the evidence in the case, contains no ordinance or evidence of an ordinance on that subject. Under such a state of the record, this court would not be warranted in presuming, in support of the verdict, something which does not appear in the bill of exceptions. Such presumptions are indulged

only in cases where the bill of exceptions does not state that it contains all the evidence. In the absence of anything in the bill of exceptions, showing an ordinance prescribing the rate of speed permitted within the corporation, and evidence tending to show a violation of it by appellant's servants, we are unable, after a careful consideration of the evidence in the record, to perceive, without any regard to the testimony tending to show contributory negligence on the part of deceased, any basis in law for the verdict of the jury in this case; for it appears, by the clear weight and preponderance of the evidence, that the whistle was blown at or near the whistle-post north of the station, and the bell rung continuously upon the locomotive, as required by law; besides, the conduct of the boys shows that, when they started to run towards the track, they knew the train was coming, and that deceased saw it coming before he placed himself in peril before it. Nor was there any want of care, prudence or diligence to avoid the injury after the deceased was discovered upon the track. The liability must have for its foundation either some wrongful act, or negligence or default on the part of the defendant or its servants or agents. No wrongful act is pretended. Excluding that element from the cause of action, then, in order to show a ground for recovery under the statute, the same ingredients of a cause of action must exist as would have been requisite to a recovery if Frederick Becker had not received a mortal injury, but survived and brought suit in his own name.

It is a general principle of jurisprudence, under both the civil and common law, that, to entitle a party to recover for damages alleged to have been sustained in consequence of the negligence of another, there must not only be negligence in fact, but it must have been the proximate cause of the injury. Much difficulty has been experienced by the courts in making application of that principle, to distinguish between proximate and remote causation; but there has been still greater difficulty in the conception and application of definite rules

as regards the effect upon the right of recovery of the party injured, when the agency or negligence of the party damaged, or of some third party, intervenes the negligence of the defendant and the injury of the plaintiff, thus breaking the direct connection between the defendant's negligence and plaintiff's injury. The central idea is, that the defendant's negligence must be the proximate cause of the damages. From that idea there has come into recognition the common law rule that, although there was negligence on the part of the defendant, yet, if there was also intervening negligence on the part of plaintiff, but for which latter the misfortune of the plaintiff would not have happened; or, if the plaintiff, by the exercise of ordinary care and caution, could have avoided the consequences of the defendant's negligence, and he fail to exercise that care and caution, he can not recover, for it would be subversive of the very principle on which the liability of a negligent party rests to permit a person who, by his own negligence, causes damage to himself, to recover compensation for that damage from another. The harm which one brings upon himself, he is to be considered as not having received. So far as his relations to others are concerned, such harm is uncaused. Wharton on Neg. sec. 130.

These general rules, like most others, admit of exceptions and qualifications, often requiring much discrimination in their application to particular cases. Where, for instance, the defendant has been guilty of negligence, but seeks to defend on the ground that the party injured might have avoided the injury by the exercise of ordinary care and caution, it sometimes happens in such cases that, as a direct and immediate cause of the defendant's negligence, the party injured was placed in a position of compulsion and sudden surprise, bereft of independent moral agency and opportunity of reflection. In such a case, it would be against the common judgment of mankind to hold the injured party either morally or legally responsible for contributory negligence. The doctrine of

contributory negligence, in its various phases, has been enunciated in cases so numerous as to render their citation impracticable. But we find a generalized statement of it in a recent work of great merit, where the principal authorities are referred to. It is, simply, that a person who, by his negligence, has exposed himself to injury, can not recover damages for the injury received. The same author says: "The true ground for the doctrine is, that, by the interposition of the plaintiff's independent will, the causal connection between the defendant's negligence and the injury is broken. The principle, however," he says, "must be accepted with the following qualifications: There must be a causal connection between the plaintiff's negligence and the injury. The plaintiff, as a rule, must be a person to whom the alleged contributory negligence is imputable, excluding, therefore, persons distracted by sudden terror, persons of unsound mind, and drunkards, persons deprived of their senses, *infants*. If the defendant is guilty of gross negligence, he can not set up a trifling negligence or inadvertence of the plaintiff as a defense." Wharton on Neg. secs. 300, 301.

By the general term "infants," as one of the classes to whom contributory negligence would not, as a rule, be imputable, the author, as appears by the context, does not mean that all persons under lawful age are to be understood as belonging to such class, but only those who, from their tender age, are wanting in the requisite capacity to exercise discretion. Whether the question of the capacity of children of observing and avoiding danger be considered with reference to contributory negligence on the part of the child injured, or of parents or guardians, it is obvious that no definite rule of law can be laid down which should interfere with the jury judging each case on its own merits and by its particular circumstances. If the child, from its age and experience, be found to have capacity and discretion to observe and avoid danger, it should be held responsible for the exercise of such

measure of capacity and discretion as it possesses. The question is similar, and to be determined by the jury in the same way, from facts and circumstances in evidence, as where the capability of an infant, under the age of fourteen years, to commit crime, is involved in a criminal prosecution at common law against such infant. On the attainment of fourteen years of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society, for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil. But there is no inflexible rule which governs where the question arises in civil cases whether contributory negligence is imputable. As stated above, it is in each case a question for the jury, to be determined upon the particular circumstances in evidence.

In the light of these principles, imperfectly presented though they be, we are prepared to give our views of the instructions for plaintiff below, complained of by appellant's counsel. They are as follows:

"The court instructs the jury that the law does not require that a boy of six or seven years of age should exercise that degree of diligence that would be required of a grown person. The court therefore instructs the jury that, although they may believe, from the evidence, that the deceased, Frederick Becker, was guilty of a slight degree of negligence, yet, if the jury further believe, from the evidence, that the defendant was guilty of gross negligence and thereby caused the death of said Frederick Becker, the jury should find the defendant guilty, and assess such damages as they believe would be right."

The age, the capacity and discretion of the deceased to observe and avoid danger, were questions of fact to be determined by the jury, and his responsibility was to be measured by the degree of capacity he was found to possess. The first branch of the instruction was erroneous, in assuming facts and drawing conclusions of law from them. When taken in

connection with what followed in the second branch, the jury would be likely to infer that only slight negligence could be imputed on account of his being a boy of six or seven years of age. Besides, the record shows no evidence upon which to submit the question of gross negligence on the part of defendant.

The last clause directs the jury to "assess such damages as they believe to be right." By this direction, the jury were at liberty to include damages for mental suffering and anguish of parents, while the statute limits the damages to compensation with reference to the pecuniary injuries resulting to the next of kin of deceased.

The judgment will be reversed and the cause remanded.

Judgment reversed.

THE CITY OF BEARDSTOWN *et al.*

v.

THE CITY OF VIRGINIA *et al.*

1. ELECTIVE FRANCHISE—*alien minors residents of the State April* 1, 1848. The constitution of 1870 does not provide that all persons *who at any time* became electors by virtue of the constitution of 1848, shall be entitled to vote, or that every person who was or became an elector under that constitution, shall be so entitled. It only authorizes those persons to vote who were *electors* on the first day of April, 1848. Aliens who were minors on that day were not electors, and consequently are not made voters by the new constitution.

2. SAME—*naturalization in county court.* It was held in *Knox County* v. *Davis*, 63 Ill. 405, that the county courts of this State had no jurisdiction, under the act of Congress, to admit aliens to citizenship; but under the new constitution, certificates of naturalization granted by such courts prior to Jan. 1, 1870, entitled the parties receiving the same to vote, but not their minor sons after their becoming of age.

3. SAME—*presumption in favor of.* Where an alien born person votes at an election, the presumption that he is not entitled to vote arising from the fact of being alien born, is not sufficient to exclude his vote on

a contest, but the presumption will be that he voted legally. The presumption of law against the fact of the commission of crime, will overcome the one against his right to vote arising from the fact of his foreign birth.

4. SAME—*proof sufficient to overcome presumption of right to vote.* But where a person of foreign birth, who was a minor when he came to this country, testified that he had never been naturalized, and did not know that his father had been, it was *held*, that this afforded *prima facie* evidence that such person was not entitled to vote, notwithstanding he had voted.

5. CONSTRUCTION—*words taken in their ordinary meaning.* It is not allowable to interpret what has no need of interpretation, and where the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction, for the purpose of either limiting or extending their operation.

6. SAME—*of constitution and statutes.* In the construction of constitutional provisions and statutes, the question is not what was the intention of the framers, but what is the meaning of the words they have used. A constitution does not derive its force from the convention which framed it, but from the people who ratified it, and the intent to be arrived at is that of the people, and this is found only in the words of the text.

7. EVIDENCE—*proof of a negative.* Full and conclusive proof is not required where a party has the burden of establishing a negative, but even vague proof, or such as renders the existence of the negative probable, is in some cases sufficient to change the burden to the other party.

8. ELECTION—*accidental loss of ballots and affidavits of voters.* The fact of the loss of the ballots and affidavits made at an election in a particular precinct, where such loss is accidental, affords no ground for rejecting the entire return from such precinct.

9. EVIDENCE—*declarations of voter in contest.* On the contest of an election, the voter being considered a party as against the contestant, his declarations showing his want of qualification to vote may be shown against him, after first proving that he voted adversely to the contestant, on the ground that such declarations are against his interest. But where it is not shown by other competent evidence how he voted, such declarations are not admissible.

10. SAME—*declarations of voter not admissible to show how he voted.* On the contest of an election where the ballots are lost, the unsworn declarations of a voter as to how he voted, are not competent evidence to prove how he in fact voted.

11. SAME—*evidence to contradict ballot.* On the contest of an election, the ballot of a voter showed that he voted a certain way, but the voter testified that he voted the other way: *Held*, in the absence of proof of any fraud, that the testimony could not be received to show the intention of the voter in opposition to his ballot.

APPEAL from the Circuit Court of Cass county; the Hon. LYMAN LACEY, Judge, presiding.

This was a suit in chancery, brought by the city of Beardstown and others, against the city of Virginia and others, to contest an election held in the county of Cass, November 12, 1872, on the question of the removal of the county seat of the county from Beardstown to Virginia, and to restrain the county officers from removing their offices or the records of the county, until the final determination of the suit.

The facts necessary to an understanding of the points decided are stated in the opinion of the court.

Mr. ANTHONY THORNTON, Mr. GARLAND POLLARD, Mr. I. J. KETCHAM, Mr. THOMAS H. CARTER, and Messrs. HAY, GREENE & LITTLER, for the appellants.

Messrs. LAWRENCE, WINSTON, CAMPBELL & LAWRENCE, Mr. C. G. WHITNEY, Mr. J. N. GRIDLEY, and Mr. ISAAC L. MORRISON, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On the 12th day of November, 1872, an election was held in the county of Cass, to determine whether the county seat should be removed from Beardstown to Virginia, the latter being nearer the centre of the county than the former. By the returns of the board of canvassers, the election was decided in favor of removal, by a majority of 128 votes.

To contest this decision, a bill in chancery was filed by Beardstown against Virginia, and the county officers were made parties, and enjoined from removing their records from

the court house at Beardstown, and from transacting any official business in the town of Virginia, pending the suit.

After the cause was at issue, the evidence was taken in vacation by a commission, and finally heard by the court below, at the August term, 1874, the result of whose finding was as follows:

Majority for removal, by election returns	128
Votes against removal, which were rejected by the court as illegal, on the hearing	129
Votes illegally excluded by the judges of election, and received by the court	2
Total	259
Votes for removal, which were rejected by the court as illegal, on the hearing	102
Legal voters of Cass county, upon the day of election, who did not vote	149
Total	251
Leaving majority for removal	8

In pursuance of this finding of the court, a decree was rendered dissolving the injunction and dismissing the bill. This appeal is prosecuted to reverse the decision of the court below, and cross-errors are assigned by defendants.

Several legal questions arose upon the evidence which appellants insist were erroneously determined against them.

One is, are persons of foreign birth, who have never been naturalized, but who were, on the first day of April, 1848, *minors*, and inhabitants of the State of Illinois, legal voters under the constitution of 1870?

Of this class, 44 voted—10 for and 34 against removal. The court below refused to count these votes.

The suffrage clause of the constitution of 1870 is as follows:

"Every person having resided in this State one year, in the county ninety days, and in the election district thirty

days next preceding any election therein, who was an elector in this State on the first day of April, in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this State, prior to the 1st day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States, above the age of 21 years, shall be entitled to vote at such election." Rev. Stat. 1874, p. 73, sec. 1, art. 7. The right of these persons to vote is based upon the ground that they were electors in the State of Illinois on the first day of April, 1848. Whether they were or not must be determined by reference to the constitution of 1848.

Sec. 1, art. 6, of that constitution, is as follows:

"In all elections, every white male citizen above the age of 21 years, having resided in the State one year next preceding any election, shall be entitled to vote at such election; and every white male inhabitant of the age aforesaid, who may be a resident of the State at the time of the adoption of this constitution, shall have the right of voting as aforesaid; but no such citizen or inhabitant shall be entitled to vote except in the district or county in which he shall actually reside at the time of such election." Rev. Stat. 1874, p. 51. That constitution was adopted in convention August 31, 1847, ratified by the people March 6, 1848, and became in force April 1, 1848, and by it persons having the following qualifications were "electors on the 1st day of April, 1848:"

1. White male CITIZENS, above the age of 21 years, having resided in the State one year next preceding any election.

2. White male INHABITANTS, *of the age of* 21 *years*, residents of the State at the time of the adoption of the constitution, *i. e.* March 6, 1848.

These 44 persons were not electors under the first clause, as they were never citizens. It is claimed, however, that they became electors under the second clause; that under this clause they were entitled to vote as soon as they became of age, by reason of the fact that they were white male inhabitants, and

residents of the State on the 6th day of March, 1848, the day of the adoption of the constitution of 1848. Without considering whether this is the true construction of the second clause of sec. 1, but upon the hypothesis that it is, and that these persons did become voters, by virtue of the constitution of 1848, *when they became of age*, we are of opinion that they are not shown to be electors under the constitution of 1870.

That instrument does not provide that all persons *who at any time* became electors by virtue of the constitution of 1848, should be entitled to vote, or that every person who was or became an elector under that constitution should be so entitled. It only authorizes those persons to vote who were electors on a specified day, to-wit: the first day of April, 1848. But on that day these persons were *minors*, and therefore, *were not electors.*

The definition given by Webster, in his dictionary, of "elector," is, "One who elects, or one who has the right of choice; a person who has, by law or constitution, the right of voting for an officer."

"Elector—one who has the right to make choice of public officers; one who has a right to vote." Bouvier Law Dict. letter E.

Not one of these persons had the right to vote on the first day of April, 1848, and so they were not electors on that day.

It is, however, urged that the constitution of 1870 could not have intended to disfranchise those who, though not electors on the 1st day of April, 1848, by reason of their minority on that day, afterwards became voters by virtue of the constitution of 1848, and had exercised the elective franchise ever since; and that it must have intended to include all persons who at any time became voters under the constitution of 1848; and it is insisted that by an equitable construction such should be held to be the meaning of the words "electors on the 1st day of April, 1848." That the restricting of the elective franchise to the alien born unnaturalized inhabitants, who were residents of the State on the 1st day of April,

1848, to those who were 21 years of age, and to deprive the alien born minors who were inhabitants at that same time of that privilege, would be an odious and unjust discrimination, and there would be no good reason for it.

But the words of the constitution of 1870 are clear and explicit on this point; there is no ambiguity in the language, and no room for construction.

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." Cooley's Const. Lim. 55, and see cases cited and note.

It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. *McCluskey* v. *Cromwell*, 11 N. Y. 601. The rule is well expressed by JOHNSON, J., in *Newell* v. *The People*, 3 Seld. 97, in these words: "Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing we are to seek is, the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the

words declare, is the meaning of the instrument; and neither courts nor legislatures have the right to add to, or take away from that meaning."

The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used. Per DENMAN, Ch. J., in *Rickman* v. *Carstairs*, 5 B. and A. 129.

It was said by BRONSON, J., in *Waller* v. *Harris*, 20 Wend. 561, that "the current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation." And see *The People* v. *Purdy*, 2 Hill, 35, and 4 Hill, 384; *Denn* v. *Reid*, 10 Pet. 524; *Spragins* v. *Houghton*, 2 Scam. 377. These doctrines received the explicit recognition and approval of this court in *Hills* v. *City of Chicago*, 50 Ill. 86.

In view of the well settled and sound and only safe principles applicable to the exposition of constitutions, statutes, and instruments in writing above declared, we do not feel at liberty to enter into the field of speculation, and essay whether we may not construe away the plain and obvious meaning of the clearly expressed language in question, according to some conjectural intention of the framers of the constitution.

The constitution does not derive its force from the convention which framed, but from the people who ratified it, and the intent to be arrived at, is that of the people. Cooley Const. Lim. 66.

Says Judge Story, in speaking of the constitution of the United States, "The people adopted the constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men." 1 Story Com. on Con. 392, note.

The injustice of a constitutional provision does not authorize the courts to disregard it, or indirectly to annul it by construing it away.

Such provisions, when free from doubt, must receive the same construction as any others. Cooley Const. Lim. 73.

There are no such monstrous and absurd consequences involved as to require a departure from the natural and obvious meaning of the words here employed. Allowing the correctness of appellants' construction that, under the constitution of 1848, alien born persons who were minors on April 1, 1848, became voters on their afterwards attaining majority, the extent of the injustice done, or hardship imposed upon such persons by the constitution of 1870 would be, the subjecting them to the inconvenience of applying to be naturalized, as they were entitled to be naturalized at once, upon their mere application, without any previous declaration of intention. Where citizenship is thus easily obtainable, is it an unreasonable hardship to require it as a prerequisite to the right of voting? It is a just policy, in such case, to induce one to become a citizen, and be subject to the obligations of a citizen. It is an unfair distinction against the citizen, in such case, that a class of persons should enjoy the highest privilege of the citizen, the elective franchise, and be exempt from the burdens of the citizen.

Reference is made by appellants to the use of the words "qualified electors," in the 8th section of the schedule of the constitution of 1870, and in the 11th section of the schedule of the constitution of 1848, as indicating a distinction made by the constitution between "electors" and "qualified electors." The words in the schedule of the constitution of 1870 are used in this connection: "Every person entitled to vote under the provisions of this constitution, as defined in the article in relation to 'suffrage,' shall be entitled to vote for the adoption or rejection of this constitution, and for or against the articles, sections, and questions aforesaid, separately submitted; and the said qualified electors shall vote at the usual places of voting," etc. And the words are used in the same connection in the schedule of the constitution of 1848. Now, plainly, the words "qualified electors," are

not here used, in any way, in contradistinction from "electors," but merely as expressive of the class of persons who might vote at the approaching election upon the question of the adoption of the constitution. "The said qualified electors shall vote," etc., that is, the persons having the said qualifications of voters as named in the preceding clause. The persons who, on the first day of April, 1848, were electors, were qualified electors; and *vice versa*; there is no distinction between them, and the constitution does not sanction the idea of a distinction.

The court below refused to count, in favor of appellants, ten voters who were minors when their fathers, on proceedings in the county court, had obtained naturalization papers.

The constitution of 1870 provides, that every person shall be entitled to vote who had obtained a certificate of naturalization before any court of record in this State, prior to the first day of January, 1870. The county court, although a court of record, was held, in *Knox County* v. *Davis*, 63 Ill. 405, not to have jurisdiction under the act of Congress to admit to citizenship. Consequently, the obtaining these certificates of naturalization did not make the fathers, or the minor sons, citizens. The certificates entitled the fathers themselves, under the constitution of 1870, to vote, but not their minor sons. And here, again, we are urged to disregard the law as written, and declare that these minors had the right to vote, because such was the intention of the framers of the constitution. The intent must be found in the instrument itself. Effect can not be given to an intention not expressed. The question is, not what the framers of the constitution meant as distinguished from what its words express, but simply what is the meaning of the words. It is clear that the language of the constitution describing the fathers only as entitled to vote by virtue of these certificates of naturalization, does not give the right to the sons.

The court rejected sixteen votes against removal, and six for removal, making the difference of ten against appellants,

upon the following state of facts: The proof was, that the persons giving the votes were alien born, and that they came to the State with their fathers during minority. They stated, in their evidence as witnesses, that they had never, and they did not know that their fathers had, been naturalized, and they were inhabitants of the State, during their minority, long enough for their fathers to be naturalized. In some instances the fathers had voted. Upon these facts, the court ruled that the presumption in favor of the vote had been overcome.

As the negative allegation here involved a charge of crime —one voting without qualification, at such an election, being liable to punishment in the penitentiary—it was necessary to prove that those giving the votes in question, were not legal voters.

The presumption that they were not, arising from the fact of being alien born, we think was not sufficient, but that they having voted, the presumption would be that they had voted legally, and not committed a crime; and this presumption of law against crime would overcome the former, and it would be necessary to rebut such counter and stronger presumption by some positive evidence to establish the negative. Full and conclusive proof, however, where a party has the burden of proving a negative, is not required, but even vague proof, or such as renders the existence of the negative probable, is, in some cases, sufficient to change the burden to the other party. *The People* v. *Pease*, 27 N. Y. 45; *Commonwealth* v. *Bredford*, 9 Metc. 268; 1 Greenlf. Ev. sec. 80.

We are of opinion that the statement here in evidence of these persons that they had never been naturalized, and that they did not know that their fathers had been, constituted *prima facie* evidence that such persons had not been naturalized and so entitled to vote, and that the court was warranted in so inferring from such evidence. Had their fathers been naturalized whilst they were minors, it is probable they would have known of the fact.

It is insisted that the court erred in not rejecting the returns from Lancaster precinct, which showed quite a majority in favor of removal. The statute requires that, at the close of the polls, the board of election shall canvass the votes, and shall make two tally lists, one of which, with one of the poll-books, and the ballots properly strung, and the affidavits made at the election, shall be sealed up together and delivered to the county clerk. Rev. Stat. 1874, p. 318, sec. 83.

Another section requires the county clerk to summon two justices of the peace, who, with the clerk, shall open and canvass the votes and returns of the election. Ib. sec. 86. When the canvassing board, composed of the county clerk and two justices of the peace, met to perform its duty, they had none of the ballots or affidavits used at the election in Lancaster precinct; they had been lost or destroyed. The judge of the election, who took the returns to the county clerk, testified that he delivered to the county clerk the ballots and affidavits used at the election in Lancaster precinct. The clerk testified that he had no recollection of having seen them. The claim for the rejection of the returns of this precinct is founded upon the missing of said ballots alone, without any evidence, more than the above, for the imputation of wrongdoing to any one whatever. The circumstance of the want of the ballots has doubtless operated prejudicially to appellants, but, for aught that appears, it is through accident, or at least without the fault of appellees or any voter of Lancaster precinct. It can not form ground for the exclusion of the whole vote of the precinct. Such exclusion would be a manifest injustice to appellees and to the voters of the precinct.

The poll-books show that six persons voted in Lancaster precinct, whose votes appellants sought to have rejected. The ballots being wanting to show how these persons voted, appellants offered proof of their declarations, made after the election, that they voted for removal, and that they were disqualified. The court below held that such declarations were

competent to prove the disqualifications of the voters, but not to prove how they voted; and there being no evidence how they voted other than their own declarations, the six votes were counted.

It is the established practice of legislative bodies, upon inquiries as to the election of members thereof, to receive in evidence the declarations of voters as to their disqualifications. The case of *The People* v. *Pease* is one which gives some judicial sanction to such a practice in courts of justice. The decision there was by a divided court, the main controversy in the case being, whether the decision of the inspectors of elections, in receiving the ballots of voters, was conclusive, or whether it was competent for the court to go behind the ballot-box and inquire into the qualifications of the voters.

The opinions on the part of the majority of the court were delivered by Justices Davies and Selden. The former, in the course of his opinion, says: "In the case at bar, the disqualification was proven by the voter himself; but these authorities (referring to parliamentary election cases, and the note to 3 McCord Rep. 230, and 2 Cow. & Hill's Notes, 322) abundantly sustain the position that the declaration of the voter, as to his want of qualification, would have been admissible and legal evidence." The only declarations of the voters in that case, were those made by themselves while on the stand and under oath, so that the opinion in this respect, of the declarations out of court, of voters, appears to be upon a point not before the court. In the opinion of Mr. Justice Selden, there is nothing in support of this language on the subject of hearsay evidence.

The authority of this case, as regards the main point which was in controversy in it, was repudiated by the Supreme Court of Michigan in *The People* v. *Cicott*, 16 Mich. 296; and, so far as the decision slightly goes in that direction, would rather seem to be adverse as to receiving declarations of voters.

State v. *Olin*, 23 Wis. 311, sustains the rule as contended for by appellants, that the declarations of voters are receivable

in evidence, both of their want of qualification and of how they voted. It is to be observed, in reference to this case, that the voters were placed upon the stand, and there refused to testify, upon the ground that their evidence might tend to criminate themselves. On the contrary, the doctrine is expressly repudiated in the case of *Gilliland* v. *Schuyler*, 9 Kan. 569.

This practice with legislative bodies of receiving in evidence the declarations of voters, has, at best, not as yet received more than a limited judicial sanction in courts of justice. It is, apparently, contrary to legal principle, as being the reception of hearsay evidence. The ground of the admission of such testimony seems to be that stated by Mr. Thesiger, (afterwards Lord Chancellor,) in a case before the election committee of the House of Commons in England: "A voter who has voted for the sitting member, is always considered as a party, and it is on that ground that his declarations are admissible. The question is always considered to be between the voter and the party questioning his vote, and not merely between the sitting member and the petitioner." Fale & Fitzh. Election Cases, p. 72. Considering the voter as a party, then it consists with legal principle to receive in evidence his declarations against himself, under the rule that the declarations of a party to the record are, as against such party, admissible in evidence. But this is on the ground of their being declarations against the interest of the party, and therefore probably true. But the declarations of a party are never receivable *for*, but only *against* him. The difficulty in the reception of these declarations here, is, it does not appear by any legal evidence that they were *against;* they may have been *in favor* of the parties who made them. The poll-books show that these persons voted; that is all. The ballots of Lancaster precinct being lost, there is no evidence whatever *how* these persons voted, except their own declarations afterward, offered in evidence. They were not, themselves, placed upon the stand; no effort was made to get their testimony,

and no reason shown why it could not be got; but third persons are placed upon the stand who testify that these absent voters, after the election had passed, admitted that they were not legal voters, and that they had voted "for removal."

We think there should be some legal evidence that they voted "for removal," before their declarations, not under oath, are admissible in evidence. May be they voted "against removal." If they did so, then, admitting these declarations —the voters being considered as parties—would be receiving in evidence the declarations of a party in his own favor. Could they, by their unsworn statements of their disqualification, and that they voted for removal, cause six votes "for removal" to be stricken out, then they would, in effect, double their vote "against removal."

The reception of such statements, as evidence *how* these voters cast their votes, would, in our view, under the circumstances of this case, be inconsistent with legal principle, and dangerous in tendency in opening a door to fraud.

There being, then, no evidence as to how these six voters in Lancaster precinct voted, other than their own declarations afterward, made without the sanction of an oath, we are of opinion the court below did right in not rejecting their votes, notwithstanding their declarations of disqualification as voters, and that they voted "for removal."

Three persons were counted for removal, and the ballots disclosed that they so voted; each one, however, testified that he voted against removal. Nothing more than that is disclosed or claimed, of any fraud or mistake. Appellants insist that the will of the electors should be carried out, and the so-called mistake be corrected.

We know of no precedent or principle for such a proceeding. The intention of the elector can not be thus inquired into when it is opposed to the paper ballot which he has deposited in the ballot-box. That is to prevail as the highest evidence of his intention. *The People* v. *Seaman*, 5 Denio,

409; *The People* v. *Saxton*, 22 N. Y. 309. Were there independent proof of fraud, a different question would be presented.

In the rulings of the court below against appellants, in respect of matters of law, we find no error.

As regards matters of fact, a great number of findings in respect thereto, on both sides, in the admission and rejection of individual votes, as well as in passing upon the legal qualifications as voters, of such in the county who did not vote, all of whom, under the statute, are to be counted against removal, are complained of as being erroneous.

To review the cases in detail would be tedious, and serve no useful end, and we shall undertake no more than to state the conclusion. We find a number of cases on each side where we would be inclined to find differently from the court below in the admission and rejection of individual votes; but, upon a balancing thereof, the one against the other, on the respective sides, we fail to find an excess of erroneous rulings against appellants large enough to overcome the majority of votes in favor of removal, found by the decree.

Upon consideration of the whole case, we are satisfied the election was fairly carried by a majority of all the legal voters of the county, and perceive no sufficient reason to disturb the decree. It will therefore be affirmed.

Decree affirmed.

Mr. CHIEF JUSTICE WALKER: I hold that those who were of foreign birth and minors, at the adoption of the constitution of 1848, never became voters under that instrument.

FERGUS WHALIN
v.
THE CITY OF MACOMB.

1. STATUTE—*when directory only.* Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed or the language used by the

legislature shows that the designation of the time was intended as a limitation of the power of the officer.

2. Where the charter of a city required the city authorities to publish a digest of its ordinances within one year after the grant of the charter, and every five years thereafter, it was *held*, in a suit by the city for the violation of an ordinance, that this requirement was only directory, and a neglect to observe it presented no ground for defeating a recovery.

3. ORDINANCE—*right to recover under not defeated because act was a breach of party's bond.* In a suit by a city to recover the penalty fixed by ordinance, for selling liquors contrary to the terms of his license, it is no defense that the defendant is liable to the city on his license bond for the same act, the ordinance prescribing that the penalties thereby imposed might be recovered in an action of debt, or as damages in a suit on the bond. The fact that the acts complained of were breaches of the bond, makes them none the less violations of the ordinance.

4. CHARTER—*forfeiture, how questioned.* Whether a city has forfeited its charter, can only be raised in a direct proceeding by *scire facias* or *quo warranto*. The question can not be raised in a suit for a violation of its ordinances.

APPEAL from the Circuit Court of McDonough county; the Hon. CHAUNCEY L. HIGBEE, Judge, presiding.

This was a prosecution, by the city of Macomb against Fergus Whalin, a licensed saloon keeper, for selling liquor contrary to the ordinance of the city regulating such sales by licensed persons. The suit was originally brought before a justice of the peace, and taken to the circuit court by appeal. Section seven of the ordinance under which the suit was brought, is as follows:

"Any person or persons who have obtained a license to keep a grocery under the provisions of this ordinance, as aforesaid, and shall fail or neglect to keep a quiet, orderly and well governed house, or shall knowingly suffer or permit gaming in or about his grocery, or shall fail, neglect or refuse to keep his grocery closed at all hours on Sunday, or who shall open his grocery or cause the same to be done before 4½ o'clock A. M., or who shall keep his grocery open, or cause, suffer or permit it to be kept open, after forty-five minutes past 9 o'clock P. M., railroad time, or who shall sell

or give away any of the liquors mentioned in section one hereof to minors, without the written consent of such minor's parent, guardian or master, or who shall sell or give away any of said liquors named in section one to an intoxicated person, or one who is in the habit of getting intoxicated, or who shall violate any of the provisions of the ordinances of this city relative to groceries or spirituous and intoxicating liquors, or who shall fail, neglect or refuse to observe and obey all orders of the city council respecting his grocery and business done therein, shall be deemed to have violated this ordinance and the condition of his or their bond, and for each and every of the acts of violation, aforesaid, shall forfeit and pay to said city the sum of $100, which may be recovered in an action of debt, or as damages in a suit on his or their bond."

The cause was tried in the circuit court, and the defendant found guilty of two violations, and the damages assessed at $200, for which sum judgment was rendered, and for costs. The defendant appealed.

Messrs. COLE & SIMMONS, for the appellant.

Mr. E. P. PILLSBURY, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

There are but two grounds of reversal insisted on in the argument filed on behalf of appellant, and they may be briefly disposed of.

First—It is argued that by section 28 of the charter of the city of Macomb, a digest of the ordinances of the city is required to be published in one year after granting the charter, and a like digest within every period of five years thereafter; and that this duty has been disregarded by the city, as the last digest of its ordinances was published on the 13th of November, 1868

Whether it is intended to insist that the city has thereby forfeited its charter, or only that the ordinances, a digest of which has not been published within five years, are void, is not entirely clear. If the former is intended, it would seem to be a sufficient answer that the question of whether the charter has been forfeited can only be raised in a direct proceeding for that purpose—by *scire facias* or *quo warranto*. If, however, as is more probable, it is only intended to be claimed that the ordinances are void, it will be readily seen that this requirement in the charter belongs to that class of legislation which is held to be directory merely. It is not declared in the section under consideration, that the ordinances shall be void if not thus published, nor is there any other language used showing that such publication was to be a condition precedent to the further exercise of municipal powers by the city. The publication seems designed merely for the convenience of those whose duties or necessities require that they should be familiar with the ordinances, it being entirely independent from that required prior to the ordinance being in force as a municipal law—which is shown by the record to have been properly made.

A familiar common law rule, repeatedly recognized by this court, is: "Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer." This applies with equal force where, as in the present instance, the act to be done requires the co-operation of several officers.

Second—It is claimed that, under the ordinance by virtue of which the suit is brought, appellant, if liable at all, could only be sued on his bond, which he was required to execute to secure his faithful compliance with the law and ordinances while engaged in his business.

We fail to appreciate the force of this argument. The ordinance, as copied in the record and published in appellant's abstract, is explicit in its language, that the penalties thereby imposed "may be recovered in an action of debt, or as damages in a suit on his or their bond." The causes for which these penalties may be imposed are distinctly stated; and they are none the less offenses under the ordinance because they are also breaches of the conditions of the bond.

The judgment is affirmed.

Judgment affirmed.

CYRUS FANNING, for use, etc.

v.

THE FIRST NATIONAL BANK OF JACKSONVILLE.

1. EXEMPTION—*from garnishment.* The delivery of property in the hands of a garnishee to an officer, to be sold under execution against the owner, will not impair the rights of such owner in claiming the same as exempt from sale, but he may make such claim the same as though the property was taken from him.

2. SAME—*money in the hands of garnishee exempt.* Where a judgment debtor had no other property than such as was specifically exempt from levy and sale, but had less than $100 on deposit in a bank, which was sought to be reached by garnishee process, it was *held*, that he might claim the same as exempt under the clause of the statute which exempts $100 worth of other property suited to his condition in life, to be selected by him, and on such selection that it could not be reached in the hands of the garnishee.

APPEAL from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

Mr. WILLIAM H. BARNES, for the appellant.

Messrs. CASSELL & KELLOGG, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a proceeding to reach money in the First National Bank of Jacksonville, by garnishee process, which had been deposited in the bank by Cyrus Fanning.

James W. Ash obtained judgment in the circuit court of Morgan county against Cyrus Fanning, for the sum of $166.36, upon which an execution was issued, and returned *nulla bona*. On the 19th day of May, 1873, garnishee process was issued and served upon the bank.

The answer filed by the bank shows that Fanning had on deposit the sum of $80.60. It was also set up in the answer, that after the garnishee process had been served it received a notice, in writing, from Fanning, that he claimed the money on deposit as exempt under the statute, and directing the bank to pay it to no person without his order.

The defense that the money was exempt under the statute, and not liable to garnishee process, was interposed.

The evidence contained in the bill of exceptions shows the rendition of the judgment against Fanning, the issue and return of execution, the deposit of the money, and that Fanning was the head of a family, residing with the same, that he owned no property except a small quantity of household goods, which were included in the list of specific articles exempt.

The circuit court rendered judgment against the bank, for the use of the judgment creditor, for the amount of money on deposit, to reverse which this appeal has been prosecuted.

The only question presented by the record is, whether the money on deposit in the bank was subject to be reached by garnishee process.

The statute exempting from execution, writ of attachment, and distress for rent, personal property owned by the debtor, among other clauses of exemption contains the following: "$100 worth of other property, suited to his or her condition in life, selected by the debtor." See Revision of 1874, page 499.

In order to arrive at a correct construction to be placed upon this provision of the statute, in its application to the case under consideration, a reference to chapter 62, of the statutes of 1874, entitled Garnishment, seems to be necessary.

Section 20, of the last named act, Statutes of 1874, page 553, provides, that when any garnishee has any goods, chattels, choses in action, or effects other than money, belonging to the defendant, or which he is bound to deliver to him, he shall deliver the same to the officer who shall hold the execution in favor of the plaintiff in the attachment suit or judgment, which shall be sold by the officer, and the proceeds applied and accounted for in the same manner as other goods and chattels taken on execution.

Section 21 provides, if the goods in the hands of the garnishee are pledged for the payment of money to him, the plaintiff in the action may pay the money for which they are held, and then the garnishee shall deliver the goods to the officer, to be sold as provided for in section 20.

Section 23 provides, all goods, etc., received by the officer under the preceding sections, shall be sold in the same manner as if they had been taken on an execution in any other manner.

It was, no doubt, contemplated by the legislature, when these sections were adopted as a part of our statute, that cases would arise where property would be found in the possession of a garnishee, belonging to a defendant, and hence ample provision was made, when such did occur, that it might be taken and sold.

But where property is found in the hands of a garnishee, and delivered over to an officer to be sold, the officer would hold it for sale in the same manner as if it had been found and taken from a defendant in execution in the first instance, nor would the rights of a defendant in claiming the property as exempt from sale be changed or impaired.

If any portion of the property thus obtained was exempt under the statute exempting $100 worth of property from

sale, cited *supra,* then a defendant would be entitled to interpose his claim, and have the same set off to him.

Had it been intended to provide that exemptions might be claimed where property was found in the hands of a defendant in execution, and that none should exist when property was found in the hands of a third party, by garnishee process, certainly some provision would have been made to embrace a case of this kind.

If Fanning had loaned the bank a horse, and placed the property in the possession of the bank for a certain time, and, while possessed of the property, if the bank had been garnisheed, and the horse turned over to the officer, we apprehend it is clear that Fanning would have been entitled to claim the horse as exempt, under that clause of the statute exempting $100 worth of property. If this be true, we perceive no reason, upon principle, that will prevent him from claiming the $80.60 which was deposited in the bank.

The money deposited was property; it was less in amount than $100; he selected it as authorized by the statute; and the mere fact that it was attempted to be reached by garnishee process, can make no difference. We are satisfied it was exempt under the laws of the State.

Section 14, of the Garnishee act, which provides that the wages and services of a defendant, being the head of a family, shall be exempt from garnishment, does not lessen or impair the rights of a defendant, under the statute which provides for certain exemptions.

The fact that the wages of a defendant, to a certain amount, is not liable to be reached by garnishee process, can not be construed as repugnant to the section, cited *supra,* which allows a defendant to select $100 worth of property as exempt.

We see no reason why the specific articles named may not be claimed, and, at the same time, if the defendant has wages due, this too, to the amount of $25, is protected.

The judgment of the circuit court will therefore be reversed and the cause remanded. *Judgment reversed.*

Syllabus.

MARK H. COOPER *et al.*

v.

SARAH A. COOPER *et al.*

1. CONVEYANCE—*rule of construction.* According to the rules of construction of deeds of conveyance, all the language of the grant must be considered and effect given to it, unless it is so repugnant or meaningless that it can not be done; and when that is the case, the repugnant or senseless portion may, in some cases, be rejected as surplusage.

2. SAME—*grant construed.* A deed to A and B, husband and wife, contained the following granting clause: "Have granted, bargained and sold, and by these presents do grant, bargain and sell unto the party of the second part and his assigns, with power to sell the same, during the life of the said A, and to his wife, B, after the death of her husband, A, during her widowhood, and after her death, or, after she ceases to be the widow of said A, to the heirs of A on the body of the said B begotten, certain tracts of land," etc.: *Held*, that A took a life estate, with a power to sell and convey the fee, and B a conditional life estate after the death of A, liable to be defeated on her marriage, and that the heirs of A, begotten of the body of B, before or after the grant, took the remainder in fee simple absolute.

3. SAME—*office and effect of the habendum.* The *habendum* clause of a deed of conveyance can not enlarge the estate granted contrary to the terms of the granting clause. Its proper office is, not to give anything, but to limit or define the certainty of the estate in the grantee who should be named in the previous part of the deed.

4. SAME—*deed to husband and wife—tenancy by the entirety—survivorship.* Under the legislation of this State giving married women the right to acquire property, and hold the same free from their husband's control, the reason for the rule which holds that a conveyance to husband and wife makes them tenants by the entirety with right of survivorship, has ceased to exist, and they will, in this State, take and hold as tenants in common.

5. SAME—*deed construed.* A deed for land described the grantees as husband and wife, and the heirs of the natural body of the latter, and after acknowledging payment of the consideration by the party of the second part, by apt words conveyed the land to "the said party of the second part, their heirs and assigns, forever." The *habendum* was "unto the said party of the second part, heirs and assigns, forever:" *Held*, that the husband and wife took, each, an undivided half in fee as tenants in common, and that, upon the husband's death, his portion descended to

his heirs at law, subject to the dower of his widow; and that the words "heirs of the body of the wife" must be rejected as surplusage, there being no apt words to limit an estate to the heirs of the wife's body.

WRIT OF ERROR to the Circuit Court of Menard county; the Hon. LYMAN LACEY, Judge, presiding.

This was a bill filed by Mark H. Cooper and others, heirs at law of William Cooper, deceased, against Sarah A. Cooper, widow, and the other heirs at law of said William Cooper, for the partition of certain lands and for the assignment of the widow's dower therein. The court below dismissed the bill, and complainants appealed.

Mr. EDWARD LANNING, and Mr. T. W. MCNEELY, for the plaintiffs in error.

Mr. N. W. BRANSON, for the defendants in error.

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

It appears that on the 4th day of March, 1865, Noah M. King and wife conveyed to Wm. Cooper and Sarah Ann Cooper, his wife, and the heirs of her natural body, several tracts of land in Menard county. The consideration expressed in the deed was $6,350, and is stated to have been paid by the party of the second part.

Again, on the 9th day of March, 1866, Wm. S. Senter and wife conveyed to Cooper and wife, for the consideration of $4,000, paid by the party of the second part, certain lands in Menard county.

The granting clause of the deed is this: "Have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the party of the second part and his assigns, with power to sell the same, during the life of said Wm. Cooper, and to his wife, Sarah Ann Cooper, after the death of her husband, Wm. Cooper, during her widowhood, and after

her death or after she ceases to be the widow of said Wm. Cooper, to the heirs of Wm. Cooper on the body of said Sarah A. Cooper begotten, certain tracts of lands," etc. And the *habendum* clause is this: "To have and to hold the aforesaid tracts of land, together with all and singular the privileges and appurtenances thereto belonging, to the only proper use and benefit of the party of the second part, with full power and authority of the said William Cooper to sell, bargain and convey any of said lands or premises during the life of said Wm. Cooper, and after the death of said Wm. Cooper the said lands, if the same shall not have been sold or conveyed by said Wm. Cooper, to be held, possessed and enjoyed by her, the said Sarah A. Cooper, so long as she shall remain the widow of said Wm. Cooper, and all rents and profits thereof, and after she ceases to be the widow of said Wm. Cooper, by death or marriage, the said land and premises to be held and owned by the heirs of said Wm. Cooper on the body of said Sarah A. Cooper, his wife, begotten, or hereafter begotten, in their own right in fee simple, forever, and to their heirs and assigns."

Cooper and wife sold no portion of the lands embraced in these deeds, and he departed this life some time in June, 1873, leaving complainants and others his heirs at law; the widow, Sarah A. Cooper, is still living and has not married since his death; Albert W., George A., Emma M., Martha A. and Ella J. Cooper, are the only children of the body of Sarah A. Cooper, begotten by intestate—the other heirs, we presume, are his children by a former wife, and the children of his deceased children. The master reported that they were heirs, but does not report how they became so, but says they are his children.

Complainants filed a bill for partition, making the widow and her children, and some of the other heirs, defendants. A hearing was had, when the court below found that Sarah A. Cooper, the widow, had a life estate in the Senter lands, and that her children held the remainder after her death; and

that she was entitled to hold the Senter lands during widowhood, and, if she never married, for life, in remainder to her children, and dismissed the bill at the costs of complainant. From that decree complainants appeal to this court.

We shall consider and give a construction to the Senter deed first. It is urged that this deed vested the absolute fee in intestate; that it was granted to him and his assigns, and, never having assigned the premises, it descended to his heirs generally; and that, on his death, complainants took under the Statute of Descents. On the other side, it is contended that the deed only vested in intestate a life estate, with power of sale, and, in default of a sale, in remainder for life, entailed to his heirs on her body begotten.

There would seem to be no doubt that William Cooper, by this deed, took a life estate, with a power to sell and convey the fee. From the entire grant, this is the only reasonable construction that can be given to the language; otherwise, all the language of the granting clause which limits a life estate on Sarah A. and Cooper's heirs, begotten on her body, must be rejected, and no rule of law requiring its rejection has been referred to, nor does any occur to us. The language undeniably purports to limit a remainder during widowhood, or for life, on Sarah A., and then a fee tail on his heirs begotten on her body.

The rules of construction require that all of the language of the grant shall be considered, and effect given to it, unless so repugnant or meaningless that it can not be done. When that is the case, the repugnant or senseless portion may, in some cases, be rejected; but the language employed in the granting clause of this deed is neither repugnant nor senseless. It is consistent and harmonious. Had the granting clause stopped with the power to sell, the want of any words to carry a fee to intestate would have been obvious. It used no words that could be construed to confer the title upon his heirs, or that he was to take anything more than a life estate. It is not to him and his heirs, but to him and his assigns. Had it been

to him, without the words "and his heirs," had the word "assigns" been omitted, no one would have supposed that he took anything more than a life estate.

That portion, then, of the granting clause only conveying to him a life estate, it was entirely competent to confer on him full and ample power to sell and convey the fee simple of the premises, which was done by this deed. Having created a life estate in him, it was competent for the grantor to limit a conditional life estate upon his wife, to be defeated on marriage after the death of her husband, and then to entail the estate, as far as our statute permits, to his heirs begotten on her body. Under the rules of the common law, this was not only permissible but was common in conveyancing. And that this deed conveyed a contingent life estate to Sarah A., liable to be defeated on her again marrying, we have no doubt, and that, under our statute, it conveyed a remainder in fee simple absolute to his heirs, on her body begotten, before or after the grant, admits, we think, of no doubt. See *Beacroft* v. *Strawn*, 67 Ill. 28; *Butler* v. *Hustis*, 68 Ill. 594; *Voris* v. *Sloan*, 68 Ill. 588; and *Blair* v. *Vanblaircum*, 71 Ill. —. In these cases it is held, that the 6th and 14th sections of the Conveyance Act, (R. S. 1845,) have converted what at common law is a fee tail, into a life estate in the donee, and a remainder in fee simple absolute in the heirs of the body of the grantee. And we have no hesitation in saying, that these cases fully cover and control this; hence there is no error in the decree as to the lands embraced in this deed.

Nor can the *habendum* clause enlarge the estate contrary to the terms of the granting clause. Its proper effect is, not to give anything, but to limit or define the certainty of the estate to the feoffee or grantee who should be previously named in the premises of the deed; but in this case the *habendum* clause does not profess to enlarge the grant, but follows it in its limitations.

Nor do we see that the conferring the power to sell and convey conferred an absolute fee upon intestate. It is true,

that it gave him the power to pass the fee by sale, and thus cut off the remainder, if he chose; but he did not exercise the power, and the title passed, according to the terms of the grant, to the widow for life, and in remainder to his children named in the deed. And the *habendum* expressly limits to such heirs, "in their own right, in fee simple, forever, and to their heirs and assigns."

This case is different from the cases referred to by counsel for appellants, as in those cases a fee passed to the first taker, and was not limited over to others, or only a life estate was granted. In the case of *Siegwald* v. *Siegwald*, 37 Ill. 430, the testator only gave to the widow a life estate, and limited a fee to the son. In that case, as in this, the fee was limited on a life estate, and not an attempt to limit a fee upon a fee, which the law forbids. The deed in this case, neither expressly nor by implication, gives or grants to Wm. Cooper a fee, but the language employed only purports to convey a life estate, and a power to sell the fee and remainder.

We now proceed to examine and construe the deed from King and wife to Cooper and wife. The first clause of the deed is this: "This indenture, made this 4th day of March, in the year of our Lord, 1865, between Noah M. King and Jane King, his wife, of the county of Menard and State of Illinois, of the first part, and Wm. Cooper and Sarah Ann Cooper, and the heirs of her natural body, of the county and State aforesaid, of the second part: Witnesseth, that the said party of the first part, for and in consideration of the sum of $6350, in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said party of the second part, their heirs and assigns, all the following described lot, piece or parcel of land situate," etc. The *habendum* clause is this: "To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, heirs and assigns, forever."

The parties in this case treat this as a conveyance to the husband and wife in fee simple absolute; and one side contends that they took an estate by the entirety, with survivorship to the longest liver, according to the rules of the common law governing such tenures. On the other side it is insisted that, since the adoption of the act of 1861, commonly known as the "married woman's law," the parties took as tenants in common; that this act authorized a married woman to acquire, during coverture, real and personal estate as her sole and separate property, under her sole control, and to be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried, and that it shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband.

In this case, the property came from another source than the husband. It was conveyed to her by King, who then owned it, and the deed states that the consideration was paid by the party of the second part, and the grantees are described in the deed as the party of the second part; and the reasonable presumption is that her money, as well as that of her husband, was paid for the land, as nothing is shown to contradict the statement in the deed. But, even if it were conceded that the entire consideration was paid by the husband, we presume no one but a creditor of his could object. Husbands out of debt have always had the legal authority to have property settled upon their wives, or conveyed to them. Then, if she thus acquired and paid for her portion of the land with her sole and separate money, and the statute authorizes her to thus acquire real estate, and then to have the exclusive enjoyment and control of it, free from the interference of her husband, why, under the statute, shall she not be treated as a tenant in common with her husband? This statute seems to have removed all of the reasons for holding that such a conveyance creates an estate by the entirety. At the common law, the husband, by marriage, acquired all of the title to

his wife's personal property and choses in action, the right to hold and enjoy the rents and profits of her real estate, and to all of the personal property she might acquire during coverture, and to all of her earnings; and these were the principal considerations which led to the common law rule, that real estate thus acquired should be held as an estate by entirety, with survivorship; and this was all based on the theory that the husband and wife were, by the law, considered but one person, and could not have separate and conflicting property rights. But our statutes have so far changed the common law that they are not one person, so far as the acquisition and enjoyment of property is concerned. To the extent of acquiring property, and so far as its enjoyment is concerned, and the enjoyment of her earnings, the statute has declared, in effect, that they are two independent persons; and in doing so, great modifications have been wrought as to their rights of property. And, under these great changes, no reason is perceived, nor is any suggested, why a married woman should not hold property thus acquired, in fee, and as a tenant in common with her husband, precisely as she might with another person. The husband, under the statute, has no more immediate interest in or control over her property than has any other person. She may delegate the power to her husband to act for her in the management and control of her property, and so she may any other person.

These views are in entire harmony with the case of *City of Chicago* v. *Speer*, 66 Ill. 154. In that case, in construing this statute, it was held that, where a wife was injured in her person, she must sue alone; that it was the intention of the General Assembly to sever the interest of the husband from that of the wife in her property rights, and that they should not join in bringing suit in such a case, lest the recovery might be controlled by the husband, or might survive to the husband in case of the death of the wife. This case can not be distinguished in principle from that, and the reasoning

there employed applies with full force to the facts in this case, and must govern its decision.

If, then, our conclusions are correct, the interest which the husband took by the King deed descended to his heirs in the same manner as though it had been conveyed to him alone. It was, therefore, subject to the dower of the widow, and each of his heirs took under the Statute of Descents, subject to debts and the widow's dower. And Mrs. Cooper took her interest in fee, and holds it since as before the death of her husband.

These views in nowise contravene the case of *Lux* v. *Hoff*, 47 Ill. 425, as in that case the marriage and purchase were before the adoption of the act of 1861. The maxim, *cessante ratione legis, cessat ipsa lex,* applies in this case with full force.

We are aware that this construction is not in harmony with that given by the courts of some of the States of the Union in construing their statutes enabling married women to hold separate property. But it may be our statute is materially different from theirs. But if it is not, still the tenor of our legislation has been broader and more liberal on the subject than the legislation in those States, and hence we, to effectuate the intention of our General Assembly, should be more liberal; otherwise, the courts would rather hinder than carry out the intention of the law. The intention of a law may be, to some extent, ascertained by subsequent legislation on the same subject. If, then, we look at all of our legislation on this subject, we can entertain no doubt that the General Assembly intended to remove all the fetters that barred married women in acquiring and controlling property, and that this was removed with the others. Mrs. Cooper, having acquired the right to purchase and hold in common with her husband, took the property with the incidents of that estate.

But the question arises, whether the heirs of the body of Sarah A. Cooper became purchasers and took with their parents. They are named by that general description as being of the parties of the second part. But it is a familiar rule of

law that the living have no heirs. Persons may be living who, on the death of a person, may become his or her heirs, but they are not, nor can they be until the person shall die. Then there were no persons in being that could answer to that description when the deed was made, nor are there yet such persons. She, not being dead, has no heirs of her body; she has children, but not heirs. She, for aught that appears, may then have had children, and others may have since been born of her body, but the deed does not name children of her body. We must therefore hold that these words are inoperative as they would have been had a dead or fictitious person been named as a grantee.

To render a deed valid, there must be proper parties capable of contracting, and they must contract. But here, there is an attempt to convey an interest to persons not then in being, and who may never be. The utmost that could be contended for would be that an undivided half of the property conveyed passed to Mrs. Cooper for life, and in remainder to the heirs of her body. But that can not be so, inasmuch as no apt words were employed to limit such an estate. Nor are they so mentioned in the granting or *habendum* clause. We must reject these words as surplusage, and hold that William Cooper and Sarah A. Cooper were the parties of the second part, and each took an undivided half of the property conveyed by that deed, in fee. And the court below erred in refusing to partition the undivided half of the lands conveyed by the King deed to the heirs of William Cooper, deceased, under the Statute of Descents, and in not assigning to the widow her dower in that undivided half of these lands.

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

Decree reversed.

Statement of the case.

The Toledo, Wabash and Western Railway Co.

v.

Henry F. Elliott *et al.*

1. Contract—*to pay back a rebate on freight.* Where the plaintiff, having sold a large lot of corn, to be delivered in Boston at a certain price, the purchaser agreeing to advance the regular freight, which was 80½ cents per hundred pounds, as a part of the price, made a special contract with a railroad company to allow him a rebate of 5½ cents per hundred, which the company was to pay him, and the corn was shipped, a part at 80½ cents, as agreed, and on which the company paid the plaintiff back 5½ cents per hundred, and a part was billed through at 75 cents per hundred, without the shipper's consent: *Held*, that the company was liable to the shipper for 5½ cents per hundred on the latter portion of the corn.

2. Same—*legality.* Such a contract is not illegal, as being in violation of the law to prevent unjust discriminations, as the company was to carry at the customary rates. The rebate in the charges was a matter of private agreement between the carrier and the shipper, and the contract was not fraudulent as to the purchaser of the corn.

3. Agency—*ratification of agent's contract.* Where a local agent of a railroad company was authorized to make a special contract for transporting a lot of corn from this State to Boston, even if the agent transcended his authority and made a contract to return a part of the freight charged, yet if the company availed itself of the benefit of such contract, it was *held*, that it ought not to be allowed afterwards to repudiate the agreement on the ground its agent had no authority to make it.

4. New trial—*finding of court.* Where the evidence is conflicting, and nearly balanced, the finding of the court below upon the facts will be regarded the same as the verdict of a jury, and will not be disturbed.

Appeal from the Circuit Court of Logan county; the Hon. Lyman Lacey, Judge, presiding.

This was an action of assumpsit, by Henry F. Elliott, James Congdon and Eugene Burnell, partners, doing business under the name and style of Elliott, Congdon & Co., against the Toledo, Wabash and Western Railway Company, to recover back a rebate of five and a half cents per hundred pounds on a lot of corn shipped to Boston on defendant's

road, under a special agreement to that effect. The facts of the case are stated in the opinion.

Mr. G. B. Burnett, for the appellant.

Messrs. Beason & Blinn, for the appellees.

Mr. Justice Scott delivered the opinion of the Court:

In February, 1872, plaintiffs had on hand a large amount of corn, which they were desirous of selling. They effected a sale in the Eastern market, at a certain price, upon the basis of a tariff of freights, to "Boston and Boston points," at the rate of 80½ cents per one hundred pounds, which the proof shows was then the regular rate or charge. By the terms of the contract with the shippers, the consignees were to pay the charges on the corn as a part of the contract price, the rate being made known to them, and was as previously agreed upon with defendant, viz: 80½ cents per one hundred pounds.

Plaintiffs testified they made the sale upon a small margin, expecting to get a rebate or drawback on the rates, by which they would have realized a profit. Under a special contract, the railroad carried a large amount of corn for plaintiffs. The controversy in the case is as to the terms on which the company was to freight the corn. Plaintiffs claim it was to be carried at 80½ cents per one hundred pounds, and the company, by special agreement, was to allow them a drawback or rebate on the charges, to the amount of 5½ cents. On the other hand, the company contend the contract was to carry the corn at a reduced rate, viz: 75 cents per one hundred pounds.

As to the terms of the shipping contract, the evidence is quite conflicting; but there are some facts that appear to strengthen plaintiffs' theory of the case. They had sold the corn at a certain price, on the definite agreement the consignees would pay the usual charges, viz: 80½ cents. It was

obviously no interest to them to negotiate for a reduction of rates, if they were to receive no benefit therefrom. A significant fact in the case is, the corn was, in fact, billed at 80½ cents at Lincoln, but the rates were changed at Toledo without the knowledge or consent of the shippers. Some of the cars so billed went through without change of rates, upon which the consignees paid the charges at the rates agreed upon in advance. As to these cars, the company allowed plaintiffs a drawback of 5½ cents, which has been paid. Upon the whole evidence the court below, before whom the cause was tried without the intervention of a jury, found the company contracted to allow plaintiffs a drawback of 5½ cents; and we are not prepared to say it found incorrectly. Were it a question of first impression with us, we might reach the same conclusion; but regarding the finding of the court as we would the verdict of a jury, we perceive no reason for disturbing it.

The question of the most difficulty in the case is, whether the local agent of the company had authority to make the contract insisted upon. Upon this question the evidence is as conflicting as upon any point in the case. Weed was the local agent of defendant, with whom the contract was negotiated. He wrote, as he says, to the general freight agent for authority to make a special contract as to rates on plaintiffs' corn. According to his testimony, he reported to Congdon he had authority to contract for a reduced rate, viz: 75 cents per one hundred pounds, to the points indicated. But Congdon says he told him then, distinctly, he did not want reduced rates—he wanted a drawback, to be paid to his firm when the shipments of corn were made. Weed returned again, and Congdon s testimony is to the effect Weed then told him he had authority to make an arrangement by which the company would allow plaintiffs a rebate of 5½ cents. Weed, however, denies the statements of Congdon in this particular.

Whatever Weed's instructions were, they were contained in a letter from the general freight agent. That letter, he says, was returned as soon as the contract was closed. It was not produced on the trial.

The explanation Weed gives of the fact the grain was billed, when shipped, at 80½ cents is, defendant had a contract with the Chicago and Alton Railroad Company to maintain the rates at 80½ cents from Lincoln to "Boston and Boston points," and the company did not want any evidence in his office of the violation of the agreement. It was for that reason, he says, he returned his letter of instruction.

There was certainly an apparent authority in the local agent to contract for carrying the grain under some special arrangement. It seems quite certain, from all the evidence, the corn was shipped over defendant's road on the agreement the company would allow plaintiffs a rebate on the usual charges; and, having availed of the benefits of the contract, the company ought not now to be permitted to repudiate it on the ground their agent had no authority to make it.

There is nothing in the point insisted upon, that plaintiffs were endeavoring to defraud the consignees, and the contract, if made, was therefore unlawful. The consignees had agreed to pay so much for the corn, with the rates at 80½ cents. Had the usual rates been lower, we may presume the shippers would have been able to obtain a larger price. There was no fraud intended, nor none, in fact, in the transaction, so far as we can see.

We do not understand the contract is at all in violation of the statute to prevent unjust discriminations in charges by railroad carriers. The contract was to carry the grain at the customary rates. The rebate in the charges was a matter of private agreement between the carrier and the shipper.

The judgment must be affirmed.

Judgment affirmed.

Syllabus.

J. H. L. TUCK

v.

JEROME F. DOWNING.

1. CHANCERY—*proof must correspond with bill.* A party can not make out one case by his bill and another by his proofs, but they must correspond to entitle him to relief in a court of equity.

2. FRAUD—*rescission of contract for misrepresentations.* To justify a court of equity in rescinding a contract of sale, it is not only necessary to establish the fact of misrepresentation by clear proof, but it must be about a material matter, or one important to the interests of the party complaining; for, if it was of an immaterial thing, or if the other party did not trust to it, or if it was a matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other, there is no reason for equity to interfere to grant relief on the ground of fraud.

3. SAME—*materiality of misrepresentations.* Where a party is dealing with his own property and trying to effect a sale, he has the right to puff the same in the most extravagant manner, and exalt its value to the highest point his antagonist's credulity will bear; and a false representation that it had cost $40,000, or that the vendor had given his obligation for that sum for it, where there is no relation of trust or confidence between him and the vendee, will not be regarded as material or so important as to constitute a fraud in legal contemplation, or entitle the vendee to rescind the purchase or recover back the difference between what he agreed to pay and what it cost the vendor.

4. SAME—*expressions which are matters of opinion.* On a bill to set aside a purchase of an interest in a certain mine in Utah, and for the cancellation of the note given for the price, on the ground of fraudulent misrepresentations of the quality and prospects of the mine, it appeared that the vendor went East to make sales of shares, and on his representations procured capitalists to appoint a committee to go and investigate, the purchaser acting with the others in the appointment, and the committee reported that the representations were true, and the vendor made extravagant declarations of the rich prospects, but made no warranty or guaranty, it was *held*, that such declarations could only be regarded as the expression of an opinion about a matter of which the committee could judge for themselves, and that they formed no ground for setting aside the contract.

5. SAME—*representations not relied on.* Where the representations relied on for setting aside a sale were necessarily a mere matter of opinion

as to the future prospects of a mine, equally open to both parties for examination, and the purchaser, through his agents, does make an examination by actual inspection and tests, the sale will not be set aside at the instance of the purchaser on the ground that the mine shall prove unprofitable, because the purchaser in such case deals on equal footing with the seller, relying upon his own judgment. If he places reliance on such representations, it is his own folly and indiscretion, against which the courts can not aid him.

6. If a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or his agents, he can not be heard to say that he has been deceived by the vendor's misrepresentations, for the rule is *caveat emptor*, and the knowledge of his agent is as binding on him as his own knowledge.

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

This was a bill of complaint, in the circuit court of Cook county, exhibited by Jerome F. Downing, against J. H. L. Tuck, George A. Childs and Octavius Prince, the scope of which was to procure a cancellation of a promissory note executed by complainant to Tuck for five thousand dollars, and which Tuck had placed in the hands of Childs & Prince, bankers at Chicago, as collateral for a loan by them to Tuck of seven hundred dollars. The principal allegations in the bill of complaint are, that Tuck, in July, 1873, came to Erie, Pennsylvania, with Lucien P. Sanger, claiming to come from Salt Lake City, in the territory of Utah; that after they had been in Erie a short time, sojourning at the house of Irving Camp, then a resident, they endeavored to form a company to purchase a two-thirds interest in pretended mines, veins and lodes in the West Mining District in Salt Lake county, Utah, and to facilitate their purpose, Sanger and Tuck represented to complainant and to others that one Scribner, of Salt Lake City, owned an interest of two-thirds in two mineral veins or lodes, known as "Aqua Frio" and "Black Metallic" lodes, containing six hundred feet in each, and situated in the "West Mountain Mining District" in Salt Lake county, Utah, and certain other veins known as "Green Yankee," containing

thirteen hundred feet, adjoining the north-east end of the "Black Metallic Vein," which interests Scribner desired to sell, and offered them for sale for forty thousand dollars; that Tuck and Sanger represented that Sanger had a deed from Scribner of this two-thirds interest, which Scribner had executed to enable Sanger to give deeds to parties who might purchase, to save the trouble of procuring deeds from Salt Lake to be executed by Scribner. Tuck, in talking very freely about the mines, and in his endeavors to sell and to induce complainant and others to form a company to purchase and work these mines, represented to complainant and others that he, himself, had no interest in these mines, and that his only object in coming with Sanger was as a professional attendant and a practical and experimental geologist, and as one well acquainted with mines and mining in the territories, and therefore could speak more confidently as to these mines, and that he came to explain the geological features of the country and the character of the mines; that they represented to complainant and others that the mines were of great value, yielding rich copper ore, with more or less gold; that Sanger had purchased from Scribner one-third interest therein, which he bought to hold as an investment, and that Scribner would not sell his remaining interest for less than forty thousand dollars; that on this visit nothing was effected, and the adventurers left Erie, but a short time afterwards Tuck returned and again endeavored to induce complainant and others to purchase this two-thirds interest, he, Tuck, having then and there a deed purporting to have been executed by Scribner to him for this two-thirds interest, he representing the deed was executed to him on the condition he should go East and dispose of the same for not less than five thousand dollars a share of one-twelfth, and that he had given his personal obligation to Scribner in the sum of forty thousand dollars to secure Scribner out of the sales of these shares at five thousand dollars for one-twelfth part thereof; that, by these representations to complainant and others, named in the bill of complaint,

they were induced to form a company to purchase this two-thirds interest; and, as a further inducement to purchase, Tuck represented that no reduction in price could be obtained from Scribner, and he further represented to them that he was an experienced geologist, well acquainted with mines and mining in the territories, and with these mines in question, by which he could speak confidently as to their value, he then representing them to be of great value, yielding rich copper ore, with more or less gold, and assured complainant, if he would purchase a share, the profits immediately to result from their being worked, or within the first six months, would be large enough to enable him to pay for such share from the profits; that the mines could be depended upon for sufficient copper ore to keep one or more smelters in constant operation from the commencement, and that the profits would be large; that, relying upon these representations, complainant purchased of Tuck one undivided one-twelfth interest, and gave to him his promissory note for five thousand dollars, payable six months after date, upon which Tuck delivered to complainant a quit-claim deed from himself for this one-twelfth interest; that Tuck disposed of other shares, to-wit: to W. L. Scott one share, to I. Camp one share, to Noble two shares, and to M. R. Barr two shares—he, Tuck, pretending to divide Scribner's interest into eight shares, he selling seven shares and retaining one share to himself.

The bill then alleges that a company was then formed in Erie to work this mine, to smelt and sell ore and copper; that it was called "The Erie Mining and Smelting Company," but was not incorporated. It is then alleged the company took possession of the mines in August, 1873, and attempted working them, but found them wholly worthless; that complainant fully relied on all the representations of Tuck, and believed them true when he made the purchase and gave his note, but they were all false and untrue, and made by Tuck to cheat and defraud complainant out of his note; that, so far from being true, Scribner gave Tuck the deed for his two-

thirds interest in the mines on the understanding that he should go East and dispose of it for not less than five thousand dollars for an undivided one-twelfth part, and so far from its being true that Tuck had given his personal obligation to Scribner for forty thousand dollars, he had obtained Scribner's interest for a mere nominal value and without such an obligation; that the entire interest of Scribner could have been obtained for the amount of complainant's note; that Tuck well knew this at the time he made his representations; that he made them with intent to cheat complainant out of the note, he, Tuck, knowing all his representations to be untrue, and the mines to be worthless.

It is then alleged, so anxious was Tuck that complainant and the others should not know what he paid Scribner, or what Scribner had or would ask for his interest, that when one of the persons, to whom shares were sold, suggested to Tuck that a letter should be written to Scribner to see if he would not take less than forty thousand dollars therefor, Tuck immediately opposed the idea, asserting it was Scribner's best terms, and he had obligated himself to pay forty thousand dollars, and Scribner would not take a cent less.

The bill then charges that, in disposing of this stock to these members of the company, he unjustly discriminated in favor of certain members by selling to such interests in these mines on more favorable terms than he did to complainant, to the prejudice of his rights as a member of the company, and in violation of a common understanding as to the price to be paid by each member thereof purchasing from him, Tuck, and the note was obtained by fraud.

The bill then charges that, after obtaining the note, Tuck left Erie and was not heard from until the 13th of October, 1873, when complainant received a telegram from Childs & Prince, bankers in Chicago, asking if complainant's note to Tuck was all right, to which complainant replied it was not all right, and in three or four days thereafter complainant received a letter from these bankers to the effect that his

telegram did not reach them in time to prevent them advancing upon the note to Tuck seven hundred dollars, and that they held the note as collateral security therefor.

Answer under oath was waived. The prayer of the bill of complaint was, that Childs & Prince be restrained from buying this note and from selling, or in any manner disposing of the same, except to complainant, and if they had bought it in good faith, or had advanced money on it to Tuck, that they may be decreed to deliver to complainant the note upon payment by him of the amount advanced by them, and that complainant might be subrogated to their rights, and that they deliver up to complainant any notes of Tuck or other securities held by them from or against Tuck for this advancement, and that the note in question might be delivered up and cancelled, and for further relief.

An injunction was allowed, and defendants Tuck, and Childs & Prince, filed their answers, the latter stating, in substance, the receipt and possession of complainant's note, that they had advanced seven hundred dollars upon it without notice of any infirmity in it, and held it as collateral security therefor. They admit having in their possession some silver mining stocks received from Tuck, and will present a list of the same when required by the court, and have no other property of Tuck.

Tuck answered the bill at length, and in detail, in which he gives his version of the transaction; admits the visit to Erie in July, 1873, where he endeavored to form a company to purchase a two-thirds interest in these mines, and admits he represented to complainant and others there that one Scribner, of Salt Lake City, owned a two-thirds interest in these mines, as alleged, and that he would sell this interest for forty thousand dollars, and that Sanger had a deed for that purpose; admits they spent some time in Erie; that he there represented he had no interest in the mines; that he came with Sanger as a professional attendant, he, himself, being a professional and practical geologist and acquainted with

mines and mining in Utah territory, and for that reason could speak more confidently of the character and value of these mines; that they (he and Sanger) represented that the mines were valuable, yielding rich copper ore, with more or less gold and silver, and that Sanger had an interest of one-third in these mines as an investment, and that Scribner would not sell his two-thirds for less than forty thousand dollars. He admits they then left Erie, and that he, Tuck, returned to that place on the 1st of August, 1873, with a deed from Scribner of his two-thirds interest, and represented to complainant and the others that it was executed to him to enable him to convey that interest to others, for not less than five thousand dollars for each share of an undivided twelfth part of the same, but denies that he represented to complainant or others of Erie that he had given his personal obligation to Scribner for forty thousand dollars, or other sum, as a guaranty that he would sell his interest for that sum and secure its payment by sales of shares, or otherwise, and denies making the representations to complainant or others of Erie, alleged in the bill.

He admits he did state to complainant, and others of Erie, that no reduction in price could be obtained of Scribner; that the mines were of the capacity and value as alleged in the bill, and that he made such representations in order that complainant and the others might be induced to examine the mines themselves, and satisfy themselves, upon such examination, of their value, preliminary to the formation of such company for working the mines, and that all the representations made by him were true in every particular, and that the representations were so understood by complainant and the others to have been made for the only purpose of inducing them to examine the mines, and thereby ascertain if it would be advisable for them to embark in the enterprise; that, thereupon, complainant and the others appointed a committee, consisting of M. R. Barr and Irving Camp, to proceed to the mines and examine into their capacity and value—he, Tuck, promising to accompany the committee to the mines, which

he did; that the committee, when at the mines, examined them fully, and at defendant's suggestion they went to "Mammoth" and "Copperopolis" mines, at East Tintic, eighty miles from Salt Lake City, to examine those mines, in order to assure themselves of the character, value and extent of the mines in question, they being of the same general character of the mines in question, and so understood by this committee at the time; that after a critical examination by the committee of these Tintic mines, they returned to Salt Lake City and again went to the mines in question and made another thorough examination of them, and took ores from the mines and had them assayed to ascertain their richness and value; and, thereupon, the committee expressed themselves to be more than satisfied with the result of their investigation, and said to defendant and others that the mines were of greater value than had been represented to them by Sanger and Tuck at Erie; that the committee, whilst at these mines, made arrangements to purchase a favorable site for the company; that, shortly thereafter, the committee and defendant returned together to Erie, the committee reporting to the parties the result of their mission, and of their examination of the mines, to complainant and the others interested in the enterprise, and they reported to these persons that these mines were of great value, and better, in every respect, than had been represented.'

The answer then alleges that, upon this report of the committee on their return to Erie, the company was formed, composed of certain persons, among whom were complainant and defendant Tuck, for the purpose of purchasing Scribner's interest in these mines and operating the same; that complainant, relying upon the report of the committee so made, purchased of defendant one share, being one-twelfth, for five thousand dollars, executing his note at six months therefor, whereupon defendant executed to complainant a deed for such share. He denies that complainant was deceived by any representations made by Sanger or himself respecting these

mines, and did not rely upon the same, but did rely upon the report of the committee alone. He denies he obtained the deed from Scribner for five thousand dollars, or a mere nominal sum, or that he represented to complainant, or any one else, that he had given Scribner forty thousand dollars or any other sum, and denies all fraud. He admits leaving the note with Childs & Prince as collateral security for a loan of seven hundred dollars, and thereupon defendant entered his motion to dissolve the injunction.

At the March term, 1874, a general replication was filed, and the cause set for hearing at April term, 1874.

On the hearing, against the objections of defendant, the court permitted complainant to amend his bill by alleging an offer and willingness on his part to reconvey to the defendant all his interest in these mines, and title, conveyed to him by defendant by his deed.

A decree passed, as prayed in the bill of complaint, the note in question declared fraudulent and void, and to be "annulled, set aside and cancelled," and that Childs & Prince, upon the payment to them by complainant of the seven hundred dollars loaned defendant, and interest thereon, deliver the note to complainant, and that complainant reconvey the property to defendant, covenanting that he has done nothing to incumber it, etc.

Messrs. BROWNELL & MONTONY, for the appellant.

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

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from the circuit court of Cook county, to reverse a decree entered in that court in favor of Jerome F. Downing against J. H. L. Tuck and others, cancelling a certain note executed by the complainant to the defendant Tuck, for certain mineral lands in Utah territory, sold and conveyed by the defendant to complainant. The cause was

regularly set for hearing on bill, answer, replication, and proofs heard, and a decree passed as prayed. The defendant appeals.

It is unnecessary to consider the point made by appellant, questioning the right of the court to allow an amendment to the bill of complaint on the hearing, for, in our view of the whole case, appellee has no merits.

Appellee, under the second head of his brief, contends there are three elements of fraud in this transaction, or three classes of fraudulent representations; and, first, with regard to the price for which Scribner's two-thirds interest could be bought; second, the representation made by appellant to appellee that Camp and Scott had paid, each, five thousand dollars for a share, and that Noble had paid for two shares; and, third, the false representations made by appellant as to the character, quality and condition of the mines.

On the first point, there being no fiduciary relation between the parties, such a misrepresentation, if one, is not sufficient cause to rescind a sale. *Banta* v. *Palmer*, 47 Ill. 99. If the price alleged to have been paid, in that case, was thousands of dollars instead of units, the principle would be the same—that is not controlled or affected by figures. We also refer to 1 Story's Eq. Ju., secs. 199, 200; *Merryman* v. *David*, 31 Ill. 404.

But what are the real facts on this head? Scribner, through whom appellant claimed, was, with one Wood, the undisputed owner of the property in question, the legal title being vested in Scribner alone. He was an experienced miner and prospecter, and had sold to Lucian P. Sanger an interest of one-third in these mines, and they, not having the necessary capital, were desirous of finding those who had and were willing to invest, for the purpose of further developing and working the mines. Scribner was examined as a witness in this cause, and he stated, and it is not contradicted, that the first time appellant went East with Sanger, he (Sanger) had a deed, or some other writing, giving him the control of this

two-thirds interest, and he had given his obligation to pay nine thousand dollars therefor, in sixty days, or return the papers. There was no agreement between the parties as to the selling price to other parties. When they went East they were not acting for witness or Wood, but for themselves. No sales were made by Sanger at Erie, and he returned the papers to Scribner, who did, about the 24th of July, 1873, execute a deed to appellant for this interest. Appellant gave his obligation for nine thousand dollars, which recited if they did not get their pay in sixty days, they (Scribner and Wood) were to hold the mines—appellant was to reconvey to them. At any time, Scribner testifies, their interest could have been purchased for ten thousand dollars. He further testified, when Barr and Camp (the committee) were at Utah, appellant had the sole right to determine the value for which this two-thirds interest should be sold. On the return of appellant to Utah, he paid Scribner for his interest, telling him the property had been sold for fifteen thousand dollars, saying, he and Sanger still retained an interest, but how much witness did not know—don't think they ever told him.

Upon this point appellant testified, that Mr. Noble asked him in his bank at Erie, the second time he was there, if he did not think if he (Noble) was to go to Utah, he could buy this property of Scribner for less money than appellant was asking for it. Appellant replied, "No, not a cent less," and this, as appellant testified, for the reason he had the deed for the property in his possession, and showed it to Noble, and said to Noble he had given Scribner his obligation. Appellant repeated this to the other parties, and showed to all of them the deed he had from Scribner, and told them he had given Scribner his obligation, not naming forty thousand dollars he had given, but that they could not purchase the mines for less than forty thousand dollars of Scribner, for it had ceased to be Scribner's property.

The pretense these parties were not dealing with appellant himself, but with Scribner through him, is put at rest by

this testimony and by the exhibition of Scribner's deed to appellant for this property, sold and conveyed to him, in consideration of nine thousand dollars. All this occurred after the return of the committee from Utah, and after they had made their report, and shows conclusively they were dealing with appellant as the owner of the property, which he, in fact, was.

Appellee testified, that appellant told him the contract for the sale of the mines had virtually been transferred to him. Appellee, then, before he bought, and executed his note, knew when he was trading with appellant he was negotiating with the real owner of this two-thirds interest, who made the representations he did make as owner of the property, eager to get the best price he could for it.

Now, when this deed to appellant, exhibited freely to appellee and all the other parties before the sale, showed on its face that the consideration paid or agreed to be paid by appellant was only nine thousand dollars, how could it be material if he did state he was bound to pay forty thousand dollars for it? There was the deed which appellee saw and read, expressing nine thousand dollars as the whole consideration. Can it be believed these parties could have been influenced by this declaration when they were confronted by the fact that nine thousand dollars was the price appellant had paid or was bound to pay Scribner? It is folly to urge that this statement of appellant influenced the action of appellee in any degree. It could not have been so, appellee being a man of business capacity, and the general Western agent of one of the most extensive corporations in the Union. Justice STORY says, if a party knows a representation to be false when made to him, it can not be said to influence his conduct; and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make, under such circumstances. 1 Story's Eq. Jur. sec. 202. Courts of equity do not aid parties who will not use their own sense and discretion upon matters of this sort. Appellant was

dealing with his own property, and had a right to "puff" it in the most extravagant terms, the other party being at full liberty to exercise his own judgment about it. There is nothing in the record to contradict appellant in these respects, and it must be taken as true. The deed spoke a language all could understand, and that informed these parties appellant had purchased the property for nine thousand dollars, and common sense should have taught them he had the right to sell it for as much as he could get for it, he himself occupying no fiduciary relation. *Banta* v. *Palmer*, *supra*.

It is not fair to say, as appellee does in his brief, that he was dealing with appellant as a partner, and between partners the utmost good faith must be observed. The evidence does not show this relation. A partnership is not the theory of the bill. Appellant owned this interest, and desired to divide it into eight parts, and sell as many parts as he could find buyers. When appellee bought one share, he became a tenant in common with appellant, and when the others purchased their shares, they also became tenants in common with appellant. There were no articles of co-partnership, verbal or written, no mutual responsibilities resting on these parties; the proceeds of the sales of the several shares belonged to appellant as proprietor and not as a partner. Not being a partner in a partnership, appellant was not responsible to any of them, and is not accountable to his co-tenants for his acts of sale. Besides, appellee argues that appellant in this matter was acting as the agent of Scribner, and, as such, practiced the deceitful arts charged in the bill. If so, it is utterly impossible he could be a partner with appellee and the other purchasers, for he could not act for both. The whole case shows there was no relation whatever of trust or confidence between these parties; but it does show appellant owned the property, and appellee bought one share after it had been thoroughly examined by a committee of gentlemen he aided in appointing, and without the least reliance on the

representations of appellant. We think the proofs show appellant was acting for himself alone, in this transaction.

Having disposed of the first element charged as fraud by appellee, the second will be considered—the representations made by appellant to appellee that Camp and Scott had each paid five thousand dollars for a share, and Noble had paid for two shares.

If appellee chose to rely upon such a statement, when these persons were his near neighbors, seeing them, possibly, every day, it was his own folly. But, as we understand appellee's testimony on this point, he said, before he gave his note, appellant said he had "closed up" with all the other parties, and delivered the deeds. Appellant did not say they had paid him, but that he had closed the matter with them by delivering the deeds. Had appellee desired fuller information on this subject, he could have inquired of the parties. But it is strange that a man of business and experience, such as appellee is, should place any reliance on such statements, and, whether true or false, it is impossible to believe they could have influenced the decision of such a man as appellee is represented to be; and it appears to us it was of no importance how appellant might dispose of this property, it being his own. How he closed up the matter with these persons, was no business of appellee, and concerned him in no possible way.

The third element of fraud, and one most worthy of consideration, is the alleged falsity as to the character, condition and quality of these mines. We have searched the record with great care for proof to sustain the charge of falsehood in this respect. In addition to what we have said in regard to the purchase of a mining interest, we will state the facts as they appear to us in the record.

It is not denied, when the committee went to the mines to examine them, they were treated with perfect fairness by Scribner, Sanger and appellant, and every aid afforded them to a full and satisfactory examination. The record shows all

their acts were in the utmost good faith, and prompted by a sincere desire to furnish all the information they could, before appellee and the others should make the purchase. What do the witnesses say on this point?

Scribner says, the committee examined the mines thoroughly. They took up the ore; they broke off pieces, and witness broke off some from different places in the mines. They took that ore and returned to Salt Lake City, with the intention of having it assayed, and told him afterwards they had it assayed. Scribner accompanied them to Brigham Canon and Copperopolis, to examine the mines there; were gone two or three days, and whilst in Brigham Canon they examined the Winnimuck mines. On their return they went again to these mines, took other specimens of ore, and examined the ground thoroughly, and told witness, when they got back to town, they got their assay certificates; and then Mr. Barr, in witness' room in Salt Lake City, said, they intended to take the mines, and that they were better than Sanger and appellant represented, and that he was more than satisfied, and if they "played out" there was no one to blame. Scribner further says, the committee went to examine the mines in the Tintic district, in order to compare them with the mines in controversy—that was what they said. They went away satisfied, when they examined the Tintic mines, that these they were about to purchase would turn out as well, judging from what they could see.

Mr. Camp, one of the committee appointed by appellee and his associates, testified: We examined these mines and their development, and took specimens of the ore therefrom to assay, and, on our return to Salt Lake City, left them with the assayer, John McVickar, for assay by him. We then went to the East Tintic mining district, to visit the mines known as "Mammoth," "Copperopolis," and "Chrisman Mammoth," which we inspected. These were similar in their ores to the mines we were intending to purchase. We then returned to Salt Lake City, and went from that place to visit

the Winnimuck mines in Brigham Canon. This last mine is only one and a quarter miles from the mines which were the subject of negotiation. On our return we made a second and further examination of the out-crop of the veins or ores, and of the ore in the openings and cuttings at or near the junction of the "Aqua Frio" and "Black Metallic" mines. We then returned to Salt Lake City, where we obtained the report of the assayers, and made examination of the abstract of title of these mines, at the recorder's office, and returned to Erie. On our return to Erie, the associates or parties spoken of were called together, and our report made. The report was, that we found the situation, surroundings and development of these mines fully up to the representations made by Sanger and Tuck, and the assay of the ores, on an average assay, three or four per cent better than the assay Sanger and Tuck had shown at Erie, and the title thereto reported we found all right. Then a canvass commenced for getting up the association for the purchase of shares, when appellee took one, etc.

Appellant, in his testimony, states that his object in visiting Erie was to interest capitalists there to such an extent that they would send a committee to examine these mines, and if they found them as good as represented, they could have a two-thirds interest, at the rate of sixty thousand dollars, or five thousand dollars each one-twelfth. Drew up a subscription list, embodying these facts and conditions of sale. Among those who signed it was the appellee. Met the committee appointed to examine the mines, at Joliet, and proceeded with them to Utah. Took them to the mines, which they carefully examined, made measurements of the work done and of the amount of the ore inside, and estimated the amount of the ore in the dump, and they said the out-crop and the appearance of the indications of these mines were really superior to that of the out-crop of the "Mammoth' and "Copperopolis." While at the mines the committee took a large number of samples of ore

from the mine, in different locations, and also from the dump, and brought them to Salt Lake City for assay. He further testifies, that Barr, on the next day, employed Scribner to go back to these mines and purchase another mine, called an extension of "Aqua Frio," which he did, Barr paying for the same by draft. The committee remained thereafter at the city one day, to attend to the assays, and went again with witness to the canon to buy a location for a furnace site. Met Scribner there. The ground was selected, and Barr authorized Scribner to buy it, which he did, taking deed to Barr; next day started for home. Barr left the train at Peru, for a short visit. Witness left at Joliet, promising to meet them at Erie at an early day, to perfect the papers. The committee were more than pleased with the mines. They made a written report from Utah about them, and at Erie a meeting was called and the report considered, and Barr then and there, having before his visit to the mines taken one share, said he would take two shares, and did so. A company was then organized, of which appellee was president. Appellee was to have paid cash for his share, but complaining of hard times, and that he had been purchasing real estate, asked indulgence of six months. Witness had employed nine men at the mines, and commenced taking out ore immediately, and piled on the dumps as much as one hundred and fifty tons, as he thought. It was measured, and amounted to more. Had business East, and left the mines in charge of Joseph Hicks, as foreman. When East, Mr. Barr, in November, about the middle, came out to the mines, which had been worked since August 20. By Barr's orders work was suspended entirely.

This witness fully sustains the others as to the favorable appearance of the mines.

Lucien P. Sanger was familiar with the mines, and corroborates all that has been said as to their flattering appearance. The assays averaged $23\frac{7}{10}$ copper, $70 in silver, and from five to eighteen dollars in gold, to the ton. He went to Erie to

get capital to assist in developing the mine, he owning one-third of the whole; rode with Barr from Joliet to Chicago, on his return from examining the mines, and conversed freely with him; he said he had examined them thoroughly; had been to Tintic and examined the mines there having the same character of ore; that the prospects were better than he and appellant had represented them; his opinion, as a miner, is, that the mines should be worked by all means, the indications being there is there one of the biggest mines in the country. Witness was a large owner in these mines, and had paid all his assessments. On October 20, 1873, the drift was 120 feet; after going through barren ground a number of feet, the rock was becoming very much stained; had it assayed, and it went $403 to the ton in silver; believes these stains indicate the biggest kind of mineral; regrets the work was stopped, for the ground is not proved at all; stopped without his knowledge or consent, without consulting him, while he was absent in the States; it was bad policy to stop.

Experienced miners, well acquainted with these mines, testify the ores are copper, gold and silver producing ores; from out-crop and outside appearance, the mine was very large; such property worth sixty thousand dollars; in buying and selling mines, people buy and pay, or agree to pay, according to the prospect in sight; out-crop very flattering, showing a large amount of mineral in sight in the open cuts and strippings; the work done on them in August and September done with very poor judgment; the tunnel was run according to the stratification, when it should have been run to cut the stratification, so as to cut the vein; acquainted with similar mines in that vicinity, but with none with a prospect so flattering as the mines in question; from the out-crop and ore in the dumps, would consider the property worth from seventy-five thousand dollars to one hundred thousand dollars; parties purchase mines on the prospect, without warranty or guaranty, and on the mineral in sight; there is no custom requiring guaranty or warranty; Tuck is an honorable man, and

well posted on mining and scientific matters connected therewith; have a high opinion of the property from its showing; never been in Tuck's employment.

Another witness says, the finest prospect on the surface he ever saw; the out-crop indicated a very valuable mine; at the time this was sold, no mines were being sold in that vicinity of a similar kind; such a thing as a warranty of a mine on the Pacific coast is unknown; no custom of the kind; buy and sell on the ore in sight; several mines very valuable now there, lately discovered.

Joseph Hicks, an experienced miner, worked these mines two months for Scribner and three months for the Erie Mining and Smelting Company; ordered to quit work by Barr; prospect favorable, when he quit, of striking ore in paying quantities, but impossible to tell how soon; judged it bad policy to quit; impossible to tell the actual value of a mine by the prospect; indications good; met Camp and Barr at the mines; they examined the mine two different days; took samples of ore; when they visited it in July, 1873, the prospect was favorable for a large mine.

McVickar, the assayer, testifies the out-croppings of these mines are similar to those of the "Mammoth" and "Copperopolis;" no guaranty is given as to the quantity of ores or minerals which will be produced from mines, in selling them; people buy from the prospect in sight; have made a great many assays from these mines, some for Scribner; and in August last made five for Barr and Camp; the average of those assays would be about 24½ per cent copper, seventy dollars in silver and eleven dollars in gold per ton of two thousand pounds; gave these results to Barr and Camp.

This proof shows clearly that, at the time the sale was made, and this note executed by appellee, the mines were substantially as represented by appellant and Sanger, and the committee that examined them thought them even better.

Against this mass of testimony as to the appearance of the mines when sold to appellee and others, we have the testimony

of Wellington Downing, son of appellee, a young man about twenty-three years of age, who was sent out to the mines in August, 1873, who had no experience, and who, Sanger testifies, acted as cook to the hands, and took charge of the water supply, and sometimes the check roll of the men. He quit in November following, because no encouragement to proceed further—indications then very unsatisfactory.

Barr also figured as a witness for appellee. What he discovered on his second visit to the mines, in October, 1873, or how they appeared, has nothing to do with the decision of this case. The purchase was made on the faith of his report as one of the committee, in July previous. The proof, as we have seen, sustains the representations then made. Just before he made this second visit, the great money panic of September had produced dismay and trouble throughout all departments of business, and these gentlemen, though connected with large moneyed corporations, found it difficult to raise means. Money is the sinew of mining, as of war, and that supply failing, the mines were a fraud, and the whole thing a cheat and a swindle. It matters not how the mines turned out. If the prospect was as represented when appellant sold, the purchasers are bound to stand to the bargain.

Who are these purchasers complaining?

The complainant, Jerome F. Downing, is a man forty-seven years of age, residing in the important borough of Erie, in the State of Pennsylvania, and the general manager in the West of one of the most known and substantial insurance companies in the United States, known as "The Insurance Company of North America, at Philadelphia."

Orange Noble, another member of this Erie Mining Company, was fifty-six years of age, and president of the "Keystone National Bank of Erie."

Matthew R. Barr was fifty-six years of age, and had been, for a long time prior to this transaction, engaged in the iron foundry business. He was one of the committee to visit these mines in person. These persons were the principal witnesses

for complainant, and their testimony, at first blush, and without a careful examination, might tend to sustain some of the allegations in the bill of complaint. It is upon proof of these allegations, if they establish fraud, that relief can be had, and upon them only. A party can not make out one case by his bill and another by his proof—they must correspond. The nature of the subject bargained for, and what was sold; the character of the representations made, whether true or false, and if false, were they material; and how does the evidence preponderate, taking the whole case into consideration; and care must be observed in order to distinguish mere opinion from facts.

After a careful examination of this record, we are satisfied no false representation of facts is established against appellant, unless it be in respect to the amount he was to pay Scribner for his two-thirds interest in these mines, forty thousand dollars, and for which he had given his personal obligation. Appellant denies having made this latter statement, but in this he is contradicted by several witnesses, all interested, who testify he did so state. But we hold, admitting he did so state, it was of no importance. It was not a fraud in legal contemplation, there being no relation of trust or confidence between these parties, creating a duty resting on appellant to state the truth. It might be morally wrong, but the law can not lay hold of it. This doctrine was distinctly announced by this court in *Banta* v. *Palmer*, 47 Ill. 355. There, the plaintiff had paid defendant eighty-five dollars per acre for the land, on defendant's representation to him that he himself had paid that sum for it, when, in truth and in fact, he had paid but seventy-five dollars per acre for it. The court say, if no fiduciary relation existed between the parties, however wrong, morally, it may have been in the defendant to misrepresent the price he had paid for the land, the misrepresentation does not entitle the plaintiff to recover back the difference between what he had paid for the land and what it had cost the defendant.

These gentlemen trading for these mines were old and experienced men of business, mingling and taking active parts in the struggles of life, and it could be of no possible advantage to them, in determining how much they could risk in a speculation like this, what the seller had paid or was bound to pay for it. Besides, this representation could have had no effect when the deed from Scribner to Tuck, conveying his two-thirds interest, expressed a consideration of nine thousand dollars only. These parties purchased on the strength of this deed, as assuring Scribner's title to be in appellant for the consideration of nine thousand dollars.

If one has a horse, and, proposing to sell, shall assert that he paid one thousand dollars for him, when the bill of sale expresses a consideration of one hundred dollars only, it can hardly be said a purchaser of the horse for two hundred dollars, and that sum greatly above his value, can hope to rescind the contract on the ground of such a misstatement. The truth is, such statements by practical men, as these parties all are, are never regarded, and enter not into the conclusions they may reach as to the value of an article. Practical men, like these, act on their judgments of values. The declarations of appellant, that he had given his personal obligation to Scribner for forty thousand dollars, was to these business men but as the idle wind, the mere vaporing of one whose only object was to get a high price for an article he owned and desired to sell.

This court said, in *Miller* v. *Craig*, 36 Ill. 109, upon this question of fraudulent misrepresentation, the appellant, in endeavoring to effect a trade with appellee, used no more *artifice* than is usual and allowable where a party wishes to dispose of property, real or personal. He has a right to exalt the value of his own property to the highest point his antagonist's credulity may bear, and depreciate that of the other party. This is the daily practice, and no one has ever supposed that such boastful assertions or highly exaggerated description amounted to fraudulent misrepresentation or

deceit. The parties were dealing at arm's length and on equal grounds, and their own judgments were to be their guide in coming to a conclusion. It is proved that complainant had the fullest opportunity, of which he availed, to examine the property, and afterwards moved into it.

It will be remembered, the evidence shows, that no sale was effected by appellant on his first visit to Erie with Sanger. They went there for the purpose of procuring capitalists to embark in this mining enterprise, all of which are, in their incipiency, hazards which few besides practical men are willing to incur, and men who have money to invest. The world is full of such, no one of whom enters into associations of this nature with a certainty of ultimate success. Appellant, as a practical geologist, had freely and earnestly expressed to these people his convictions of the value of these mines, but he desired, before any investment was made, a committee should proceed to Utah, examine and report. A committee was raised, of which Barr, a man of great experience in the iron foundry business, was one. Mr. Irving Camp, also a prominent business man of Erie, was the other member of the committee, and they, with appellant, proceeded to these mines, examined them critically, went eighty miles further south, to visit the mines of East Tintic, to compare the ores of the mines controlled by appellant with the ores of these rich and productive mines. They returned and again visited these mines, again examined the prospect, broke off fragments of the ores, took them to a noted and competent assayer at Salt Lake City, to be assayed, who pronounced them such ores as had been represented, and as valuable, and the committee were well satisfied with the prospect and with the promises of rich returns. So much pleased was Mr. Barr with the appearance, that he purchased, on his own private account, an adjoining mine, for which he paid several thousand dollars.

The committee returned to Erie and made their report, in all respects favorable, though appellee testified it was not

satisfactory to him. Yet he did, of his own free will, after the report was made, purchase one-twelfth interest, and executed the note in question therefor. It is idle to say or pretend this report did not influence him, but the false representations of appellant did; that he relied upon them, and not upon the report of the committee. But the truth is, the report of the committee sustained appellant substantially in the declarations he had made. It is not proved he was guilty of stating anything which was not true, save and except as to his personal obligation to pay Scribner forty thousand dollars, and this, we have shown, was unimportant, and not such a deceit as the law forbids.

It is in proof that appellant rendered all the assistance in his power to the committee in their examination, and made to them many statements of the richness of the vein, its extent and value, and spoke of it as the mother vein of all this country; that there never was such a "blow-out" without there being a mammoth vein. This was all matter of opinion on appearances visible to the committee men, and on which they could form their own opinions, and did so, and were satisfied with the prospect; so reported to appellee and their other associates; after which they executed their notes.

It is in proof that, in buying and selling mines, people buy and pay, or agree to pay for them, influenced by the prospect. No man, however scientific he may be, could certainly state how a mine, with a most flattering out-crop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. "The sight" determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their out-crop!

The extravagant declarations of appellant after his return to Erie with the committee of examination, and made in their presence, that a silver mine with copper croppings was an inexhaustible mine of wealth; that the "Aqua Frio" and "Black Metallic" were the biggest things in Utah; that situated at the Fork Hills was greatly to their advantage; that they were well developed mines, with well defined veins; that he had never seen, in all his experience, such a "blow-out;" that a furnace ought to be erected at once, as the ore could be mined, and all the money put into it could be got out in a few months—was mere gassing, and for the purpose of extolling what these men, through their committee, had seen, and could judge of the prospects and promise for themselves. There was nothing unlawful, or prohibited in law, in all this. It was after this examination and report by Camp and Barr the share was bought by complainant, and the note in question executed and a deed delivered and accepted for the property. It is impossible their statement should be regarded as anything more than opinions, for no man can tell how a discovery like this may result. Appellee could have understood them in no other sense, and the same may be said of the report of the committee. They were opinions founded on facts as they appeared to them.

Suppose, in the oil region, which is in the neighborhood of appellee and his associates, an explorer there had sunk a shaft out of which flowed ten barrels of oil in twenty-four hours, and in the next twenty-four hours twelve barrels, and continued to flow ten or twelve barrels a day, and he should extol it as the best well in all that region—should induce Erie capitalists to visit it, who go and see the flow, and are more than satisfied after a critical examination, and they return with the owner to report, and he again makes the most extravagant representations—asserts it is the mother well of all that country; that there never was such a flow without there being an abundant supply; that it would flow one hundred barrels in twenty-four hours, and it could be purchased

for fifty thousand and no less; a company is formed, each taking one share at five thousand dollars; one of the associates is made president of the company, as this complainant and appellee was of the Erie Mining Company; should send his son, a young man without experience, to manage the well, and soon after one of the leading associates should visit the well and find it was flowing less than five barrels in twenty-four hours—could, under such circumstances, a court of equity interfere to rescind the contract on the ground of false representations? Where is the essential difference between the oil well and a mineral discovery? One is a liquid, the other a solid, and that is all the difference. In purchasing the oil well, they would buy from "the prospect," and no court would hold the extravagant assertions of the seller as anything more than gassing. The court would not hold them as statements of fact, but as opinions, which the fact, as it appeared, justified, or at least presented ground on which to base the statement. So in the sale of a mine. These exaggerated statements are always made, and a man's own natural judgment must be his counselor and guide. The great "Comstock" mine of Nevada, which has poured into the country its millions of silver, was bought and sold on the prospect, and for a few dollars. The discoverer could not pry into futurity; he took his chances for a few dollars, whilst those purchasing have a bonanza of scarcely appreciable value.

It is in proof the son of appellee, a youth inexperienced in mining operations, was sent out in August, 1873, to oversee these mines, and the operations to be performed there, and in October of that year Mr. Barr again went to the mines and was disappointed—gave it up as a bad job—thought they had been swindled; whilst Hicks, a practical miner in charge of the mines, and Tuck and Sanger, who owned an interest twice as great as any one of their associates, protested against quitting work, being well assured by perseverance their brightest hopes would be realized. In September, 1873, the great

money panic occurred, and it is quite probable these gentlemen's associates found it somewhat difficult to raise the money necessary to develop these mines fully, and because no rich vein was immediately struck they quit the matter in disgust, and now insist upon rescinding the contract on the ground of fraud!

Whilst writing this last paragraph, a newspaper article attracted attention. It was in regard to the recent discovery of a silver mine at Newburyport, in the State of Massachusetts, a locality where it was never supposed silver ore had a home. The statement was this: "Six hundred feet of land on the Boynton lode were sold last week to a Springfield company for one hundred and sixty thousand dollars." This purchaser has purchased on his judgment from the indications, as complainant did on the report of his committee. Should this six hundred feet turn out to be a bad speculation, could the courts of Massachusetts be successfully invoked to rescind the contract, and have the notes, executed for the purchase money, if that was the fact, given up to be cancelled? We fail to see any real difference in the cases.

We are familiar with the fact that there is a large class of cases in which courts of equity will grant relief where there has been a misrepresentation, or, as it is called, *suggestio falsi*. To justify such interposition, it is not only necessary to establish the fact of misrepresentation by clear proof, but it must be about a material matter, or one important to the interests of the party complaining; for, if it was of an immaterial thing, or if the other party did not trust to it, or if it was a matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other, there is no reason for equity to interfere to grant relief on the ground of fraud. 1 Story Eq. Jur. sec. 191. The misrepresentation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion equally

open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judgment. Matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against. Thus, a false opinion, expressed intentionally, of the value of the property offered for sale, where there is no special confidence or relation, or influence between the parties, and each meets the other on equal grounds, relying on his own judgment, is not sufficient to avoid a contract of sale. Ib. sec. 197.

Again, it is said, nor is it every wilful misrepresentation of a fact which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort. Ib. sec. 199. This is illustrated by a case at law, *Vernon* v. *Keys*, 12 East, 637, where a party, upon making a purchase for himself and his partners, falsely stated to the seller, to induce him to the sale, that his partners would not give more for the property than a certain price. It was there held, by Lord ELLENBOROUGH, that no action at law would lie for a deceitful representation of this sort.

Story thinks, 1 Story Eq. Jur. sec. 200, a court of equity, under like circumstances, would probably hold a somewhat more rigorous doctrine, at least if the party appeared to have been materially influenced by the representation, to his disadvantage, and if it did not avoid the contract, it would refuse a specific performance of it. But he says, in all such cases the court will not rescind the contract without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as show the contract was founded upon them. He further says, section 200a: On the other hand, if the purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of

knowledge open to him or his agents, he can not be heard to say that he was deceived by the vendor's misrepresentations, for the rule is, *caveat emptor*, and the knowledge of his agents is as binding on him as his own knowledge. Courts of equity do not sit for the purpose of relieving parties under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion.

Of puffing and commendation of commodities this author says: However reprehensible in morals are gross exaggerations or departures from truth, they are, nevertheless, not treated as frauds which will avoid contracts. In such cases, the other party is bound, and, indeed, is understood, to exercise his own judgment, if the matter is equally open to the observation, examination and skill of both. Sec. 201.

These principles have been recognized by this court in several cases. To test this case by them, we have given a full statement of the leading facts.

That the prospect hanging over these mines in July, 1873, when appellee purchased, was as represented, the testimony is conclusive. The seller was not responsible for their condition or for their ultimate value at a future time. There was no warranty—no guaranty, and never is in such sales.

That this was a rich mineral region, we are informed by the report of Mr. Raymond, United States Commissioner of Mining Statistics, made to the Secretary of the Treasury in March, 1872.

In speaking of the "West Mountain Mining District," the *situs* of the mines in question, he says, among the numerous claims there may be mentioned the Winnimuck,—two thousand feet located—vein varies in width from a foot to 10½ feet. The ore is argentiferous galena and carbonates. An English company paid $450,000 for the property. The mines are located at the head of Brigham Canon, and the claims cover several hills by being staked out on imaginary veins running in all conceivable directions. This ore contained only from four to thirty dollars in silver per ton. pp. 314, 315.

Speaking of the Tintic District, he says it is about seventy miles south-east of Salt Lake City. It, as also the Winnimuck, was visited by Barr and Camp, the examining committee, and in the "Mammoth" there is a remarkable deposit of copper ore in limestone cropping out upon the entire slope of a hill facing the broad and well-wooded valley of the Tintic. Much of the ore is ferruginous and poor in copper, but there are masses of rich, dark colored ore, mixed with green and blue carbonates of copper. Considerable quantities of this ore are shipped to Swansea, (in Wales.) p. 317. The percentage of copper in the ores from these claims varies with the care taken in selecting. From ten to fifty per cent may be regarded as a profitable range for the ore in shipping quantities. A very considerable quantity will not run over eight per cent. The value of silver is reported to be from twenty to one hundred dollars per ton. P. 318.

The proofs show, by the assay of the ores of the mines in question, a greater percentage of copper and silver than these, besides eleven dollars in gold to the ton, so that as a speculation, which all such purchases are, they were worthy the attention of men of capital, eager for sudden and great wealth.

In this region is the celebrated "Emma" mine, one of the most remarkable deposits of argentiferous ore ever opened. Of it he observes, without any well marked croppings, there was nothing on the surface to indicate the presence of such a mass of ore, except a slight discoloration of the limestone, and a few ferruginous streaks visible in the face of a cut made for starting the shaft. P. 321.

Mr. Barr need not have been discouraged when, in October, on his return to the mines, which had been improperly worked, by "the rock stained by carbonate of copper and chloride of silver," which he observed. Hicks, the experienced foreman, however, was not discouraged, but as Barr and his associates had, by their shares, a controlling influence, the works were injudiciously abandoned. But this does not affect appellant's claim nor determine his rights, as we

think he has maintained, by proof, all material statements made by him, and which were confirmed by the report of the committee on which, we are bound to believe, appellee acted.

These mines, like all others, were sold on the appearance —on the prospects, as they appeared to Camp and Barr when they visited them in July, 1873. Like an oil well flowing ten or more barrels in twenty-four hours, encouraging the hope it would flow one hundred or more in the same time, and so continue, but is exhausted in a few days, no reason for a cancellation of a contract for its sale can possibly exist. So with a copper mine, or any other mine.

These parties may have made a bad speculation, but as this court said, in *Walker* v. *Hough*, 59 Ill. 375, to justify a court in rescinding a contract executed by both parties, on the ground that one of the parties was induced to enter into it through fraud practiced by the other party, the testimony must be of the strongest and most cogent character, and the case a clear one. Appellee may be a loser by engaging in this speculation, but he did so uninfluenced, as we believe, by any misrepresentations of appellant. It is not for every losing bargain a court of equity will interpose to relieve.

The decree of the circuit court is reversed and the cause remanded. *Decree reversed.*

JOHN B. ALLEY *et al.*

v.

THE BOARD OF SUPERVISORS OF ADAMS COUNTY.

1. ESTOPPEL—*to deny permanent location of railroad on a particular route.* Where the bonds of a county, issued in aid of a railway company under a vote of the people for a corporate subscription, were deposited by the board of supervisors, to be delivered by the depositary ten per cent thereof when the road should be permanently located by a certain route named, that fact to be evi enced by the certificate of the president of the company and the agent appointed by the county, and the residue

only when it should be made to appear, by the certificate of the chief engineer of the company and the county agent, that work had been done and material provided in the construction of the road to the amount of the bonds, as called for, and it appeared that these terms were acceded to by the company, and that, for the purpose of receiving the first installment of ten per cent, the company made and procured the certificate of permanent location, by which ten per cent of the bonds were delivered to the company: *Held*, that by receiving the bonds in the manner stated, the company was estopped from denying that its road was permanently located, as represented in its certificate.

2. MUNICIPAL SUBSCRIPTION—*right to impose conditions.* Where a proposition for county subscription to a railway company to aid in building a road from Quincy, by way of Payson and in the direction of Pittsfield, in Pike county, without any other conditions, was carried by vote of the people, and it appeared that the railway company, by its charter, was not bound to locate its road on that route, but had a large discretion as to the route to be selected, it was *held*, that the board of supervisors, in making the subscription, had the right to impose conditions as to the permanent location of the road upon the route contemplated, and to make the delivery of the county bonds to depend upon the same, and that the company, by accepting such conditions, was bound by them, in respect to its rights under the vote and subscription.

3. SAME—*rendered invalid by non-observance of condition.* Where, by the terms of a county's subscription in aid of a railway company, the permanent location of the road by a certain route was an indispensable prerequisite to the delivery of the first ten per cent of the county bonds, and the company represented and certified to the permanent location of its road as it was contemplated in the conditions of the subscription, and on the faith of it obtained ten per cent of the bonds: *Held*, that this, as against the right of the company to demand the remaining bonds, would be taken as the permanent location of the road, and if the company afterwards relocated its road upon a materially different route, it could have no claim for the delivery of the remaining bonds, it not having performed the conditions on which the subscription was dependent.

4. INTERPLEADER—*proper decree on bill by depositary.* Where county bonds issued in aid of a railway company were placed in the hands of a depositary, as escrows, to be delivered to the obligee upon the performance of certain conditions thereafter by the obligee, but otherwise to be returned to the county, and it was claimed by the obligee that he had performed, and was entitled to their delivery, which fact was disputed by the county, a decree on a bill of interpleader filed by the depositary, dismissing the bill without prejudice, was held erroneous, as it failed to settle the rights of the contending parties and relieve the depositary of his responsibility.

APPEAL from the Circuit Court of Adams county; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was a bill of interpleader, filed by the First National Bank of Quincy, Illinois, against John B. Alley, William S. Woods, the Quincy, Alton and St. Louis Railway Company, and the Board of Supervisors of Adams county. The facts of the case and object of the bill are stated in the opinion of the court. The court below, on the hearing, dismissed the bill without prejudice to the rights of any of the parties, and decreed that Alley, Woods, and the Quincy, Alton and St. Louis Railway Company pay the costs of the suit. The complainants, Alley, Woods, and the railway company, appealed.

Messrs. SKINNER & MARSH, for the First National Bank, appellant.

Messrs. BROWNING & BUSHNELL, for Alley, Woods, and the railway company, appellants.

Messrs. WHEAT & MARCY, and Messrs. WARREN, WHEAT & HAMILTON, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was a bill in equity, brought in the Adams circuit court by The First National Bank of Quincy, in the nature of a bill of interpleader, for the protection of the complainant, in respect to certain bonds which had been formally made by the county of Adams to the Quincy, Alton and St. Louis Railway Company as the obligee, and delivered to complainant as a stranger, to be the bonds of the said county, upon future conditions, when certain things were performed by the obligee, and then to be delivered to the obligee, or, in other words, bonds held by complainant as escrows.

The appellant Woods was the contractor of the railway company for the construction of its road, and became the

equitable assignee of the bonds in question, and claimed them as such assignee. The county resisted that claim, and insisted that the conditions of the escrow had not been performed, and for that reason and others Woods was not entitled to them, and that they should be withdrawn by the county from the depositary.

By the first section of the act incorporating the Quincy, Alton and St. Louis Railway Company, authority was given the company to locate and construct a railroad from the city of Quincy to Alton, by way of the *township* of Payson, from thence to a point within the State of Illinois opposite the city of St. Louis; to lay out their road upon the most eligible and practicable route: *Provided*, that it should not be located more than half a mile west of the bluff in the Mississippi river bottom in Adams county or Pike county, further than a point one mile south of Mill creek, in Adams county.

For some reason, perhaps owing to the limitations upon the route and the want of means, nothing was done under this charter until after an amendment was made by the legislature, by an act of the 29th of March, 1869, which provided "that said company should have power to construct and operate a *branch* railroad from any point in the *route* of the *same*, to and connecting with any railroad built or to be built, extending eastwardly toward the east line of this State." (3 Pri. Laws 1869, 341.)

The acts referred to contemplated a railroad from Quincy southward; and it appears that in order to have one from the same place northward, an act had been passed the 16th of February, 1865, incorporating the Quincy and Warsaw Railroad Company, and authorizing the construction and use of a railroad from Quincy, Adams county, to the city of Warsaw, in Hancock county. No action having been taken under either charter, on the 9th of April, 1869, and before the first mentioned charter was amended, another act had been approved and then became a law, entitled "An act to authorize certain counties and towns to aid public improvements,"

by the first section of which it was provided that the county of Adams, including the city of Quincy, might subscribe for stock in any two companies organized or to be organized for the construction, severally or jointly, of two railroads, one from the city of Quincy northward, by way of the *town* of Mendon, to the *town* of Carthage, etc., and one from the city of Quincy southward, by *way* of the *town* of Payson, in the direction of Pittsfield, in Pike county, and beyond, in an amount, to each of said companies, not exceeding $200,000, or to both a sum not exceeding $400,000, to be equally divided. The second section provided that the subscriptions should be payable in the bonds of the county, in installments, as private subscriptions are called for; prescribed the time the bonds were to run, the rate of interest, and that they should be under the act entitled "An act relating to county and city debts, and to provide for the payment thereof by taxation in such counties and cities," approved February 13, 1865, and declared that said act should be applicable to these bonds.

The fifth section provided for the manner of submitting the proposition for subscription to the legal voters of the county.

The seventh authorized the board of supervisors of each county to appoint two persons to represent the stock of the county. The act went into force from and after its passage. (Pub. Laws 1869, 202.)

Afterwards, and on the 16th of April, 1869, the legislature passed another act relating to the same subject, and declared that it should take effect from its passage, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," the seventh section of which contained the following provision: That "any county, township, city or town, shall have the right, upon making any subscription or donation to any railroad company, *to prescribe* the *conditions* upon which such bonds, subscriptions or donations shall be made; and such bonds, subscriptions or donations shall not be valid and binding until such conditions

precedent shall have been complied with." (Pub. Laws 1869, 319, 320.)

Afterwards, and on the 16th day of September, 1869, in pursuance of a petition, under the aforesaid act of the 9th of April, 1869, the board of supervisors of Adams county ordered an election to be held in that county on the 2d day of November, 1869, that the legal voters of the county might vote upon the question whether or not the county should subscribe $400,000 to the capital stock of said Quincy, Alton and St. Louis Railway Company, to aid in building a railroad from said Quincy, by way of Payson, and in the direction of Pittsfield, in Pike county, in said State, and to aid in building a railroad from said Quincy, by way of Mendon, to Carthage, in Hancock county, etc.—said amount to be equally divided between said companies, etc. The proposition for subscription was carried, and no question is made as to the regularity of the election.

On the 9th day of December, 1869, the board of supervisors of Adams county made an order directing the chairman to make the subscription of $200,000 to each of the railroad companies mentioned, payable in bonds, which were to be for $1000 each, payable in twenty years, with six per cent interest, payable annually, to bear date the 1st day of January, 1870, to be under the corporate seal of the county, signed by the chairman and countersigned by the clerk of the board. And it was further ordered, that said bonds, when so executed, should be deposited by the chairman and clerk with the First National Bank of Quincy, Illinois, not to be registered until after delivery in payment of said subscriptions, respectively; "and that said bonds shall, by said bank, be delivered to said respective railroad companies *only* in manner following, that is to say: ten per cent of said bonds applicable to subscription to the stock of each company shall be delivered to such company when such company shall *have surveyed* and *permanently* located *its railroad* from Quincy to the county line of this county, to appear by the certificate of the president of

such railroad company and of one of the county agents hereinafter appointed; and the residue of said bonds shall be delivered in payment of said subscriptions, respectively, *only when* and *as* the company calling for the same shall show by the certificate of the chief engineer of such company and of either of the county agents hereinafter appointed, or of their successors, that work has been done and material provided on and in the construction of *said company's* railroad in Adams county, to the amount of the principal sum of the bonds so there called for; and upon each payment in bonds of said county, made as aforesaid, the said county shall receive therefor certificates of stock of the company to which such payment is made, equal, dollar for dollar, to the principal of the bonds so delivered. And it is further ordered, that the said chairman and clerk shall, on depositing said bonds with the said First National Bank, take from said bank a proper receipt therefor, in which shall be expressed the *condition* and purposes of said deposits. And if said First National Bank shall refuse to accept said deposits on the terms aforesaid, then the same may be made with any bank in Quincy which will receive the same on the terms aforesaid, to be selected by said chairman and clerk." The order also appointed the two county agents, Maurice Kelly being the one in respect to the Quincy, Alton and St. Louis company.

The bank had no interest in the principal transaction, but was a mere stranger. It accepted the bonds, and, in respect to those running to the Quincy, Alton and St. Louis company, which are the only ones in question, on the 16th day of March, 1870, executed an instrument, under its corporate seal and the hand of its cashier, acknowledging the delivery to it, on behalf of the county of Adams, of two hundred of said bonds, made under the order above mentioned, and declaring that they were "to be by said bank delivered to said railroad company *in* and *only* in the manner following, that is to say," and then setting out in full the conditions of the order, as above

set forth. The Quincy, Alton and St. Louis company, professing a willingness to construct a railroad on the course designated by the act authorizing the subscription, fully acceded to the act of the board of supervisors in prescribing the conditions upon which the bonds were to be delivered, and proceeded to made a survey of the line of the road, and professedly to permanently locate it. This done, about the 26th of March, 1870, the company caused a certificate to be made, obtained the signature of the county agent thereto, and presented it to the bank. It is as follows:

"QUINCY, ILL., *March* 26, 1870.

"We, the undersigned, in *observance of the order of the* board of supervisors of Adams county, do hereby certify to the First National Bank of Quincy, Illinois, that the Quincy, Alton and St. Louis Railroad is *permanently* located, from the city of Quincy to the southern boundary of said county, and that the said railroad company are now entitled, under said order, to $20,000 of the bonds of said county, applicable to said company, and deposited with said bank for delivery, as aforesaid, which appears from the certificate of the president of said company, under the order of the board of directors of said company, and the field notes of the survey thereof.

JAMES W. SINGLETON,
Pres. Quincy, Alton and St. Louis R. R. Co.

MAURICE KELLY,
Stockholder of County.

There is a township in the county of Adams called Payson, and towards the northwest corner of the township is an incorporated village or town of the same name. This circumstance makes the act authorizing the subscription somewhat ambiguous, the language being "to aid in building a railroad from the city of Quincy southwardly, by way of the *town* of Payson, in the direction of Pittsfield, in Pike county," etc. It is claimed by the appellees that the voters and county authorities understood that the village, which was commonly

known as the *town* of Payson, was the point to be reached by the road. By the survey accompanying said certificate, it appears that the company so understood the meaning of the act at that time, for the line established by that survey and pretended permanent location, referred to in the certificate, was from Quincy southwardly to the village of Payson, and then beyond to the county line, in the direction of Pittsfield, in Pike county. This line was clearly within the act, and, therefore, on presentation of the certificate, ten per cent of the bonds (being $20,000) was, upon the faith thereof, delivered to the company.

After these bonds were so obtained, and on the 1st day of August, 1870, the board of directors of the railway company, by resolution, empowered the president of the company to re-locate the railroad, to dispose of stock of the company, the bonds of Adams county and of the town of Payson, for the purpose of constructing and equipping their railroad, and to enter into contracts for the purpose. Full power was given him in the premises. Accordingly on the 26th of October, 1870, the president concluded a contract on behalf of the company, with Woods, for such construction and equipment of the road which was provided in the contract to be a line of railroad from the public landing on the Mississippi river at Quincy to a point on said river in this State opposite the city of Louisiana, in the State of Missouri, etc., upon such practical line and route as should be finally determined upon by the chief engineer.

We have looked, and looked in vain, through this contract for anything which manifested an intention on the part of the company to require any adherence to the route or course prescribed by the act authorizing the county subscription, or which had been previously located. We do find, however, ample authority to wholly depart from that course.

There is an intention manifested to obtain the county bonds; for the contract professes to assign them over to Woods, and the order of the board of supervisors prescribing

the conditions of the delivery is referred to and made a part of the contract. On the 7th of November, 1870, this contract was, by resolution, expressly approved by the board of directors of the railroad company. Under the authority thus conferred, a new line, within Adams county and beyond, was surveyed and permanently located, materially different from the former one, running west of the bluff and in the river bottom. Instead of being by the way of the village of Payson, as the former one was, and in the direction of Pittsfield, it is some three and a half miles southwest of the village of Payson, and merely touches the southwest corner of the township. Instead of being in the direction of Pittsfield, in Pike county, as the other was, it is ten and a half miles southwest of the village of Pittsfield, and several miles southwest of any part of Pittsfield township.

The road was built, equipped, etc., on the newly surveyed line, upon which, within Adams county, money was expended by Woods, as contractor, or the company, for work done and materials furnished, to an amount equal to if not in excess of the $180,000 of bonds in the hands of the bank, under the conditions as before mentioned. Under these circumstances the bonds were demanded by Woods, who possessed all the authority to receive them which the railroad company could give him; but the bank, acting under the instructions of the board of supervisors, refused to deliver them, and the question is, was Woods entitled to them?

It will be observed that the act authorizing the county subscription did not mention any particular railroad company whatever; consequently the company which should qualify itself to come within the provisions of the act, and receive the benefits contemplated, was one which should build a railroad on the course designated by that act. The construction of one substantially variant would not be a compliance, and it would be a perversion of the county bonds for the supervisors to apply them to such road.

Now, under these circumstances, the Quincy and Alton company professed itself willing and held out to the county authorities that it would build the road designated by the statute authorizing the subscription. Therefore the vote was taken upon the question of subscribing the $200,000 to that company, "to aid in building a railroad from Quincy, by way of Payson, and in the direction of Pittsfield, in Pike county." At the election there was a majority in favor of that proposition. This being done, the supervisors, no doubt desirous of protecting the interest of the county and prevent a perversion of the bonds, perceived that here was a railroad company of doubtful solvency seeking the acquisition of the benefits proposed, but which, by its charter, was not compelled to construct its road on the particular course designated by the act authorizing the subscription, but might, within its charter, adopt a route entirely variant therefrom and yet obtain the bonds, and transfer them to *bona fide* holders—when to let the company have them would be a palpable perversion of the bonds. How was this danger to be guarded against? The plan devised for the protection of the county, was that embodied in the order prescribing the conditions on which alone the bonds were to be delivered by the bank to the company.

The provision of that order, requiring a survey and actual permanent location of the road and a certificate of that fact, as a condition precedent to the delivery of the ten per cent of the bonds, was designed, without doubt, to afford an opportunity of knowing, before any delivery was made, that the road was, in fact, to be located on the course designated by the act authorizing the county subscription, and the call for the election made by the board of supervisors. By means of that opportunity a perversion could be prevented. If the road located was clearly variant from the course designated, while that would not affect the right of the company to proceed with its construction, yet it would end all claim on its part to the bonds.

If it was so far variant as to make it fairly questionable whether it was not outside of the course prescribed as the basis of subscription, then the supervisors would have the right, and it would, perhaps, have been their duty, to contest the company's claim to the bonds, and they could have done so without jeopardy.

That condition being prescribed for such a purpose, which is apparent upon the face of the order, the subsequent one is easily understood. It might have been couched in more explicit language, but when the whole order is looked at there is no doubt as to its meaning. The condition that the residue of the bonds should be delivered *only when and as* the company should show, by the certificate of its engineer and the county agent, that work had been done and materials provided on and in the construction of said company's railroad in Adams county, means, and can admit of no other interpretation, said company's railroad in Adams county, which had been previously shown, by the certificate provided for, to have been permanently located. What other railroad could have been meant?

This is the fair and ordinary import of the language employed, and the company and its contractor must be deemed to have so understood it. We have no doubt as to the authority of the board of supervisors to prescribe these conditions. They were obviously necessary for the protection of the tax payers against a perversion of the bonds of the county; and, besides, the railroad company fully assented to the terms of the escrow. Consider the language of the certificate upon which ten per cent of the bonds was obtained: "We, the undersigned, in *observance* of the *order of the board of supervisors* of Adams county, do certify to the First National Bank of Quincy, that the Quincy, Alton and St. Louis Railroad is *permanently* located, from, etc., to, etc., and that said company are now entitled, under said order, to $20,000 of the bonds of said county applicable to said company, and

deposited with said bank for delivery, as aforesaid." Nothing could be plainer than at this time the company had acceded to the conditions of the order, and professed to have complied with the first and most essential of those conditions, viz: the permanent location of its road, and upon a line that was unquestionably within the provisions of the act for the subscription.

That certificate was made for the purpose of obtaining the ten per cent of the bonds. Upon the faith of it they were delivered to the company, and it becomes thereby estopped from alleging that the road was not permanently located, as represented.

We have seen that to the right of receiving the ten per cent of the bonds, the permanent location of the road was an indispensable prerequisite. That to the right of receiving the residue of the bonds, the doing of work and furnishing materials upon and for the road so permanently located, to an amount equal to that of said remaining bonds, was also an indispensable prerequisite. Now, as between the county and railroad company, or its assignee, with notice, as here, for the purpose of determining the question of performance of the conditions precedent by the company, the road, which was so surveyed, represented and certified as that permanently located, for the purpose of obtaining the ten per cent of the bonds, and on the faith of which they were delivered, must be deemed and taken to have been in fact permanently located, and to be the road or line upon which the work and materials should have been bestowed, in order to a delivery of the residue of the bonds. To hold otherwise would be to sanction a gross imposition upon the county, by permitting the company to unjustly deprive it of the very means provided by the terms of the escrow, to which the company assented, for the prevention of a misapplication of the bonds to the construction of a road not upon the line designated by the statute; for it is obvious that the fact whether or not the

road was upon such line could be determined only when a permanent location was made.

The company had, it is true, the general inherent right to re-locate its road, within the limits prescribed by its charter, which gave a large discretion ; but after assenting to the conditions prescribed by the board of supervisors, upon which alone the bonds were to be delivered, and obtaining ten per cent of the bonds upon a professed compliance therewith, in respect to the permanent location of its road, the company, and its assignee, with notice of the conditions, became estopped and precluded by their acts from afterwards relocating the road upon a line substantially variant from that of such professed permanent location, on the making and certification of which the ten per cent of the bonds had been obtained, and from claiming that the work and materials done and furnished upon this new and variant line were bestowed upon that contemplated by the order of the board of supervisors prescribing the conditions upon which the bonds were to be delivered. After obtaining ten per cent of the bonds upon the professed permanent location of the road upon the line contemplated by the act authorizing the subscription or donation, the change, without the assent of the board of supervisors, operates as a fraud, both upon the statute and the tax payers of the county. At all events, it is not a performance of the condition upon which alone the bank was authorized to deliver the bonds to the railroad company. This being the case, the question arises, what disposition shall the bank make of them? It desires to be rid of the responsibility of their custody. To have that question determined was the object of this bill of interpleader.

It is manifest, from the conclusions arrived at, that the decree should have settled the rights of the parties. The bank is a mere stakeholder. On one hand, the assignees of the railroad company claim that they are entitled to the residue of the bonds ; on the other, the board of supervisors insist that the conditions on which they were to be delivered have

not been performed and never can be, and therefore they should be permitted to have them returned to their custody. As already indicated, we are of opinion that neither the railroad company nor its assignees is entitled to them, and that the bank be authorized to restore them to the county, on demand by the proper authority.

The decree of the court below simply dismissed the bill without prejudice, and the railroad company, and Alley and Woods, appeal to this court. The decree was improper. It failed to settle the rights of the contending parties, and will, therefore, be reversed and the cause remanded, with directions to enter a decree in conformity with the views herein expressed.

Under the circumstances of this case, the costs in this court will be equally divided between the appellants and the board of supervisors.

Decree reversed.

Mr. JUSTICE SCOTT dissenting.

Mr. CHIEF JUSTICE WALKER: I am unable to concur in the conclusion announced in this opinion.

WALKER EVANS

v.

RICHARD J. HUGHEY.

1. CONTRACT—*for services—when due.* Where the owner of land agreed to pay an agent $500 for selling the same at $30 per acre, and that the agent might have all he could get above that price, as an additional compensation; and the agent sold for $35 per acre, taking notes for the greater part of the purchase money to his principal: *Held*, that the agent was not entitled to maintain an action as to the $5 per acre until the notes were paid, or, at least, until after their maturity and a reasonable time for collection.

Statement of the case.

2. RECOUPMENT—*must grow out of plaintiff's cause of action.* Where the plaintiff sold land for the defendant, agreeing to take security for the first payment of $3000 on other land of the value of $6000, and afterwards the defendant sold to the same purchaser certain personal property, for the sum of $2500, and directed the plaintiff to take mortgage on the purchaser's farm, then valued at $11,200, for both payments, and record the same, and the plaintiff did take such mortgage, but, through his neglect, it was not recorded until after liens to the extent of $1179.50 had attached to the mortgaged premises, which the defendant, after foreclosure of his mortgage, was compelled to discharge by payment: *Held*, in a suit by the plaintiff to recover the compensation agreed upon for making the sale, that the defendant could not recoup the damages sustained by him in consequence of the neglect to record the mortgage, as the same did not arise out of the contract sought to be enforced by the plaintiff, but that his remedy should be sought in a distinct suit.

APPEAL from the Circuit Court of Moultrie county; the Hon. C. B. SMITH, Judge, presiding.

This was an action of assumpsit, brought by Hughey against Evans, to recover for services and commissions in making sale of certain real estate, under the following contract:

"Richard J. Hughey, of the city of Mattoon, Coles county, Illinois, is hereby authorized to sell my farm, on which I live, situate and being in the county of Franklin, and State of Missouri. Said agent is authorized to sell said tract of land, containing 343¼ acres, at the price of $30 per acre, to be paid as follows: $3000 to be paid on the first of January, 1871, and the balance as follows: $3500 on the first of January, 1872, $3500 on the first day of January, 1873, and the remainder on the first day of January, 1874; all of which payments must bear ten per cent interest per annum from date of contract until paid. For making said sale, I agree to pay said Hughey the sum of $500, and in event that said agent succeeds in selling said land for more than $30 per acre, which he is hereby authorized to do, I agree and bind myself that said Hughey, as agent aforesaid, shall have whatever sum he may get over $30 per acre, as commission, in addition to the $500, and I bind

myself to express in the deed, as the consideration, the whole amount for which said Hughey may sell said tract of land.

The first payment of $3000 must be secured by mortgage on real estate worth at least $6000 cash.

Witness my signature, this 27th day of December, 1869.

WALKER EVANS."

On January 1, 1870, Hughey effected a sale of the farm to John B. Rigney and Hugh J. Rigney, of Moultrie county, Illinois, at the price of $35 per acre, amounting to the sum of $12,015.75, to be paid as follows: $3000 Jan. 1, 1871; $3500 Jan. 1, 1872; $3500 Jan. 1, 1873, and $2015.75 Jan. 1, 1874, for which sums the Rigneys executed their promissory notes, payable to Evans, with ten per cent interest, the Rigneys agreeing to execute to Evans a mortgage on their farm in Moultrie county, Illinois, of 320 acres, to secure the payment of the first note of $3000. Afterward, Evans came to Mattoon, in this State, where Hughey resided, bringing with him a trust deed for the Rigneys to execute on the land in Moultrie county. Hughey represented to Evans that the Rigneys would not execute a trust deed, but would execute a mortgage, which Evans agreed to accept, and left for his home in Missouri, leaving it with Hughey to get the mortgage executed, and to have included in it also another note for $2500, which the Rigneys had given to Evans for stock and farming implements purchased from the latter.

Hughey subsequently procured the mortgage to be executed by the Rigneys, to secure the payment of both notes for $3000 and $2500, and handed the same to a neighbor, who was going to Sullivan, to take to the recorder's office. About a year afterward, this neighbor returned the mortgage to Hughey, saying he had forgotten to give it to the recorder, and Hughey then immediately sent the mortgage to the recorder's office to be recorded. The mortgage was executed January 31, 1870, and recorded February 14, 1871. Between these dates, certain judgments were obtained against the mortgagors, and

became prior liens upon the land, amounting to $1179.50. Default was made in paying the notes secured by the mortgage, and Evans caused the mortgage to be foreclosed, bought in the land himself under the foreclosure sale, the time for redemption expired, and he obtained a deed for the land. After procuring his deed, Evans was desirous to borrow some money and mortgage this land; and then, in 1873, for the first time, he became aware of these judgment liens, and was compelled to discharge them to remove an incumbrance from his title, and did discharge them by payment of their amount. There was evidence that the Moultrie county land was then, at the time of the trial in November, 1873, worth $35 per acre.

The suit was commenced September 13, 1873. Upon the above state of facts the court below, trying the case without a jury, found for the plaintiff in the sum of $2216.25, and rendered judgment for that amount against the defendant, from which he appealed.

Mr. ANTHONY THORNTON, for the appellant.

Messrs. STEELE & HUGHES, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

Two points are insisted upon by appellant for the reversal of this judgment: that the action is prematurely brought for the recovery of any thing more than $500, and that the loss incurred by Evans on account of the neglect of the agent in respect to the mortgage, should have been deducted from the amount to be paid to him under the contract.

All that Evans himself agreed to pay Hughey for making the sale was $500. He agreed further that whatever sum Hughey might get over $30 per acre, the latter should have, but not that Evans would pay to Hughey that excess. Hughey did make sale at $35 per acre, but instead of taking and reserving to himself the excess of $5 per acre, as he might

have done under the contract, he saw fit to mingle it in the notes which he took payable to Evans, making it a part of such notes. Whenever the notes are fully paid to Evans, or, may be, when they shall all have become due, and a reasonable time shall have elapsed for their collection, then Hughey will be entitled to recover this excess of $5 per acre as money had and received by Evans to Hughey's use. At the time this suit was commenced, the last note, payable January 1, 1874, had not become due. Evans had not then received his $30 per acre nor had it become due to him; and surely, before he had received the $30 per acre, or become entitled to receive it, he could not be called upon to refund to Hughey the excess above $30 per acre. That belonged to Hughey under the contract, with which Evans had no concern, and Hughey could not make Evans liable to pay it presently, on the making of the contract of sale, by putting it in the notes made payable to Evans. Evans had but a promise to pay him the money, from which he might fail to be able to realize the money in full. When he receives the money, that which belongs to Hughey, then he will be liable to the latter for it. The court below gave judgment for the whole amount of this excess of $5 per acre, in addition to the sum of $500 agreed to be paid by Evans under the contract. Herein, we are of opinion, the court erred, and that only $500 were recoverable at the time the suit was brought.

As to the point of the alleged loss by neglect of the agent in getting the mortgage recorded, the stipulation in the written contract sued on was, that the first payment of $3000 must be secured by mortgage on real estate worth at least $6000. Hughey testified that the Moultrie county land was worth $35 per acre, making its whole value $11,200. This considerably exceeds the amount of both the mortgage debts, and also the amount of the judgment liens on the land discharged by Evans. So that if Evans did incur a loss to the amount of the money he paid in removal of the judgment liens upon the land, it would not seem to have been in consequence of the first

payment of $3000 having been insufficiently secured, but in consequence of the mortgage not having been placed upon record within a reasonable time; and the agent's liability, if any, for such loss arises otherwise than upon the written contract sued on. It would grow out of the transaction of the business which Evans, when at Mattoon, left in the hands of Hughey on the former's departure for his home in Missouri, of obtaining from the Rigneys a mortgage for the security of the $3000 note and another one for $2500. The cause of the supposed damage would have arisen in the course of the performance of that business, and would have been, not the taking of an insufficient mortgage security in breach of the written contract, but the not using proper diligence in having the mortgage recorded, being negligence in the performance of the business of taking the mortgage, which had been intrusted by Evans to Hughey, and which the latter undertook to perform.

We are of opinion that whatever recovery Evans may be entitled to on account of this alleged damage, must be sought in a distinct suit, and can in no way be set up in the present action, as it is something not growing out of the contract sued upon. To be the subject of recoupment, the defendant's claim must arise out of the cause of action involved in the plaintiff's suit. *Hubbard* v. *Rogers*, 64 Ill. 434.

For the error before indicated, the judgment will be reversed and the cause remanded.

Judgment reversed.

MORGAN COUNTY *et al.*

v.

WILLIAM THOMAS *et al.*

1. MUNICIPAL SUBSCRIPTION—*unconditional subscription fixes rights of creditors to share in as assets.* Where the county court of a county makes an unconditional subscription to the capital stock of a railway company

under legal authority, the contract will be complete, and creditors of the company may rely upon it for payment of their debts as implicitly as upon any other assets of the company, although the company may subsequently abandon all proceedings under its charter on account of its insolvency.

2. SAME—*bona fide purchaser of right to bonds protected.* After the making of an unconditional subscription by a county to a railway company, and the issue of its bonds and placing them in the hands of a depositary, the company gave an order for $2000 of them to a *bona fide* creditor in payment of his debt, who transferred his order to a third person purchasing the same, it was *held* not material whether the delivery to the depositary was upon conditions or not, as the orders operated as an equitable assignment of $2000 of the subscription, which the county could not disregard after notice of the claim, and was bound to pay to the holder of the order, because its subscription was unconditional. If the bonds were delivered unconditionally in payment of the subscription, the holder was entitled to the bonds called for in the order, from the depositary, but if not so delivered, the county was still bound on its subscription.

3. SAME—*estoppel to claim bonds in payment of debt of the company.* Where a contractor for building a railroad had agreed in his contract with the company to take the bonds of a county which had made an unconditional subscription, and that they should be applied to payment of work done in that county alone, and upon the representation of this fact the county authorities issued their bonds and placed them in the hands of a third party, and the contractor having abandoned the work, the company, on settlement with him, gave him an order on the depositary for $2000 of these bonds, which was for work done out of the county, in full pay for what the company owed him: *Held*, that after the contract was abandoned, the contractor was no longer bound by it, and had a right to look for payment to any assets of the company, and was not estopped from taking an order for a portion of the county bonds for what was owing him for work done elsewhere than in the county.

4. SAME—*power of president of railway to change terms of subscription.* The president of a railway company has no authority, by virtue of his office, to consent that a subscription to the company, which is absolute and unconditional, and therefore constituting a part of the assets of the company, shall be changed so as to become conditional, to the prejudice of the company or its creditors. The president might bind himself, and so might the creditors or stockholders of the company bind themselves, to treat such a subscription conditional so far as their respective rights are involved.

5. SAME—*order for delivery of bonds, whether conditional.* An order of a county court for the issue and delivery of bonds in payment of a subscription to a railway company, recited that the president of the company had certified to the court that the company had placed their road under

contract, to be completed by a given day from a point in an adjoining county to a point in the county of the court, and that it was provided in the contract for construction of the road, that the bonds of such county should be expended for work done in that county, and not elsewhere, etc., and being satisfied, etc., concluded: "It is, therefore, ordered that there be delivered to the" company "the amount of $50,000 in bonds of this county of this date:" *Held*, that such order was not qualified with any conditions that the bonds should be expended in constructing that part of the road in the county.

6. SAME—*whether passed by deed of trust.* Where a railway company executed its deed of trust on its franchise and railroad, and all property connected therewith, present and prospective, to secure the payment of its bonds, but the deed did not mention corporate subscriptions made to its capital stock, it was *held*, that the purchasers under the same acquired no claim to county bonds issued under a subscription made by a county.

7. SAME—*body making has no right to transfer any part to a new company building the road.* Where a railway company, to whose capital stock a county had made an absolute and unconditional subscription of $50,000, had its franchise and road sold under a deed of trust, and abandoned its organization, becoming insolvent, and the franchise, by act of the legislature, and sale, was transferred to a new and different company, which completed the road, it was *held*, that the county had no power to donate and deliver a portion of its bonds, issued on its subscription, to the new company as against the rights of creditors of the old company, and that such could not be done even under legislative authority, as they were trust funds for the payment of debts.

8. RAILROADS—*whether new company was a reorganization of a former company.* Where an act of the legislature provided that the trustees in a deed of trust given by a railway company upon its franchise, road and property connected therewith, and the *cestuis que trust* and their associates, who should thereafter purchase at the sale under the deed of trust, should be incorporated by a name different from that of the old company, with power to purchase and own the franchise and property of the old company, and upon such purchase should be invested with all the corporate powers, privileges, etc., before given to the old company, but did not give the stockholders under the old any rights in the new company, or require the latter company to pay the debts of the former: *Held*, that the effect of this legislation was to create a new and distinct corporation, capable of purchasing, owning and using that which was conveyed by the deed of trust, and was not a reorganization of the old company, and that it took what it purchased subject to no liens or claims save such, if any, as were paramount to the deed of trust.

APPEAL from the Circuit Court of Morgan county; the Hon. CHAUNCEY L. HIGBEE, Judge, presiding.

The Illinois River Railroad Company was empowered, by its charter, to construct a railroad from Jacksonville, in Morgan county, to LaSalle, in LaSalle county, *via* Virginia, in Cass county, Bath, in Mason county, Pekin, in Tazewell county, and Lacon, in Marshall county.

At an election lawfully held for that purpose, on the 1st day of September, 1856, a majority of the voters of Morgan county voted in favor of that county subscribing for $50,000 of the capital stock of said railroad company, payable in the bonds of the county. At the next December term thereafter of the county court of that county, an order of said court was made and entered of record that the subscription be made, and the General Assembly, by an act entitled "An act to amend the charter of the Illinois River Railroad Company," approved January 29, 1857 (Laws of 1857, 105,) legalized the election, directed the subscription to be made, and bonds to be issued therefor. Soon thereafter the subscription was made by the proper officers of the county on the books of the company. Bonds were subsequently issued, bearing date September 7, 1857, one hundred in number, for $500 each, numbered from 1 to 100 consecutively, with interest coupons at the rate of six per cent per annum annexed. Prior to the issue of the bonds, no calls had been made on the county by the railroad company for payment of installments on its subscription, but R. S. Thomas, its president, applied to the county court for that purpose, and learning that the court was willing to issue them, but desired satisfactory assurance that they would not be used except in payment for work done in Morgan county, executed and filed with the county clerk the following certificate:

"STATE OF ILLINOIS, }
Morgan County. }

"I, R. S. Thomas, President of the Illinois River Railroad Company, certify that that portion of said railroad situated north of the town of Virginia, in said county, is now in process of construction, and that the portion of said road between

Jacksonville and Virginia is under contract to be completed by the first day of December, 1858, and that it is provided in the contract for the construction of said road that the Morgan county bonds shall be expended for work done in Morgan county, and not elsewhere.

R. S. THOMAS,
President Illinois River Railroad."

Whereupon the county court, being satisfied with this certificate, entered of record the following order:

"MORGAN COUNTY COURT,
September Term, 1857.

"Whereas, it is provided in and by an act of the General Assembly of the State of Illinois, entitled 'An act to facilitate the construction of railroads,' approved March 1, 1854, that any city or county in this State, which, under the provisions of an act entitled an act supplemental to an act entitled 'an act to provide for a general system of railroad incorporations,' approved November 5, 1849, has heretofore subscribed or may hereafter subscribe for any stock in any railroad company, payable in the bonds of said city or county, it shall be lawful for the city council of such city, or the judges of such county, and they are hereby authorized and empowered to issue and deliver to such railroad company the whole or any portion of the bonds of such city or county, payable on such subscription, at any time hereafter, when, in their opinion, the interest of such city or county will be promoted thereby, whether the assessments upon the stockholders of said company have been regularly assessed and made payable or not.

* * * * * * * *

"And whereas, the Illinois River Railroad Company has actually undertaken and is now proceeding with the construction of so much of said last mentioned railroad as extends from Pekin, in Tazewell county, to Virginia, in Cass county, and R. S. Thomas, the president of said company, having certified to this court that said last mentioned company have placed their said railroad under contract to be completed by

the first day December, 1858, from Virginia, in Cass county, to Jacksonville, and that it is provided in the contract for the construction thereof that the Morgan county bonds shall be expended for work done in Morgan county, and not elsewhere, and this court being satisfied that the interest and advantage of the county will be promoted by the delivery to the last mentioned company, as hereinafter provided, of the bonds heretofore subscribed by this county to the capital stock of said company;

"It is, therefore, ordered that there be delivered to the Illinois River Railroad Company the amount of $50,000, in bonds of this county, of this date, number 1 to 100, payable to said company—each bond being for $500, redeemable at the American Exchange Bank, in the city of New York, on the 1st day of March, A. D. 1877—each of said bonds to have coupons or interest warrants attached thereto for interest, payable annually from and after 1st of March next, at 6 per cent per annum." (Then follows a part of the order relating to the deposit of the certificate of stock when issued, and preserving copies of the bonds in the offices of the clerk and treasurer.)

The bonds were then issued, and, by the county judge, deposited with Elliott & Brown, bankers, for the Illinois River Railroad Company, but the evidence is conflicting as to whether the bankers were instructed to hold the bonds until further orders from the county court, or whether they were to be delivered to the railroad company upon receiving the certificate of stock for the county from the railroad company.

The evidence of James Berdan, who was then county judge, and Isaac R. Bennett, one of the associate justices, is to the effect that the bonds were to be kept and not delivered up until further orders, and that they were not to be paid out except upon work done in the county. Elliott and Brown, on the other hand, both testify that the bonds were deposited with instructions to deliver to the railroad company on receipt from it of the certificate of stock to which the county would

be entitled, and a letter written by them shortly after the receipt of the bonds, to R. S. Thomas, tending to corroborate this statement, was also in evidence. They both further say, however, that before they had delivered any of the bonds they were notified by Cassell, the successor in office of Berdan as county judge, not to deliver the bonds, and they thereafter refused to deliver them for that reason.

On the 1st of November, 1858, the railroad company issued its coupon bonds for the purpose of raising money to be used in its business, to the amount of $1,020,000, and at the same time, to secure their payment, executed a mortgage or deed of trust to Studwell, Hopkins & Cobb, as trustees, on its franchise and railroad, and all its property connected therewith, present and prospective, but neither in terms nor by necessary implication embracing the Morgan county bonds.

In June, 1859, the construction contract alluded to in the certificate of R. S. Thomas, filed with the county clerk, it being a contract with a firm known as Allen & McGrady, was abandoned by the contractors. No work was done under that contract, or by the Illinois River Railroad Company, in Morgan county.

In April, 1859, the company gave Allen & McGrady two orders for $2,000 each, drawn in their favor on Elliott & Brown, and payable in Morgan county bonds. These were subsequently sold and transferred by them to William Thomas for a valuable consideration, and they constitute his claim in the present suit. No question is made but that these orders were given for work done by Allen & McGrady for the company; and it is not claimed that the work was done in Morgan county. The company, having constructed only that portion of its road between Pekin, in Tazewell county, and Virginia, in Cass county, suspended operations.

In July, 1862, the board of directors of the railroad company, finding that the company was unable to pay the interest upon its bonds, voluntarily surrendered the property conveyed by the mortgage or deed of trust to the trustees, Studwell,

Hopkins & Cobb, who immediately took possession and operated the road for the benefit of the bondholders.

At the June term, 1863, of the United States Circuit Court for the Southern District of Illinois, a decree of foreclosure was rendered in favor of the trustees and against the railroad company, ordering the sale of the property described in the mortgage or deed of trust.

On the 1st of October, 1863, the property was sold, pursuant to this decree, to John Allen, Aaron Arnold and Edwin L. Trowbridge for $400,000, leaving a balance still due on the decree of $1,061,292.56. The sale was reported to and approved by the court on the 24th of June, 1864, and judgment was also then rendered against the company for the balance due on the decree.

By an act of the General Assembly, approved June 11, 1863, it was enacted that Hopkins, Studwell & Cobb, trustees, as before named, and Aaron Arnold, John Allen and Edwin L. Trowbridge, holders of bonds or obligations secured by said mortgage or deed of trust, and their associates who should thereafter become purchasers of the railroad premises, franchises and property described in said mortgage or deed of trust, under or by virtue of the foreclosure thereof, or under or by virtue of any decree made, or thereafter to be made, by any court within this State, directing or ordering the sale of said railroad premises, franchises and property, were thereby created a body corporate and politic, by and under the name of the Peoria, Pekin and Jacksonville Railroad Company. And the corporation thereby created was empowered to purchase and become the owner of all and singular the railroad franchises, premises and property, etc., described in the said mortgage or deed of trust, to enjoy and use the same, and upon receiving a proper transfer thereof, to have and be vested with all the corporate powers, privileges, rights, immunities and franchises theretofore given or granted to the Illinois River Railroad Company.

Prior to this enactment, and in view of obtaining it, Studwell and Hopkins, two of the trustees before mentioned, proposed and signed the following stipulation in writing:

"The undersigned, trustees of the first mortgage of the Illinois River Railroad Company, being desirous to obtain a charter for incorporating the purchasers of the said railroad, do hereby stipulate that nothing in that act of incorporation, which may be passed by the legislature, shall in any way affect the title or right of the trustees or bondholders, or any creditors of said railroad company, or any person having claim or right to the whole or any portion of $50,000 of Morgan county bonds now in litigation in the circuit court of Morgan county, but the right and title to said bonds shall be decided in the suit now pending in the Morgan county circuit court.

"June 5, 1863.

"LUCIUS HOPKINS,
"A. STUDWELL,
Trustees of Illinois River Railroad Co."

On the 21st day of May, 1864, Allen, Arnold and Trowbridge, by proper instrument of conveyance, conveyed and transferred to the Peoria, Pekin and Jacksonville Railroad Company the railroad, franchise and property of the Illinois River Railroad Company, which had been sold and conveyed to them as before stated.

Before the Peoria, Pekin and Jacksonville Railroad Company constructed any additional road to that which had been already constructed by the Illinois River Railroad Company, there was some talk and pretense by those in charge of its management, to continue the line of the road in such direction as not to touch at or in the vicinity of Jacksonville, and this caused considerable uneasiness and anxiety on the part of those interested in the prosperity of Jacksonville, and led to propositions between Allen, the president of the company, and leading citizens of Jacksonville, with regard to the construction of the road to Jacksonville, the conclusion of

which was that the road was to be built to Jacksonville in consideration of a subscription by the city for $50,000 in the stock of the company, and the donation of $20,000 by the county of Morgan of the county bonds which had been issued to the Illinois River Railroad Company, and which, it was assumed, were under the control of the county court.

The $50,000 subscription was made by the city of Jacksonville, and the company got possession of the $20,000 Morgan county bonds, but whether this last was rightfully done or not, there is quite a conflict in the evidence. No order was entered of record relating to the matter. Whitlock, the county judge, and Dunlap, one of the associate justices of the county court, swear that the order for the delivery of the bonds was agreed upon at the March term, 1869, of the county court, and that the clerk was to enter it of record. Hardin, the other associate justice, swears that no such order was agreed upon. Whitlock and Dunlap, however, do not agree as to the terms upon which the bonds were to be delivered to the company; Whitlock recollecting that they were to be delivered as a donation, and Dunlap that stock in the company was to be received for them.

The recollection of Whitlock is, in all respects, sustained by that of Morrison, then acting as attorney for the railroad company, and in part by that of the county clerk. The reason given by the county clerk for not entering the order of record is, that he understood it was to be prepared by Morrison, and Morrison says he did not know that it was desired he should prepare the order.

The bonds were delivered by Whitlock, the county judge, to Morrison, under an agreement that he was to execute an instrument in writing, binding himself to retain them in his custody until the road was completed to Jacksonville, and then deliver them to the company. Upon receiving the bonds, Morrison, in conformity with the agreement, executed and delivered to Whitlock the following instrument:

"The county court of Morgan county, Illinois, have delivered to me, for the use of the Peoria, Pekin and Jacksonville Railroad Company, $20,000 in bonds of the county of Morgan, being 40 bonds, numbered from 61 to 100, both inclusive, for $500 each, with 6 per cent interest warrants attached, from March 1, 186–, to March 1, 1877, inclusive; said bonds being payable to the Illinois River Railroad Company, or bearer, and said bonds are to be held by me with interest warrants until the said Peoria, Pekin, and Jacksonville Railroad Company shall complete the construction of their road, now under process of construction, from Virginia, Cass county, Illinois, to Jacksonville, Illinois, and put the same in running order and in operation, at which time said bonds and interest warrants I am to deliver over to said company, or to its orders, and for its exclusive use.

"ISAAC L. MORRISON."

After receiving the $50,000 Jacksonville subscription, and the $20,000 of Morgan county bonds, the railroad company proceeded to construct the road from Virginia to Jacksonville, and had the cars running thereon by the 1st day of July, 1869. The county judge then surrendered to Morrison his obligation, and directed him to deliver the $20,000 of county bonds to the railroad company, which he did.

Morrison received $10,000 of these bonds from the railroad company to his own use, and he subsequently sold and transferred two of them to an innocent holder without notice.

Having thus stated an outline of the various steps which led to the issue of the bonds involved in the controversy, and their being in the possession they now are, it will be necessary to go back and give a brief history of the litigation which has been had affecting them.

On the 31st of January, 1862, the directors of the Illinois River Railroad Company audited the accounts of its president, R. S. Thomas, and acknowledged an indebtedness to him of $16,502.24, and directed the secretary to draw an order in

his favor on any funds belonging to the company, for that amount.

At the October term, 1862, of the Mason circuit court, Vail obtained a judgment against the Illinois River Railroad Company for $4,180.18, upon which execution was issued and returned *nulla bona.*

At the November term, 1862, of the Peoria circuit court, Ladd obtained judgment against the same company for $1,567.38, upon which execution was also issued with like return as in the other case. These parties, thereupon, caused Elliott & Brown, the bankers with whom the Morgan county bonds had been deposited, as before stated, to be garnisheed on their respective judgments.

At that time, as now, William Thomas was the holder of the two orders which had been issued by the railroad company to Allen & McGrady for $2000 each, drawn on Elliott & Brown, and payable in Morgan county bonds.

Elliott & Brown, thereupon, on the 28th day of February, 1863, filed a bill of interpleader in the circuit court of Morgan county, making R. S. Thomas, William Thomas, Vail, Ladd, the Illinois River Railroad Company, the county of Morgan, and the trustees, Studwell, Hopkins & Cobb, defendants, and praying that they interplead, and that their respective claims upon the bonds should be adjudicated. The defendants all answered, and at the September term, 1863, an interlocutory decree was made, directing that the bonds be brought into court, after deducting $200 interest coupons for charges and solicitors' fees; that they be placed in the hands of M. P. Ayers & Co., as custodians, to await the further order of the court; that the several claimants interplead, etc. From the final decree rendered in that case, all the parties, except Morgan county, appealed to this court, where the case was heard at the January term, 1866. The decision here was in favor of Ladd and Vail, but against the other claimants, R. S. and Wm. Thomas. A full statement of the case will

be found in *Thomas et al.* v. *The County of Morgan,* 39 Ill. 498.

Upon the case being remanded to the circuit court, that court found that the value of the Morgan county bonds then was 50 cents on the dollar; that there was, at that time, due Ladd, on his claim, $1913.19, and to Vail, on his claim, $5094.91; and decreed that M. P. Ayres & Co., upon receiving the receipts of Ladd for the amount of his claim, deliver to the county $4782.97 of the bonds, and upon receiving the receipt of Vail for the amount of his claim, deliver to the county $12,737.27 of the bonds, and that the balance of the bonds be retained by M. P. Ayres & Co. Pursuant to this decree the county paid off the claims of Ladd and Vail, presented their receipts to Ayres & Co., and took up and canceled thirty-five of the bonds, leaving the remaining sixty-five bonds, amounting to $32,500, still in the hands of Ayres & Co.

Blair, and various other persons, assuming to be creditors of the Illinois River Railroad Company, having obtained judgment, as they claimed, against it, and had executions issued thereon, which were returned *nulla bona,* in September, 1867, commenced suit, by bill in chancery, in the Morgan circuit court, against the Illinois River Railroad Company, the county of Morgan and M. P. Ayres & Co., for the purpose of subjecting the bonds remaining in the hands of Ayres & Co. to the payment of their claims.

Subsequently, and before the cause was brought to a hearing, Studwell, Hopkins & Cobb filed a bill in the Circuit Court of the United States for the Southern District of Illinois, against the county of Morgan and others, praying that these bonds be subjected to the payment of the amount which was, as before stated, found to be due from the Illinois River Railroad Company on foreclosing the mortgage or deed of trust.

Before the return day of the writ in that case, and during the November special term, 1867, of the Morgan circuit court, the attorneys representing Blair and others consented that

the administrator of R. S. Thomas, then deceased, and Francis Lowe, should be made parties to their bill, which was accordingly done. And being apprehensive that, if the suit should not then be disposed of, Studwell, Hopkins & Cobb might dismiss their bill in the United States Court, and also ask to be made parties to their bill, these attorneys then proposed to the attorneys representing Morgan county, that if the county would permit the suit to come to trial and be disposed of at that term, the creditors claiming the bonds would allow the county to redeem the bonds, and they would treat their claims against the county as fully satisfied if it would deliver to them $6000 in the bonds and pay them $6000 in cash. This proposition was accepted on behalf of the county, with the modification that William Thomas should be allowed, if he so elected, to bring in his claim and receive a *pro rata* share of the amount to be paid, with the other creditors, upon like terms with them; but if he refused to do so, then the payments were to be made as proposed, and applied to the claims of those creditors who were parties to the bill. William Thomas being notified of the agreement in the case, and requested to bring in his claim and share with the other creditors, declined having anything to do with it. Thereupon the agreement was consummated as first proposed. Decree was entered without, in fact, hearing evidence, although the contrary is made to appear in the record, establishing the claims of the several creditors who were parties to the bill, amounting in the aggregate to some $40,000, and directing that the $32,500 of bonds remaining in the hands of M. P. Ayres & Co. should be applied to their payment; that, unless the county and the creditors should agree upon the price of the bonds, the master in chancery should sell them at public auction, etc.; but if they should agree on a price, the master in chancery should deliver to them so many of the bonds at the agreed price as would satisfy the several claims, and that he execute the decree at that term.

At a subsequent day of the same term, the master in chancery reported to the court that the creditors and the county having agreed that the former should receive all the bonds which had been left in the custody of Ayres & Co. in discharge of their several claims, he had accordingly delivered them over to the creditors, which was then approved by the court. After this, the county paid to the creditors $6000 in cash and took up all of the bonds but $6000, which were paid to the creditors pursuant to the agreement made before the decree was rendered, making $26,500 thus taken up. Of this amount, the county subsequently canceled $6500, and the remaining $20,000 are the same which were obtained by the Peoria, Pekin and Jacksonville Railroad Company.

At the January term, 1868, of the United States Circuit Court for the Southern District of Illinois, Morgan county filed its answer to the bill of Studwell, Hopkins & Cobb, setting up the proceedings in the Blair case, (omitting to mention that the decree was by agreement,) claiming that the bonds were all either canceled or appropriated, etc. Upon this, the bill of Studwell, Hopkins & Cobb was dismissed.

The bill of William Thomas was filed in the circuit court of Morgan county on the 27th day of April, 1868, against the county of Morgan, West, Schooley and others. The county interposed a demurrer, which was sustained by the court below, and from that ruling an appeal was prosecuted to this court, where the cause was heard at the January term, 1871, and judgment rendered reversing the decree of the court below and remanding the cause for further proceedings. The case is reported as *Thomas* v. *The County of Morgan et al.* 59 Ill. 480, where a full statement of the substance of the bill of the complainant will be found.

After the remanding of the cause, the county of Morgan answered the bill, claiming that its bonds had been all canceled except those disposed of pursuant to previous decrees of the court. Answers were also filed by the other defendants. West and Schooley filed cross-bills, to which answers

from the proper parties were also filed. Replications were filed to all the answers.

The claim of Schooley, set up in his cross-bill, is for services rendered by him as secretary of the Illinois River Railroad Company, for which he received orders drawn by R. S. Thomas, president, on the treasurer of the company, three dated December 3, 1860, two for $100 each, and one for $57.05, and one April 7, 1862, for $200, all bearing ten per cent per annum interest from date.

West's claim, as presented by his cross-bill, is for $69.63, as evidenced by a due bill signed by the Illinois River Railroad Company, by R. S. Thomas, its president, dated on the 4th of January, 1860, and bearing interest at the rate of ten per cent per annum.

Neither Schooley nor West was a party to any of the prior legal proceedings by the creditors of the Illinois River Railroad Company seeking to reach the Morgan county bonds, and their claims against the company are fully established by proof.

On the 28th of June, 1870, the county of Morgan filed its bill in chancery in the circuit court of that county, against the Peoria, Pekin and Jacksonville Railroad Company, to obtain possession of the $20,000 of its bonds in the hands of that company, upon the ground that they were improperly and fraudulently obtained by it. Upon the defendant's answer being filed, showing that $10,000 of these bonds had been delivered to Isaac L. Morrison, by an amendment to the bill he was made a defendant also.

Again, on the 20th of February, 1873, William Thomas, Schooley and West were also made defendants.

The defendants all answered, and Schooley and West filed cross-bills setting up their respective claims, and asking their payment decreed, substantially, as in the case of William Thomas. Answers were filed to the cross-bills, and replications were then filed to all the answers.

At a special chancery term of the Morgan circuit court, held in September, 1873, the following stipulations were, by agreement of all the parties, entered of record:

"It is ordered, by consent, that the case of William Thomas against the county of Morgan and others, be tried with the case of the county of Morgan against the Peoria, Pekin and Jacksonville Railroad Company and others, as one suit.

"2d. That the depositions taken in the case of the county of Morgan against the Peoria, Pekin and Jacksonville Railroad Company, may be read on the trial of said cases as so tried.

"The foregoing stipulations shall, in no respect, diminish the rights of said Thomas, but he shall have and may exercise all the rights of which he would be possessed if his case was tried separately.

"The foregoing stipulations shall extend to the cases of M. H. L. Schooley against Morgan county and others, and B. S. West against the same.

"The foregoing stipulations shall, in no respect, diminish the rights of the Peoria, Pekin and Jacksonville Railroad Company, or the rights of Isaac L. Morrison, or the county of Morgan, but each and all of said parties shall have and may exercise all the rights of which he or they would be possessed if the cases were tried separately."

The court, on hearing, at the same term, decreed: "That the bonds of Morgan county, originally issued to the Illinois River Railroad Company, dated the 10th day of September, 1857, for $500 each, numbered from No. 61 to No. 80, inclusive, amounting to $10,000, heretofore delivered to the Peoria, Pekin and Jacksonville Railroad Company, together with the interest coupons thereto belonging, maturing on the 1st of March, 1870, and thereafter, be restored to the custody of the county of Morgan by the delivery of the same to the clerk of the Morgan county court, by said Peoria, Pekin and Jacksonville Railroad Company, on or before the 1st day of November, 1873.

"2d. That the bonds of Morgan county, originally issued to the Illinois River Railroad Company, dated the 10th day of September, 1857, for $500 each, numbered from No. 83 to No. 100, inclusive, amounting to $9000, heretofore delivered to the Peoria, Pekin and Jacksonville Railroad Company, and by said company transferred to Isaac L. Morrison, and now in the possession of the said Morrison, be restored, together with the interest coupons thereto belonging, maturing on the 1st day of March, 1870, and thereafter, to the custody of the county of Morgan, by the delivery of the same to the clerk of the Morgan county court, on or before the 1st day of November, A. D. 1873.

"3d. That the said bonds, when restored to the custody of the county of Morgan, shall be held, except so far as the same are disposed of by this decree, as the same were held previous to their delivery to the said Peoria, Pekin and Jacksonville Railroad Company.

"4th. That, of the bonds so restored to the custody of the said county of Morgan, the said county of Morgan shall, within ten days after acquiring possession thereof, deliver to William Thomas, in discharge of his claim as assignee of Allen & McGrady, eight of said bonds, with interest coupons thereto belonging, from March, 1860.

"5th. That if the county of Morgan shall not be able to deliver to said William Thomas coupons as above directed, by reason of their cancellation or otherwise, then, in lieu of said coupons not delivered, the county shall pay, on the delivery of said eight bonds, the equivalent, at par value, in money.

"6th. That Mahlon H. L. Schooley is adjudged to have a claim against the Illinois River Railroad Company to the amount $1012.84; and the said Benjamin S. West is adjudged to have a claim against the Illinois River Railroad Company to the amount of $163.64; that the said bonds of Morgan county, not disposed of by this decree, are assets, applicable to the payment of said claims of Schooley and West; that, of

said bonds so to be restored to the custody of Morgan county and not otherwise disposed of by this decree, the county of Morgan shall deliver to the master in chancery of Morgan county, within ten days after acquiring possession of the same, so many of said bonds, with coupons attached, as will produce a sum sufficient to pay the claims of the said Schooley and West, and the costs of their cross-bills; that the said master in chancery sell said bonds so delivered to him, with coupons attached, at public sale, for cash, and apply the proceeds of the sale to the payment of the claims of said Schooley and West, with six per cent interest from the date of this decree, and costs of sale and costs of cross-bills, adjudged as aforesaid, the said master having first given twenty days' notice of the time, place and terms of sale, by publication in some newspaper published in Jacksonville, Illinois.

"7th. That the Peoria, Pekin and Jacksonville Railroad Company, and Isaac L. Morrison, pay the costs of the said suit of the county of Morgan against the Peoria, Pekin and Jacksonville Railroad Company and others.

"8th. That the county of Morgan pay the costs of the said suit of William Thomas against the county of Morgan and others, and the costs of the cross-bills of Schooley and West."

Appeals from this decree are prosecuted by the county of Morgan, the Peoria, Pekin and Jacksonville Railroad Company and the Illinois River Railroad Company, and Isaac L. Morrison, all of whom have assigned errors. William Thomas also assigns cross errors.

Mr. J. T. SPRINGER, and Messrs. DUMMER & BROWN, for the appellant, Morgan County.

Messrs. MCCLURE & STRYKER, and Messrs. MORRISON & WHITLOCK, for the other appellants.

Mr. WILLIAM THOMAS, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This is the third time this court has been called upon to determine questions affecting the claim of William Thomas to a portion of the bonds involved in this controversy. In the first case, *Thomas et al.* v. *The County of Morgan*, 39 Ill. 496, it was in evidence, as it is now, that the question whether Morgan county should subscribe for $50,000 of the capital stock of the Illinois River Railroad Company, payable in the bonds of the county, was submitted to the voters of that county at an election held for that purpose, on the 1st day of September, 1856; that a majority of the legal votes cast at such election were in favor of the subscription; that at the next ensuing December term of the county court, an order was made and entered of record, directing the subscription to be made; that the General Assembly, by an act to amend the charter of the Illinois River Railroad Company, approved January 29, 1857, legalized the election and directed the subscription to be made, and the bonds to be issued therefor; that soon after the passage of this act the subscription was made, and the county court, by an order absolute in its terms, subsequently, and at its September term, 1857, directed that the bonds be issued and delivered to the Illinois River Railroad Company. But it was then assumed that William Thomas was a director of the Illinois River Railroad Company at the time the bonds were placed in the hands of Elliott & Brown, whereas it now appears that he was not then, nor for several months afterwards, such director.

In the next case, *Thomas* v. *The County of Morgan et al.* 59 Ill. 479, the questions presented grew out of the action of the court below in sustaining a demurrer to complainant's bill; and the allegations of the bill were, necessarily, assumed to be true. Two important modifications of facts, upon which considerable stress was then laid in the opinion as published, are made by the present record. 1. The court was then required to assume that the Peoria, Pekin and Jacksonville

Railroad Company was the successor of the Illinois River Railroad Company, in the sense that the new company was but a reorganization of the old one, possessing the same property rights and burdened with the same obligations and duties, both public and private. 2. That the Peoria, Pekin and Jacksonville Railroad Company was making no claim, for itself, to the bonds in controversy.

By the case now presented, the Peoria, Pekin and Jacksonville Railroad Company is a totally distinct and independent corporation from the Illinois River Railroad Company, and claims that $20,000 of the bonds, all that have not been canceled by the county, were delivered to it by the county in consideration that it constructed the railroad which the Illinois River Railroad Company failed to construct, between Virginia and Jacksonville; that it thereby became the lawful owner of such bonds, free from any claims of the creditors of the Illinois River Railroad Company; that it has since transferred $10,000, in nominal amount, of them to Isaac L. Morrison, who has since transferred $1000 of them to innocent parties, and is claiming still to own the residue, and that it still retains for itself the other $10,000, in nominal amount, of the bonds, and insists that its right thereto can not be questioned.

The difference in the facts thus presented, from what they formerly appeared to the court to be, has made it necessary to re-examine, with some care, the grounds of the previous decisions alluded to, and having done so, we have come to the conclusion that the claim of William Thomas should be sustained; not for the reason that the supposed condition upon which the bonds were placed in the custody of Elliott & Brown was performed, but because no such condition, so far as the stockholders and creditors of the Illinois River Railroad Company, including Mr. Thomas, were concerned, ever existed.

The subscription which the county court was authorized to make for capital stock in the Illinois River Railroad

Company by the vote of the people, and the subsequent enactment of the legislature, was not conditional, but absolute, and the subscription made pursuant to this authority was unconditional. It was made prior to any issue of bonds, and when made, the contract between the county on the one side and the railroad company on the other was complete. The county was then legally bound to issue and deliver its bonds to the company in conformity with the terms of its subscription, and upon its doing so, the company was bound to deliver to the county the requisite certificate showing that it was the owner of the number of shares subscribed for in its capital stock. This claim for unpaid subscription then became a part of the assets of the company. Creditors might rely upon it for payment of their debts as implicitly as upon any other assets of the company, and this, too, although the company, subsequently to the making of the subscription, may have abandoned all proceedings under its charter, on account of its insolvency. *Henry* v. *The Vermilion and Ashland Railway Co.* 17 Ohio, 187; *Miers* v. *Z. and M. T. Co.* 11 Ohio, 273; 1 Redfield on Railways (3d Ed.) 170. Or, the company might have sold and assigned it to a purchaser in good faith, and a court of equity would have protected the assignee in his purchase and enforced for his benefit payment of the subscription. *Morris, Admr. et al.* v. *Cheney*, 51 Ill. 451. And, upon this principle, it was said, correctly, as we think, in *Thomas* v. *The County of Morgan et al. supra*, that the two orders to Allen & McGrady, subsequently assigned to Thomas, operated as an equitable transfer of so much of the county subscription from the railroad company to Thomas. The fact that the railroad company was honestly indebted to Allen & McGrady at the time the orders were delivered to them—that they were, in good faith, delivered and received as a payment of so much indebtedness, and that the purchase of Thomas was free from objection—is not questioned.

Whether the county bonds had been absolutely delivered to Elliott & Brown for the company before the orders were

drawn, or not, we do not conceive is of any consequence. They were supposed to have been, and for that reason the orders were addressed to them. But the object in giving the orders was not to invest Allen & McGrady with the title to any particular bonds; it was simply to give them the right to have bonds of the county to that amount, thus paying that much of the company's indebtedness by transferring to them a like amount of indebtedness from the county. The orders were conclusive on the company whether the bonds were delivered on presentation of the orders or not, and they were notice to the county of the holder's rights if brought to the knowledge of its proper officers before the delivery of the bonds in payment of its subscription. The company could not, after delivering the orders, make claim to this portion of the county's indebtedness, nor could the county, after notice of their delivery, before payment of its subscription, disregard the claim.

If, therefore, the bonds have been delivered to the railroad company, the debt of the county has been paid, and Thomas is entitled to have the bonds called for by the orders. If they have not been delivered, and the county was not released from its obligation to deliver them, by the railroad company, prior to receiving notice of the orders, the county still owes, at least, so much of the debt, unless Thomas is, by some act of Allen & McGrady, or of himself, estopped from resorting to the county for payment; and he is entitled to now have the proper bonds issued and delivered to him.

It appears that Allen & McGrady had entered into a contract with the railroad company for the construction of the road, and that it was provided in that contract that the bonds of Morgan county should be applied to payment for work done in that county alone. No work was done in the county, and the contract was abandoned by Allen & McGrady without the fault of the company. Subsequently, on a final settlement between Allen & McGrady and the railroad company, it was found to be indebted to them for work done elsewhere,

and the orders held by Thomas were given to them by the company in payment of such indebtedness. Had the contract not been abandoned, Allen & McGrady could not, in attempting to enforce it, have insisted that the Morgan county bonds should be otherwise applied than as provided by the contract. But when the contract was abandoned and the company acknowledged an indebtedness to them, which was honestly due, they were then certainly entitled to look for its payment to any assets of the company which were available for the payment of its debts generally. The subscription being absolute in its terms, and therefore constituting a part of the assets of the company, R. S. Thomas had no authority, simply as president of the company, to consent that it should become conditional; nor could the county make such claim as a matter of right. As was held in *Thomas et al.* v. *Morgan County*, *supra*, R. S. Thomas might, however, bind himself to treat the subscription as conditional, and so might other creditors, or the stockholders of the company. But there is no evidence that Allen & McGrady, or William Thomas, were either parties or privies to any arrangement made between R. S. Thomas and Morgan county with regard to the delivery of the bonds due from the county. When the contract between Allen & McGrady and the railroad company was made, no bonds had been issued, and the county stood bound by the terms of its subscription to deliver them to the company without any conditions.

It would, in our opinion, be going too far to say, because Allen & McGrady made a contract with the railroad company to receive from it Morgan county bonds for payment of work to be done in Morgan county alone, they must also be held to have agreed that the subscription of Morgan county was changed from an absolute to a conditional one. They had no contract with Morgan county, and had nothing to do in reference to its obligations to the company. They only had to look to the company for the bonds when their work was done, in conformity with the contract, and could not have

had, so far as we can perceive, the slightest motive to consent that the character of the county subscription should be changed. Nor can we perceive how any act of theirs, in making a contract with the railroad company, could have so far prejudiced the county as to work an estoppel in favor of it and against them with regard to the subscription. The county's obligations were fixed and known. The company was entitled to have the bonds, and whether it made conditional or absolute contracts on the faith of them was a matter to be solely determined by it, and in which the county had no other concern than that of any other stockholder.

It can not be questioned that it was competent for the company, under proper circumstances, to consent that Allen & McGrady should abandon their contract and acknowledge any indebtedness which was justly due them. The debtor, merely as such, can have no special interest in the question, whether the creditor shall permit others with whom he contracts to abandon their contracts and become general creditors or not, for this can not possibly affect his debt. These orders were issued to Allen & McGrady as creditors of the Illinois River Railroad Company, just as they might have been to any other creditor, and we fail to discover sufficient evidence of any contract or act of estoppel on their part which Morgan county is entitled to interpose as a reason why they should not, in common with other creditors, have recourse on its bonds as assets of the company.

So far as the acts of William Thomas have been shown, it appears that he was not a director in the company when the bonds were issued, and had no connection with or knowledge of the circumstances attending their delivery.

Passing from this branch of the question, it becomes necessary to inquire whether the evidence shows that the bonds were actually delivered to the company or not. The preponderance, in our opinion, is clearly that they were. The bonds were ordered to be delivered by the county court at its

September term, 1857; and it appears, by the preamble preceding the order, as entered of record, that R. S. Thomas had certified to the court that the contract for the construction of the road provided that the bonds of Morgan county were to be paid out for work done in that county and not elsewhere, but the order itself is unqualified by any conditions. The record, after referring to the law authorizing the court to issue the bonds, and directing the delivery of certain bonds to other railroad companies, is as follows:

"And, whereas, the Illinois River Railroad Company has actually undertaken and is now proceeding with the construction of so much of said last mentioned railroad as extends from Pekin, in Tazewell county, to Virginia, in Cass county, and R. S. Thomas having certified to this court that the last mentioned company have placed their said railroad under contract, to be completed by the 1st day of December, 1858, from Virginia, in Cass county, to Jacksonville, and that it is provided in the contract for the construction thereof that the Morgan county bonds shall be expended for work done in Morgan county, and not elsewhere; and this court being satisfied that the interest and advantage of the county will be promoted by the delivery to the last mentioned company, as hereinafter provided, of the bonds heretofore subscribed by the county to the capital stock of said company, *it is therefore ordered that there be delivered* to the Illinois River Railroad Company the amount of $50,000 in bonds of this county, of this date," etc.

Subsequent to the making of this order and the issue of the bonds, the county voted as a stockholder in the election of directors for the railroad company, and for two years it paid the interest on the bonds.

Opposed to the presumptions created by this evidence is only the recollection of the county judge and one of his associates, to the effect that the bonds were delivered conditionally, and that is fully balanced by the contrary recollection of Elliott & Brown.

It is scarcely reasonable to suppose that if the bonds had not been intended to be delivered until, and as the work on the road progressed in the county, the record would have been silent in this respect; and it is still less reasonable to suppose that, if conditions precedent to the delivery of the bonds had been agreed upon, there would not have been, also, some definite way prescribed by which it was to be determined when those conditions were performed. How much, and what kind of work was to be done before any bonds were to be delivered? Who was to determine when the requisite amount and quality of the work was done? If there was a condition precedent to the delivery of the bonds to be performed, as claimed, these were important questions, and yet the record contains no evidence by which they are answered.

That it was expected and believed, and even intended, when the bonds were issued, that they were to be paid out on work to be done in Morgan county, and not elsewhere, is abundantly proved; but this was to be done by the railroad company to whom the bonds were rightfully due, and not by the county.

Where a party receives property from another in discharge of a precedent liability, and the party delivering the property has no legal right to prescribe its future disposition or use, as in the present instance, the mere fact that when he delivers it he expects and intends that it shall be applied to a particular disposition or use, does not make such an application of it a condition precedent to the vesting of title.

What has been said with regard to the claim of Thomas, will apply with equal force to that of Schooley, and no objections have been urged against the claim of West.

The views we have expressed in regard to the claims against the county, leave but little to be added on the question between the county and the Peoria, Pekin and Jacksonville Railroad Company, and Isaac L. Morrison.

The trustees, under the deed of trust from the Illinois River Railroad Company, and Allen, Arnold and Trowbridge,

described in the act of incorporation as "holders of bonds or obligations secured by the deed of trust, and their associates, who should thereafter become purchasers at the sale under the deed of trust," were incorporated as the Peoria, Pekin and Jacksonville Railroad Company, and empowered to purchase and own the franchise and property of the Illinois River Railroad Company, and upon such purchase and ownership, to be invested with all the corporate powers, privileges, rights, immunities, etc., theretofore given or granted to the Illinois River Railroad Company.

Until the title of the Illinois River Railroad Company was legally divested, the Peoria, Pekin and Jacksonville Railroad Company owned no franchise or railroad, and of course had no authority to exercise the incidental immunities, privileges and powers connected with such ownership. Deriving its title under the sale, it took what it purchased, subject to no liens or claims save such, if any, as were paramount to the deed of trust under which the sale was made. The act of incorporation imposed no conditions subject to which the purchase under the deed of trust was to be made, and the consequent rights and privileges enjoyed. It neither provided that the stockholders in the Illinois River Railroad Company should be stockholders in the Peoria, Pekin and Jacksonville Railroad Company, nor that the latter company should be liable for the payment of debts due from the former. The franchise granted was upon a new and valuable consideration, moving from parties other than those who composed the Illinois River Railroad Company. The effect of the act was simply to create a legal entity, capable in law of purchasing, owning and using that which was conveyed by the deed of trust.

Both upon principle and authority, therefore, the Peoria, Pekin and Jacksonville Railroad Company was not a reorganization of the Illinois River Railroad Company, but a new and totally independent corporation. *Bruffett* v. *G. W. Ry. Co.* 25 Ill. 353; *Villar* v. *Milwaukee and Prairie DuChien R. R. Co.* 17 Wis. 497; *Smith* v. *Chicago and Northwestern*

Railway Co. 18 id. 17; *Commonwealth* v. *Passenger Railway Co.* 52 Pa. (St.) 506; *S. and S. E. R. R. Co.* v. *Barnhill Township*, 74 Ill. ——.

The Peoria, Pekin and Jacksonville Railroad Company acquired no claim to the Morgan county bonds at the sale under the deed of trust, because they were neither expressly nor by necessary implication included within its terms; and it is, for that reason, unnecessary to inquire whether they were turned over to the trustees, or whether the trustees renounced all claim to them. Their powers and duties were measured by the deed, and could not have been otherwise enlarged. The language of the charter of the Illinois River Railroad Company was, undoubtedly, comprehensive enough to have enabled it to include the bonds in the deed, but it was not compelled to do so, and it was not done.

The bonds, then, remaining as assets of the Illinois River Railroad Company, could not have been donated by the county to the Peoria, Pekin and Jacksonville Railroad Company. Nor was it competent for the legislature, by enactment, to make such donation. 1 Redfield on Railways, 3d Ed. 168–9. They were a trust fund, to be held for the payment of the debts of the company to which they belonged, and this, even if the failure of that corporation to exercise its corporate powers had worked its dissolution. *James* v. *Woodruff et al.* 2 Paige, 541; same, again reported in 2 Denio, 574; Angell & Ames on Corp. 5 Ed. 779a; 1 Redfield on Railways, *supra.*

But it is said, in this view of the case, the decree is erroneous, for the county is not interested as to who may be in possession of the bonds. We think differently. As a stockholder in the Illinois River Railroad Company, the county is interested in the preservation of its assets, and their appropriation to the payment of its debts. It is, moreover, interested in having its bonds restored to the custody whence they were improperly removed, that its obligations to others having claims upon them may be discharged.

Perceiving no error in the decree of the court below, it is affirmed. *Decree affirmed.*

Syllabus.

DANIEL OTMER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. EVIDENCE—*instruction as to the credibility of witness.* On the trial of a party indicted for murder, the defendant was sworn and testified, and the court instructed the jury that if they believed, from all the evidence, that he had knowingly sworn falsely in regard to any material point in the case, they *ought to* disregard his testimony on all material points, except so far as he was corroborated by other evidence in the case: *Held*, that the instruction was erroneous. It would have been proper if it had told the jury they *might* disregard his testimony, etc., leaving the jury to determine for themselves whether to give his testimony any weight.

2. SAME—*sufficiency of circumstantial evidence to convict.* What circumstances will amount to proof, can never be matter of general definition. The legal test is, the sufficiency of the evidence to satisfy the understanding and conscience of the jury. Absolute certainty is not essential to proof by circumstances, but it is sufficient if they produce moral certainty to the exclusion of every reasonable doubt.

3. SAME—*instruction as to sufficiency of circumstantial evidence.* On the trial of one for murder, the court instructed the jury that if they believed, from the evidence, beyond a reasonable doubt, that the accused deliberately and intentionally shot and killed the deceased, as charged, they should find the defendant guilty; and that in such case, it mattered not that the evidence was circumstantial, or made up from facts and circumstances, provided the jury believed such facts and circumstances pointing to his guilt to have been proven beyond a reasonable doubt: *Held*, that the latter part of the instruction was calculated to mislead the jury. It should have left it to the jury to further find whether such facts and circumstances were sufficient to satisfy their minds and consciences of the defendant's guilt.

4. NEW TRIAL—*in criminal case.* Where a defendant was convicted of the crime of murder, in the shooting of another while he was travelling along the public highway, and a witness whose credibility was not impeached, and whose testimony seemed to be reliable, testified that at the time of the shooting, the defendant was at her house, some six or seven hundred yards distant from where the shooting took place, and had been there for some time before, it was *held*, that this evidence was such as to raise a reasonable doubt of the defendant's guilt, there being no

positive testimony that he did the shooting, but only facts and circumstances tending to prove that he did it, and the judgment was reversed, and remanded for a new trial.

WRIT OF ERROR to the Circuit Court of Hancock county; the Hon. JOSEPH SIBLEY, Judge, presiding.

Messrs. SCOFIELD & HOOKER, and Messrs. MARSH & MARSH, for the plaintiff in error.

Mr. B. F. PETERSON, State's Attorney, and Messrs. LANE & FINLAY, for the People.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an indictment against Daniel Otmer, in the county of Hancock, for the murder of one Jacob Jingst.

At the October term, 1874, of the circuit court of Hancock county, a trial was had before a jury, which resulted in a verdict of guilty against Otmer, and he was sentenced to imprisonment in the Penitentiary for a term of thirty years.

The defendant brings the record here by writ of error, and, to reverse the judgment of the circuit court, relies upon two errors.

First. That the court erred in giving instructions Nos. 5 and 7½ for the people.

Second. That the verdict of the jury is not sustained by the evidence.

The fifth instruction given for the people, to which exception was taken, is as follows:

"That if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant deliberately and intentionally shot Jacob Jingst on or about the 14th day of October, 1873, in Hancock county, Illinois, as said Jingst was passing along the public road, and that from the effects of such shooting the said Jingst died, as charged in the indictment, then the jury should find the defendant guilty; and in that case it matters not that such evidence is circumstantial,

or made up from facts and circumstances, provided the jury believe such facts and circumstances pointing to his guilt to have been proven beyond a reasonable doubt."

It is said in Starkie on Evidence, vol. 1, sec. 79, "What circumstances will amount to proof, can never be matter of general definition. The legal test is, the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature."

While the jury have no right to acquit upon trivial suppositions and remote conjectures, yet they should not "condemn unless the evidence exclude from their mind all reasonable doubt as to the guilt of the accused."

Although the instruction was carefully drawn, yet the latter clause of it was calculated to mislead the jury.

The jury may have believed the facts and circumstances pointing to defendant's guilt were proven, and yet they may not have regarded the facts and circumstances so proven sufficient to satisfy their understanding and conscience of the defendant's guilt, but notwithstanding this, they were told by the instruction it was their duty to convict.

Before the jury could be justified in returning a verdict of guilty, they should have believed the facts and circumstances pointing to defendant's guilt proven beyond a reasonable doubt, and that these facts and circumstances in proof were sufficient to establish upon the defendant the crime of which he was charged, beyond such doubt.

Instruction No. 7½, complained of, was as follows:

"The court instructs the jury that, if they believe from all the evidence, that the defendant has knowingly sworn falsely in regard to any material point in this case, they *ought to*

disregard his testimony on all material points, excepting so far as he is corroborated by other evidence in the case."

The word "ought," as here used, means, in its ordinary sense, to be held or bound in duty or moral obligation.

We understand it to be a rule of law, well settled, that the jury are the sole judges of the weight to be given to the testimony of each witness. It is also the peculiar province of the jury to pass upon and determine the credibility of a witness.

In the case of *Chittenden* v. *Evans*, 41 Ill. 251, where the court instructed the jury that the evidence of one witness, with corroborating evidence, was entitled to greater weight than the evidence of another witness, this court held the instruction erroneous, and said, while this may be true as a matter of fact, it is certainly not so as a rule of law.

On the trial of a cause, the court should leave the jury perfectly free and untrammeled to pass upon the credibility of each witness. and to determine for themselves the weight to be given to the evidence.

In no other manner can they properly exercise the functions given them by our laws as judges of the facts, and in no other way can justice be properly administered under our system of trial by jury

This instruction was erroneous for the reason that it usurped the province of the jury, and directed them that they *ought* absolutely to disregard the evidence of the defendant upon a certain contingency. That it would have been proper for the court to have instructed the jury that they *might* disregard the evidence of the defendant, if they believed from the evidence he had knowingly sworn falsely upon a material point, except so far as he was corroborated by other evidence, is undoubtedly true; but in lieu of doing this, when the court directed them in absolute terms, this took away their rights as jurors, and did not allow that unbiased deliberation which was due to the defendant from the jury, when his life was in their hands.

The last point relied upon by the defendant is, that the verdict is not sustained by the evidence.

We have examined the testimony with care, and while we are reluctant to disturb the verdict of a jury upon this ground, yet we are satisfied, from an inspection of the whole record, that the sacredness of individual rights demands, and the interest of society requires, that another jury should pass upon the case.

If the defendant is guilty of the crime with which he stands charged, he should be convicted and suffer the penalty of the law. If, on the other hand, he is innocent, a due regard for the rights of all, and a proper administration of the laws, require that he should be acquitted.

While we do not propose to enter upon a discussion of the evidence, or in any manner prejudice another trial by what we may say in regard to the testimony, yet the record before us contains evidence upon one branch of the case, which seems to be entirely reliable, and which, when it is given due weight, raises a doubt so serious, in regard to the guilt of the defendant, that we can not, in due regard to the rights of the defendant, under the law, decline to remand for another trial.

We allude to the evidence of Mrs. Henike, which tends to establish the fact that at the very time Jingst was shot and received the wounds from which he died, on the road from Warsaw to his residence, the defendant was at the house of Mr. and Mrs. Henike, a distance of six or seven hundred yards from the place where the crime is alleged to have been committed.

The deceased lived about one mile from Warsaw. On the 14th of October, 1873, about sunset, he went to Warsaw with a load of corn, and returned in about one hour. A short time after dark, while riding in his wagon on the road home, he was shot by some one, and from the effects of the wounds received he died.

Mrs. Henike testified that, on the day of the murder, she had been to Warsaw, with her children, and returned at sun-down; that the defendant was at her house, and took her horse and unharnessed him, and then went into the house and remained there until a messenger came with the news that deceased had been shot.

If it be true, as the evidence of this witness tends to show, that the defendant, from sun-down until the crime was committed, was all the time at her house, then it can not be pretended he is guilty of the crime; and as the evidence at least raises a serious doubt in regard to defendant's guilt, we are of opinion the facts should be submitted to another jury.

For the errors indicated, the judgment will be reversed, and the cause remanded for another trial.

Judgment reversed.

JEREMIAH DRISCOLL *et al.*

v.

ANDREW J. TANNOCK *et al.*

1. USURY—*forfeiture of whole of the interest.* Under the act of 1857, relating to interest, where a party reserves a greater rate of interest than ten per cent per annum, he will forfeit the whole of the interest, and can only collect the principal sum after deducting payments.

2. On bill to foreclose a deed of trust given for $455, the answer set up that the note and deed of trust were given for but $350, and that $105 was added for usurious interest. The complainant, in his replication, admitted the note was given for the loan of $350. The bill also admitted the payment of $140 on the note: *Held*, that by reserving usurious interest in the note, the complainant was only entitled to recover the sum of $350, less the payment admitted.

3. CHANCERY PRACTICE—*preserving evidence.* There is no rule better settled in this State than that the complainant, to maintain a decree in his favor, must preserve the evidence on which it is based, in the record, and failing to do so the decree will be reversed.

WRIT OF ERROR to the Circuit Court of Montgomery county; the Hon. H. M. VANDEVEER, Judge, presiding.

This was a bill in chancery, filed by Andrew J. Tannock and George P. Fowler against Jeremiah Driscoll and others, to foreclose a deed of trust, Fowler being the trustee in the deed of trust. The facts are stated in the opinion.

Mr. A. N. KINGSBURY, for the plaintiffs in error.

Mr. W. T. COALE, for the defendants in error.

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

Plaintiffs in error filed a bill to obtain a sale of real estate conveyed to a trustee to secure a note given to Tannock by Driscoll. The note was for $455, upon which Tannock, in his bill, admitted payments amounting to $140. It was payable eighteen months after date, with ten per cent interest till due, and thirty-six per cent per annum as damages after maturity.

Driscoll answered the bill, admitting giving the note; alleges that the note was given for but $350, and that $105 was added in the note for usurious interest. The answer also claims larger payments than are set up in the bill.

Complainant filed a replication, in which he admits that the note was given for the loan of $350, but denies that there was paid on the note more than $140. Thereupon, the case was heard on bill, answers, replication, exhibits and proofs, as is recited in the decree, and the court rendered a decree in favor of complainant, for $375 and costs. It fixed a time for payment of the money, and directed that, in case of a default therein, the premises be sold to raise the same.

The evidence, beyond the exhibits, is not preserved in the record, and plaintiffs in error urged that, inasmuch as complainant admitted that the note was usurious, the court erred in rendering a decree for more than the sum actually loaned. The

third section of the act of 1857, (Sess. Laws, p. 45,) provides, that if any person or corporation shall contract to receive a greater rate of interest than ten per cent upon any contract, written or verbal, such person or corporation shall forfeit the whole of the interest, and shall be entitled only to recover the principal sum due to such person or corporation. Now, from the answers and replication, it stands admitted that the contract in this case was for more than ten per cent interest, and brings the case fully within the provisions of the statute, and the decree allowing $125 interest is manifestly erroneous. It is palpably in violation of the clear and unmistakable provisions of the statute. We are at a loss to comprehend how such a decree could have been rendered in the face of such an enactment.

But it is answered, that the decree states that there was other evidence. If so, it was not preserved in the record. And there is no rule better settled, and none much more frequently repeated, than that the complainant, to maintain his decree, must preserve the evidence on which it is based in the record, and failing to do so the decree will be reversed.

In this case there are minor defendants, whose interests may be seriously affected by the decree, and it has ever been held in this court, to pass upon and cut off rights of minor defendants, there must be satisfactory evidence, and it must be preserved in the record, or the decree will be reversed. There can be no presumption that they waived any rights or estopped themselves from setting up the defense of usury, as their father, from whom they inherit, purchased a portion of the land from Driscoll, and he and they took it with the right to set up the usury on a foreclosure. But as to adult defendants, the evidence must be preserved in the record in one of the modes required by the rules of chancery practice. It was for the complainant to make out his case. He, in doing so, admitted that he had an indebtedness of but $350, and that the balance of his claim was for interest, and that it was usurious. That showing would entitle him only to the balance

of the principal, after deducting the payments he admits to have been made. Under the interest laws that would be all he could recover on this record.

If there was evidence which would sustain this decree above that amount, it should have been preserved in the record. On the pleadings, as they are made up, we are unable to even conjecture how evidence could have been received that could sustain the decree for the sum decreed to be paid.

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

Decree reversed.

MARY J. GOBBLE

v.

JOHN M. LINDER.

1. LIQUIDATED DAMAGES—*intention determines whether provision is for, or is a penalty.* The question whether the sum named in an agreement to secure performance will be treated as liquidated damages or as a penalty, is to be determined in accordance with the intention of the contracting parties.

2. SAME—*rule for determining.* Where the parties to an agreement have expressly declared the sum to be intended as a forfeiture or penalty, and no other intent is to be collected from the instrument, it will generally be so treated, and the recovery will be limited to the damages sustained by the breach of the covenant it was to secure.

3. On the other hand, it will be inferred the parties intended the sum named, as liquidated damages, when the damages arising from the breach are uncertain, and are not capable of being ascertained by any satisfactory and known rule, or where, from the nature of the case and the tenor of the agreement, it is apparent the damages have already been the subject of actual and fair calculation and adjustment.

4. Where the agreement is in the alternative to do some particular thing or pay a given sum of money, the court will hold the party failing, to have had his election, and compel him to pay the money.

5. SAME—*agreement to exchange farms.* Where a written contract for the exchange of farms provided that in case either party failed to make

the deed in exchange at the appointed time, such party would "forfeit and pay as damages" to the other the sum of $1500: *Held*, that in view of the nature of the contract, the difficulty of proving the actual damages, and from the words used, the sum named was to be regarded as liquidated damages, and recoverable on a breach of the agreement.

APPEAL from the Circuit Court of Macoupin county; the Hon. CHARLES S. ZANE, Judge, presiding.

This was an action of debt, brought by Mary J. Gobble against John M. Linder, upon an agreement for the exchange of farms between the parties. The facts may be found in the opinion of the court.

Messrs. GWIN & HAMILTON, for the appellant.

Mr. D. M. WOODSON, and Mr. W. R. WELCH, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The written contract between the parties to this suit obligated them to exchange farms. It contained a provision, in case either one failed to make the deed in exchange at the appointed time, such party would "forfeit and pay as damages" to the other the sum of $1500. Plaintiff was ready, and offered to perform the agreement on her part, but defendant having failed to make a deed, as he had contracted to do, this suit was brought to recover the sum named in the contract.

The agreement is set out in the declaration *in hæc verba*, with all proper averments, to which defendant interposed a demurrer. It was agreed by the parties, the court might, on the demurrer, determine the legal construction to be placed upon the contract, whether the sum specified was liquidated damages, or in the nature of a penalty for the non-performance of the contract, and in the event the court should hold the sum was liquidated damages, judgment should be rendered for plaintiff for $1500; but should the sum be held as penalty,

then, in that case, plaintiff agreed the actual damages suffered did not exceed $50, and judgment should be rendered for that amount. Construing the contract, the court held the sum named was penalty, and not liquidated damages. The correctness of that decision is the only point pressed on the attention of the court on this appeal.

No branch of the law is involved in more obscurity, by contradictory decisions, than whether the sum named in an agreement to secure performance will be treated as liquidated damages or as penalty. All authorities, however, agree the question is to be determined in accordance with the intentions of the contracting parties. *Low* v. *Nolte*, 16 Ill. 475; *Peine* v. *Weber*, 47 Ill. 41.

It is the difficulty in ascertaining what was meant, that has given rise to so many conflicting cases. Text writers have undertaken to deduce rules from the adjudged cases, by which the intention of the parties may be ascertained. But as each case must depend on its own peculiar and attendant circumstances, such rules are seldom of any practical utility. Some general principles, however, may be regarded as settled.

Where the parties to the agreement have expressly declared the sum to be intended as a forfeiture or penalty, and no other intent is to be collected from the instrument, it will generally be so treated, and the recovery will be limited to the damages sustained by the breach of the covenant it was to secure. On the other hand, it will be inferred the parties intended the sum named as liquidated damages where the damages arising from the breach are uncertain, and are not capable of being ascertained by any satisfactory and known rule, or where, from the nature of the case and the tenor of the agreement, it is apparent the damages have already been the subject of actual and fair calculation and adjustment. Of the latter sort, says Mr. Greenleaf, are agreements "to convey land, or, instead thereof, to pay a certain sum." 2 Greenleaf on Ev. secs. 258, 259.

On a review of the cases, Mr. Sedgwick, in his work on Damages, says certain principles seem deducible from them; among others, that where the agreement is in the alternative, to do some particular thing or pay a given sum of money, the court will hold the party failing, to have had his election, and compel him to pay the money. Sedgwick on Meas. Dam. side p. 421. Without entering upon an examination of the adjudged cases, it is sufficient to say, they fully support the text cited.

We are of opinion the case at bar comes within the principles announced. Plaintiff and defendant had agreed to exchange large and valuable farms, which would usually involve the making of new plans, and might render necessary the expenditure of considerable sums of money. To what extent it would inconvenience a party could not readily be foretold or anticipated. In case of a breach of the agreement it would be difficult to estimate and prove, with any degree of certainty, the amount of damages sustained, and for that reason we may well presume, in the language of the books, the damages have been the subject of calculation and adjustment, and the sum named was the amount definitely agreed upon. It does not militate against the principle, that the damages actually suffered may be small in comparison with the sum mentioned in the agreement. Under less favorable circumstances they might have been greater, depending on the outlays in making arrangements to carry into execution the undertaking. At all events, the defendant had his election to make the deed to plaintiff conveying the land to her, or to rescind the contract on payment of a stipulated sum of money. He chose, for reasons no doubt satisfactory to himself, not to make the conveyance, and there is no reason in law or morals why he should not pay the agreed damages.

Nothing in the agreement or attendant circumstances manifests any intention that the sum named should be treated as penalty. On the contrary, it is more rational to presume the parties, in view of the difficulties we before suggested of

making accurate proof of the damages that would flow from a breach of the contract, had adjusted in advance what would be compensatory damages to either party injured. As was said in *Peine* v. *Weber*, "unless there is good cause for it, a court can not declare a stipulated sum, which the parties themselves have said shall be the amount of damages, to be a penalty merely." The facts in this case afford no sufficient reason for so declaring. The contract was fairly made and understandingly entered into. Considering the language employed, the nature of the contract, what the parties had contracted to do, and all the attendant circumstances, we can not avoid the conclusion it was the intention the sum named should be the measure of damages in case of the failure of either party to perform the agreement. As sustaining this construction of the contract, numerous cases, entitled to consideration as authority, might be cited. It will only be necessary to refer to a few most analogous, among others the following: *Slasson* v. *Beale*, 7 Johns. 72; *Knappe* v. *Maltby*, 13 Wend. 587; *Tingley* v. *Cutler*, 7 Conn. 291; *Streeple* v. *Williams*, 48 Penn. St. 450; *Mead* v. *Wheeler*, 13 N. H. 351.

A majority of the court are of opinion the judgment should be reversed and the cause remanded, with directions to enter judgment in favor of the plaintiff for the sum named in the agreement, as damages.

Judgment reversed.

ALEXANDER EDGMON

v.

MATTHEW ASHELBY.

1. NEW TRIAL—*on finding as to facts.* Where there is considerable contradictory and conflicting testimony upon the disputed questions of fact in a case, the parties themselves being the principal witnesses, and the verdict is not clearly against the preponderance of the evidence, and the

jury have been properly instructed, this court seldom interferes, unless it appears that injustice has been done.

2. SAME—*newly discovered evidence.* Where the newly discovered evidence would not be conclusive if admitted, and the case was pending two years before trial, affording ample opportunity to obtain testimony, a new trial will not be granted on the ground of the discovery of such new testimony.

3. INTEREST—*due bill.* A due bill reading, "Due A, on settlement, $96, April 16, 1869," and signed by the maker, bears six per cent interest from date.

APPEAL from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

This was an action of assumpsit, brought by the appellee against the appellant.

Messrs. MORRISON, WHITLOCK & LIPPINCOTT, for the appellant.

Messrs. KETCHAM & TAYLOR, and Mr. E. P. KIRBY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the Morgan circuit court, counting on a due bill and on an account stated, a bill of particulars accompanying the declaration, brought to the May term, 1872, by Matthew Ashelby, against Alexander Edgmon. The cause was continued from term to term until the November term, 1873, at which term the defendant pleaded non-assumpsit, and set-off, accompanying the same with a bill of particulars. The cause was then continued to May term, 1874, when a trial was had by a jury, and a verdict rendered for the plaintiff for three hundred and five dollars and eighty cents. A motion for a new trial was entered by the defendant, which, on a *remittitur* being entered for fifty-eight dollars and fifty cents, was denied by the court, and judgment rendered for two hundred and forty-eight dollars and fifty cents. To reverse this judgment the defendant appeals, and assigns as error the refusal

of the court to grant a new trial, insisting that the verdict is against the preponderance of the testimony, and instructions for plaintiff wrong, and refusing instructions asked by defendant.

We have fully considered all the points made on this appeal, and are satisfied none of them have weight.

The due bill was in these words, to which no objection was made: "Due Ashelby, on settlement, $96, April 16, 1869." This note, under the statute, bore interest from date. The plaintiff's account, attached, evidenced various items, and on trial a question was asked in regard to the sale of certain hogs by plaintiff to defendant, which was not specified in the bill of particulars, and on objection made by defendant to any testimony on that point, the court, on motion of plaintiff, permitted him to amend his bill of particulars, which was done, defendant not objecting, by adding the item of a sale of twelve hogs at $180; cash, $30; 5 cords wood, $25; interest, $100.

Defendant's bill of particulars, under his plea of set-off, was composed entirely—except an item of four and a half cords wood at $4, and interest four years at 6 per cent—of brick and tile, sold and delivered by defendant to plaintiff. The chief controversy was about the amount of brick and the delivery of the hogs, defendant insisting they were delivered prior to the date of the due bill, in 1866 or 1867, and settled for on the execution of the due bill. Plaintiff contended they were sold and delivered afterward.

Much testimony was heard on the several points in dispute, the parties being their own principal witnesses. It was a case peculiarly fitted for a jury of the neighborhood to decide, who are presumed to know the parties and the witnesses, and something of the nature of the transactions spoken of, which so often occur in the ordinary course of life. In such case, where the verdict is not clearly against the preponderance of the evidence, and the jury have been properly instructed, this court seldom interferes, unless it shall appear that injustice has been done.

The instructions in this case were more in number on both sides than its exigencies required. There may be some slight inaccuracies in those given for each party, but not of a character to mislead the jury. The jury were required to allow interest on the due bill at six per cent, and if interest was allowed on the account, it may have been included in the *remittitur*.

The jury did right in their finding on the evidence before them. The newly discovered evidence by McMillen would not be conclusive if admitted. The cause was pending two years before it was brought to trial, affording defendant ample opportunity to obtain testimony, especially that of McMillen, as he lived near the county seat, and on diligent inquiry he could have traced the hogs to the farm of McMillen and found out from him all he knew about the matter.

Upon a review of the whole case, believing justice has been done, the judgment must be affirmed.

Judgment affirmed.

JACKSON GRIMSHAW

v.

MELGAR C. PAUL.

1. ADMISSIONS—*of deputy revenue collector not admissible to bind his principal.* In a suit by a deputy United States collector against the principal collector, for compensation for services in collecting and remitting taxes on distilled spirits, in which the defendant testified that the deputy was to receive no pay, but was acting for the accommodation of his son, who was storekeeper under the revenue laws, and denied any promise to pay, it was *held*, that a letter written by a regular deputy of the defendant, who performed duty at the chief office, to the plaintiff, acknowledging the receipt of the taxes, and promising to send him a draft in a few days for his pay, in the absence of proof that his principal directed or even knew of the writing of the same, was not admissible as evidence against the defendant, such promise not being part of the *res gestæ*, it having no relation to the subject of his acts.

2. SAME—*of real parties in interest.* The admissions of persons not parties to the record, but who are the real parties in interest, are admissible in evidence in favor of the adverse party, such as the admissions of the *cestui que trust* of a bond, those of the persons interested in a policy of insurance in another's name for their benefit, those of the ship owners in an action by the master for freight, those of the indemnifying creditor in an action against the sheriff, and those of the deputy sheriff in an action against the high sheriff for the misconduct of the deputy.

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

This was an action of assumpsit, by Melgar C. Paul against Jackson Grimshaw, to recover for services as the defendant's deputy in collecting and forwarding certain taxes. The plaintiff in the court below recovered judgment for $112.50, from which the defendant appealed. The principal and material facts appear in the opinion.

Mr. JACKSON GRIMSHAW, *pro se.*

Messrs. MANIER, PETERSON & MILLER, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

Appellant, being United States Revenue Collector for the fourth district of Illinois, November 9, 1868, made an appointment, in writing, of appellee as deputy collector, for such duties as might be assigned, but especially as collector of the tax on distilled spirits at Sagetown, Illinois—such appointment being subject to revocation. Appellee was not required by appellant, and gave no bond as such deputy. Appellee, acting under such appointment, collected for taxes on distilled spirits at Sagetown the sum of $90,000, for which return was made to appellant.

This suit was brought by appellee to recover compensation for his services in making said collection. Appellant's theory of the case was, that the appointment was made merely as a

matter of accommodation to appellee's son, who was storekeeper under the United States revenue law, at Sagetown, and without any expectation of paying compensation for appellee's services by appellant, out of his own pocket. Appellee gave testimony tending to show an express promise to pay appellee what his services were reasonably worth. The fact of making such promise was disputed by appellant. It appeared that a man of the name of Sellon was a regular deputy of appellant, who had given the required bond, and who performed duty at the chief office of appellant. When appellee made return to the chief office, of taxes collected, Sellon, May 14, 1869, addressed a letter to appellee in respect to certain deficiencies or mistakes, and by way of postscript said: "I will send you draft in a few days, for your pay as dept. coll."

There being no evidence that appellant directed or even knew of the writing of this letter, it was offered in evidence by appellee for the purpose of showing recognition of his right to compensation. It was objected to by appellant's counsel as incompetent evidence against appellant, but the court admitted it in evidence—to which appellant excepted.

The question here presented, and as regards the class of officers concerned, seems, so far as our researches extend, to be new; and we have been favored with no discussion of it, or reference to authorities, by counsel for either side.

The admission by the deputy made in this way, in respect to appellee's right to compensation, can, in no point of view, be regarded as part of the *res gestæ*, for the acts then being done had no relation to that subject. The only other rule we are aware of under which the admission could be claimed as competent, is that which recognizes as competent the admissions of persons who are not parties to the record but yet are interested in the subject matter of the suit. In regard to this source of evidence, the law, it is said, looks chiefly to the real parties in interest, and gives to their admissions the

same weight as though they were parties to the record. Under this rule fall the admissions of the *cestui que trust* of a bond; those of the persons interested in a policy effected in another's name, for their benefit; those of the ship owners in an action by the master for freight; those of the indemnifying creditor in an action against the sheriff; those of the deputy sheriff in an action against the high sheriff for the misconduct of the deputy, are all receivable against the party making them. 1 Greenlf. Ev. sec. 180.

But the admissions of an under sheriff are not receivable in evidence against the sheriff, unless they tend to charge himself, he being the real party in the cause. He is not regarded as the general officer of the sheriff to all intents. *Snowball* v. *Goodricke*, 4 B. and Ad. 541.

Sellon, whose admission was received in evidence against appellant, the collector, was in no respect interested in the subject matter of the suit, and not, therefore, bound by the record. His admission was, for that reason, not receivable under the above mentioned rule, and we are aware of none other which would justify it.

As the case stood, this evidence was prejudicial to the appellant, and, being inadmissible, it was error to receive it, for which the judgment must be reversed and the cause remanded.

Judgment reversed.

JOHN S. RUSSELL *et al.*

v.

JAMES RANSON.

1. MISTAKE—*proof, as against subsequent incumbrancer.* As against a subsequent incumbrancer, the admission of the mortgagor of a mistake in the starting point of the boundaries of the prior mortgage is not sufficient evidence. To affect such subsequent incumbrancer's rights, there

must be proof of the mistake, and that he had notice of it at the time he took his mortgage.

2. SAME—*proof of mistake and notice.* In this case a party gave the complainant a mortgage on a lot described by metes and bounds, and as commencing "fifty feet, nine inches and thirty feet east of the north-west corner" of a certain quarter section of land, being the same description as in the mortgagor's deed under which he held possession of the premises, commencing fifty feet nine inches *south* and thirty feet east of the north-west corner of the quarter. The mortgage was duly recorded, and the mortgagor subsequently gave a second mortgage to the defendants on the lot by its number as laid off. The defendants, in their answer, admitted that they knew the first mortgage covered part of the lot described in their mortgage: *Held*, that the facts were sufficient to show the mistake and charge the defendants with constructive notice of that fact.

3. NOTICE—*what amounts to.* Whatever is notice enough to excite attention and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led, and every unusual circumstance is a ground of suspicion, and prescribes inquiry.

APPEAL from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

This was a bill in chancery, filed by James Ranson against Elijah Cobb, John S. Russell and George S. Russell, to foreclose a mortgage given by Cobb, and to correct an alleged mistake therein. The case was consolidated with a bill also filed by the Russells against Cobb to foreclose a mortgage subsequently given by Cobb to them. The facts of the case in relation to the mistake and notice thereof to the Russells are stated in the opinion.

Messrs. KETCHAM & TAYLOR, for the appellants.

Messrs. DUMMER & BROWN, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On the 10th day of September, 1867, Elijah Cobb executed a mortgage to James Ranson, the appellee, to secure the payment of a promissory note for $1000, on certain premises described as follows: "Commencing 50 feet 9 inches and 30

feet east of the north-west corner of the south-west quarter of section 21, in township 15 north, of range 10 west of the third principal meridian, running thence east 180 feet, thence south 53 feet 9 inches, thence west 180 feet, thence north 53 feet and 9 inches, to the place of beginning." The mortgage was recorded on the same day it was given.

On the 26th of May, 1871, Cobb, to secure the payment of a promissory note for $1360.70 to J. S. and G. S. Russell, the appellants, executed to the latter a mortgage on premises described as "lot 3, in block 26, in the city addition to Jacksonville, Morgan county, Illinois," which was recorded May 29, 1871.

The parties both filed their bills in chancery to foreclose their respective mortgages. Ranson, in his bill, alleged that there was a mistake in the description of the premises in his mortgage in respect of the starting point, in the omission of the word "south" next after the words "commencing 50 feet 9 inches;" that with that word supplied in the description, the corrected description would describe the same premises which are conveyed by the mortgage to J. S. and G. S. Russell, to-wit: Lot 3, in block 26, in the city addition to Jacksonville; that the latter had notice of the mistake at the time they took their mortgage; and the bill prayed that the mistake might be corrected; that Ranson might be decreed to have priority, by virtue of his mortgage, over the rights the Russells acquired by their mortgage, as well as for a foreclosure of his mortgage. The two suits were consolidated in the the court below, and, upon hearing had, there was a decree rendered for the correction of the alleged mistake, the foreclosure of the mortgages, and that the Ranson mortgage be first paid.

The Russells appealed from the decree.

The only question is as to the priority of Ranson's mortgage.

The bill having been taken for confessed against Cobb, that would be sufficient evidence of the alleged mistake, and warrant the decree for its correction as against him. But as

against the Russells, to affect their rights, there must be other proof of the mistake, as well as evidence that they had notice of the mistake at the time they took their mortgage. All the evidence in the record is the mortgages themselves, and a few agreed facts. The only evidence we discover therein of the mistake, is, the fact that the premises known and described as lot 3, in block 26, in the city addition to Jacksonville, were occupied by Cobb, by tenant, under a deed from John Mathers to Cobb, and that that deed described the premises purporting to be conveyed by it in the same manner as the mortgaged premises are described in the mortgage from Cobb to Ranson.

We think that, in the absence of any countervailing evidence whatever, premises which one occupies admittedly under a certain deed, may be taken as sufficient evidence that the premises so occupied were intended to be conveyed by the deed; and if the description of the premises in the deed fails to cover the land so occupied, that there was a mistake in the description, in its not so doing, especially where, as in this case, there is an unusual circumstance of description of the starting point of the boundary, indicative of mistake.

But the Russells must be affected with notice of the mistake. They are not shown to have had any actual notice, and the only evidence we find to charge them with constructive notice is the admission in their answer that the tract of land described by metes and bounds in Ranson's mortgage laps over on to lot 3, block 26, in the city addition to Jacksonville, and covers and embraces about 3 feet off of the north side of the east end of said lot. As, then, Ranson's mortgage admittedly covered a portion of lot 3, and was recorded, the Russells had constructive notice of that mortgage.

The description of the starting point in the boundary of the premises in Ranson's mortgage was unusual and unnatural. If the starting point was really 80 feet and 9 inches east of the north-west corner of the quarter section named, it would naturally have been so described, and not as 50 feet

and 9 inches and 30 feet east of the north-west corner. The latter is a strange and unusual mode of description of such a place of beginning. It is suggestive of mistake, and might well excite suspicion thereof.

We are inclined to hold that the peculiarity of the description, coupled with the fact of its taking off the small fraction it did from lot 3, and the deed from Mathers to Cobb, under which the latter occupied the lot he mortgaged to the Russells, containing the same description of premises, were sufficient to have awakened suspicion of a mistake in the description, and to have put the Russells upon inquiry, before taking their mortgage, to ascertain whether there was not a mistake, and that consequently they are chargeable with constructive notice of the mistake, and of the equitable rights of Ranson, and that the mortgage of the latter was properly given priority.

It is familiar doctrine that, what is sufficient to put a purchaser upon an inquiry, is good notice.

In *Kennedy* v. *Green*, 3 Mylne & Keene, it is said, whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led; and it is there further said, that, every unusual circumstance is a ground of suspicion, and prescribes inquiry.

A further question has been discussed in argument, whether there should not have been allowed by the decree a credit for an alleged payment of a portion of interest by having given a note for the same. We discover no evidence upon the subject in the record, and will not further notice it.

The decree will be affirmed.

Decree affirmed.

The Western Union Telegraph Company

v.

Herman Lieb *et al.*

1. Taxation—*foreign corporations doing business in this State.* The legislature has the power to impose taxation upon foreign corporations to whatever extent it may, in its discretion, choose, as the condition upon which they shall be allowed to exercise their franchises and privileges in this State.

2. Same—*capital stock of foreign corporation not taxable under act of* 1872. Under the provisions of the "Act for the assessment of property and for the levy and collection of taxes," in force July 1, 1872, the State Board of Equalization have no authority of law to assess the capital stock of foreign corporations doing business and exercising their franchise in this State, that act only giving power to make such assessments in respect to corporations created by or under the laws of this State.

Appeal from the Circuit Court of Cook county; the Hon. William W. Farwell, Judge, presiding.

This was a bill in chancery, by the appellant, against Herman Lieb, county clerk, and H. B. Miller, collector of Cook county, to enjoin the extension and collection of taxes upon the capital stock of the company, including its franchise. The court sustained a demurrer to the bill and dismissed it, from which decree the complainant appealed.

Messrs. Williams & Thompson, for the appellant.

Mr. James K. Edsall, Attorney General, for the appellees.

Mr. Justice Scholfield delivered the opinion of the Court:

The Western Union Telegraph Company is a foreign corporation, deriving its existence from the laws of the State of New York, but owning, operating and controlling lines of telegraph in this State. We fail to find any statute under the provisions of which it can be said it is, even constructively,

incorporated under the laws of this State. We are, therefore, compelled to assume that it is, in theory as well as in fact, a foreign corporation, exercising its franchises and privileges in this State by comity only.

There can be no doubt of the power of the legislature to impose taxation on such corporations to whatever extent it may, in its discretion, choose, as the condition upon which the corporation shall be allowed to exercise its franchises and privileges in this State. *Ducat* v. *Chicago*, 48 Ill. 172; *Paul* v. *Virginia*, 8 Wallace, 168.

The Board of Equalization assessed the capital stock, including the franchise of this company, for taxation for the year 1873, at $1,168,394, and the only question now before us is, does the "Act for the assessment of property and for the levy and collection of taxes," in force July 1, 1872, authorize this assessment?

We have held, at the present term, in *Porter et al.* v. *The R. R. I. and St. L. R. R. Co.*, *post*, p. 561, that the Board of Equalization is empowered to assess for taxation the capital stock of such corporations as are created by or under the laws of this State, and that shares of stock in such corporations are not liable to be assessed for taxation; but that persons residing in this State, owning shares of stock in corporations created by the laws of other States, must be taxed on the value of such shares. The necessary implication from this would seem to be conclusive of the question, unless there is something in the act referred to placing telegraph companies on a different footing in this respect from that of other corporations.

After a careful examination of the different sections of the act bearing upon the question, we are unable to find any provision which shows that telegraph companies are regarded in anywise differently, for the purpose of taxation, from other corporations.

It is true, by section 53, "any person, company or corporation using or operating a telegraph line in this State," is

required to make returns to the Auditor, which are, manifestly, for the purpose of determining the value of the capital stock; and returns are, by section 54, required to be laid by the Auditor before the Board of Equalization, which is directed to assess the capital stock of such companies in the manner therein provided. But the only mode in the act provided by which such assessment can be made, is that provided for assessing the capital stock of all corporations created by or under the laws of this State.

The 108th section directs that the State Board of Equalization shall "assess the capital stock of each company or association, respectively, *now or hereafter incorporated under the laws of this State*, in the manner hereinbefore in this act provided." And that this was intended to include telegraph companies is clear, from the concluding portion of the section, which requires that "the respective assessments so made, other than of the capital stock of railroad and telegraph companies, shall be certified by the Auditor," etc.

The 110th section prescribes how the aggregate amount of capital stock of railroad or telegraph companies assessed by said board shall be distributed. The manner in the act before provided for assessing capital stock, is found in the fourth clause of section 3, in these words: "The capital stock of all companies and associations, *now* or *hereafter created under the laws of this State, shall be so valued* by the Board of Equalization as to ascertain and determine, respectively, the fair cash value of the capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association." And in section 1, which declares what property shall be taxed, the third clause includes "the capital stock of companies and associations incorporated under the laws of this State."

We are unable to find any authority in the act for assessing the capital stock of companies and associations doing business in this State, but incorporated under the laws of another State. The care manifested by the legislature, wherever any

allusion is made to the assessment of capital stock, to limit it to corporations created by or under the laws of this State, is so clear and positive that no doubt can well exist as to the purpose intended.

If it shall be thought necessary to tax such corporations otherwise than upon their tangible property, additional legislation expressly authorizing such taxation must be had.

The assessment upon the capital stock of appellant is unauthorized by law, and the collection of the tax levied upon it must be enjoined.

The decree of the court below is reversed and the cause remanded, with direction to that court to enter a decree perpetually enjoining the collection of so much of appellant's taxes as is assessed upon its capital stock.

Decree reversed.

JOHN LOGAN

v.

JOHN H. WILLIAMS.

1. ACKNOWLEDGMENT OF DEEDS—*taken before unauthorized officer, cured by subsequent legislation.* The acknowledgment of a deed under the act of 1819, which conformed to the requirements of that act as to the form of the officer's certificate, but which was taken by an officer not authorized by it to take acknowledgments, is cured by the amendatory statutes of 1827 and 1829, authorizing such officer to take acknowledgments, which are retrospective in their operation; and the provision in the latter acts requiring the certificate of acknowledgment to show that the grantors were personally known to the officer, will not be held to apply to acknowledgments taken before their passage, but only to subsequent acknowledgments.

2. JURISDICTION—*of the person, by publication.* Where the record of a proceeding to foreclose a mortgage, in 1822, showed that the court ordered publication of notice to the defendants, having found them to be non-residents, and the court, at the next term, in its decree, found that notice had been given, as required, to the defendants: *Held*, that, in a collateral proceeding, it would be presumed that the notice given was sufficient, in

the absence of proof to the contrary, and that the court had jurisdiction of the persons of the defendants, although all their names did not appear in the orders and decrees.

3. DECREE—*description of land by reference to bill.* Where a bill to foreclose two mortgages made the mortgages part of the bill, as exhibits, and the lands were properly described therein, a decree of foreclosure which directs the sale of the mortgaged premises described in the complainant's bill, giving the number of tracts only, and without further description, will be sufficient. In such case, a formal description of the lands is unnecessary.

APPEAL from the Circuit Court of Adams county; the Hon. JOSEPH SIBLEY, Judge, presiding.

Mr. L. E. EMMONS, for the appellant.

Mr. JOHN H. WILLIAMS, and Mr. H. A. TURNER, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of ejectment, brought by John Logan, in the circuit court of Adams county, against John H. Williams, to recover a certain quarter section of land in Adams county.

A trial was had before the court without a jury, and the issues were found in favor of the defendant, and judgment rendered against the plaintiff for costs, who brings the record here by appeal.

The appellant, for the purpose of establishing title to the premises, read in evidence an exemplification of the patent from the United States to Samuel Andrews, dated March 24, 1818; a deed from Samuel Andrews to Wm. M. O'Hara, dated November 1st, 1819. He then offered in evidence a certified copy of a mortgage from Wm. M. O'Hara and wife to John P. Cabanne, containing the land in controversy and fifty-three other quarter sections in the Military Tract, dated —— day of September, 1820, and recorded the 21st day of February, 1821. The acknowledgment was taken before a notary public, in the city of St. Louis, and State of Missouri, October 3d, 1820.

To the introduction of this mortgage in evidence the appellee objected, on the ground, it was not acknowledged before an officer authorized by law to take the acknowledgment.

The court sustained the objection and excluded the mortgage.

The appellant then offered in evidence a certified copy of the proceedings of the circuit court of Pike county in a certain cause wherein John P. Cabanne was complainant and Susan O'Hara *et al.* were defendants, in a suit to foreclose the mortgage which had been excluded by the court. This record the court excluded.

Appellant then offered in evidence a deed, dated February 20th, 1823, from Henry Starr, who was a commissioner appointed by the court on the foreclosure of the mortgage, to sell the lands, to John P. Cabanne. This deed was also excluded by the court.

Appellant then read in evidence deeds by which he deduced title to the land by mesne conveyances from John P. Cabanne to himself.

The appellee, as is said by the record, deduced title to the land by mesne conveyances from Wm. M. O'Hara to himself.

The first question presented is, whether the mortgage from O'Hara and wife to Cabanne, which the court excluded, was competent evidence.

The act of February 19th, 1819, which was in force at the time the mortgage was acknowledged, required it to be acknowledged by the grantor, or proved by one of the subscribing witnesses, before some judge of a superior court of the State, mayor or chief magistrate of the city, or before the clerk of the county or other court of the county, where such deeds and conveyances shall be made and certified under the common public seal of such city or county.

By the terms of the act, a notary public was not empowered to take the acknowledgment, but, in 1827, the legislature passed another act concerning the conveyance of real estate, and in 1829 the act of 1827 was amended.

The first section of the act of 1829 is as follows: That all deeds and conveyances of lands lying within this State may be acknowledged or proved before either of the following named officers: Any judge or justice of the Supreme or District Court of the United States; any commissioner to take acknowledgments of deeds; any judge or justice of the Supreme, Superior or circuit court of any of the United States or territories; any clerk of a court of record, mayor of a city, or notary public; but when such proof or acknowledgment is made before a clerk, mayor or notary public, it shall be certified by such officer under his seal of office. All deeds and conveyances which have been or may be acknowledged or proved in the manner prescribed in this section, shall be deemed as good and valid in law as if the same had been acknowledged or proved in the manner prescribed in the 9th section of the act to which this is an amendment. Purple's Real Estate Statutes, 487.

The object of this statute was, to cure defective acknowledgments. It was, by its express terms, retroactive in its operation.

There had, no doubt, been a large number of conveyances made where the acknowledgments had been taken before officers not authorized by the statute to act. To remedy the evil and cure the defects, this curative statute was, no doubt, passed.

After the Revision of 1845, and in 1847, a similar curative statute was enacted. The very aim and object of these acts were to validate acknowledgments which had been taken before notaries public and other officers who were not at the time empowered by the statute to act.

These curative statutes should receive a liberal construction, such as will accomplish the object intended by their enactment by the legislative branch of the government.

When the mischief to be remedied and the manifest object of the statutes are kept in view, there can be no doubt that the acknowledgment was validated by the curative acts.

It is, however, urged that the acknowledgment is bad, for the reason the notary did not certify that the grantor was personally known to him to be the person whose name is subscribed to the mortgage, as required by the act of 1827, and in support of this position we are referred to the case of *Adams* v. *Bishop*, 19 Ill. 395, as an authority holding the acknowledgment in form must conform to the act of 1827. The obvious answer to this, however, is, that the act of 1819, in force at the time this mortgage was acknowledged, and which must control, did not require the officer to certify to the personal identity of the mortgagor.

The act of 1827 contained that requirement, and the acknowledgment passed upon in the case of *Adams* v. *Bishop*, *supra*, was made after the act of 1827 went into effect, and in that case the court very properly held the certificate of the officer must conform to the latter act.

The identical question here involved arose in the case of *Carpenter* v. *Dexter*, 8 Wallace, 513. There, a deed was acknowledged before a justice of the peace, in 1818, who was not authorized by the laws of Illinois at that time to take the acknowledgment.

The court held the curative act of 1847 validated the acknowledgment, notwithstanding the officer taking the acknowledgment failed to certify that the grantor was personally known to him, as required by the acts of 1827 and 1845. The construction placed upon the statute by the court was undoubtedly correct. From these views it follows that the mortgage was properly acknowledged, and should have been admitted in evidence.

The next question arising upon the record is, whether the record of the proceedings of the circuit court of Pike county, in the case of *John P. Cabanne* v. *Susan O'Hara et al.* was admissible in evidence.

John P. Cabanne held three promissory notes, amounting, in the aggregate, to $5462.20, against Wm. M. O'Hara. These notes were secured by two mortgages executed by

O'Hara and his wife, both of record in Pike county, one dated in September, 1820, containing fifty quarter sections of land in the military tract; the other was executed April 13, 1821, and contained sixteen quarter sections of land situated in the Military Tract.

At the time the mortgages were executed, Pike county embraced all the land lying between the Illinois and Mississippi rivers, extending to the north boundary of the State.

John P. Cabanne filed a bill, which was pending at the April term, 1822, of the circuit court of Pike county, to foreclose the two mortgages, from which it appears that William O'Hara had died; that his widow and children were non-residents. The bill was exhibited against Susan O'Hara, widow, and others, children and heirs at law of Wm. M. O'Hara, deceased.

Two objections are urged against the validity of the decree of sale rendered in the cause: First, that the court did not acquire jurisdiction of the defendants by service of summons or publication of notice, as required by law. Second, that the lands are not described in the decree.

At the April term, 1822, the record shows a certain cause pending, and an order of court, as follows:

"Daniel C. Bass, complainant, *v.* John Adams and Elizabeth, his wife, defendants. In Chancery.

"It appearing to the court that the defendants in this cause are not inhabitants of this State, and they not having answered the complainant's bill, it is ordered by the court that they file their answer to said bill with the clerk of this court on or before the first day of the next October term of said ——, or that said bill will be taken for confessed against them. And it is further ordered that a copy of this order be published three weeks, successively, in the Edwardsville Spectator."

"Robert Simpson, complainant, *v.* Susan O'Hara and others, defendants. In Chancery."

"John P. Cabanne, complainant, v. Same, defendants. In Chancery."

"*Ordered*, That the same notice be given in the two last cases as in the one immediately preceding."

At the October term, 1822, the record shows the following:

"This day came the complainant by his counsel, and it appearing to the court that the order made at the last term for the appearance of the defendants in this cause has been published three weeks, successively, in the Edwardsville Spectator, as required by said order, and the defendants not having entered their appearance herein or answered the bill of complaint, on motion of complainant's counsel, it is ordered by the court that said bill be and the same is hereby taken for confessed against them."

The act of 1819, providing for service upon non-residents, in force at the time these proceedings were had, declares that, if any defendant in chancery reside out of the State, or can not be found to be served with process of subpœna, or abscond to avoid being served therewith, public notice shall be given to the defendant, signed by the clerk, in any newspaper printed in this State, or in any adjoining State or territory, as the court may direct, that unless he appear and file his answer by a day given him by the court, the bill shall be taken *pro confesso*.

What the form of the notice published was, does not appear, nor is it material, as no form is prescribed. The nature of the notice seems to have been left, in a great measure, to the discretion of the court. The court, by the decree, found that notice had been given as required by the order of the court, and when the question arises collaterally, as it does here, the presumption of law is, that the notice given the defendant was sufficient.

The court that rendered the decree that notice had been given as required, was a court of general jurisdiction, and the presumption of law is, the court had jurisdiction of the

parties, and the decree valid, until the contrary is made to appear.

It is said the children and heirs at law of Wm. M. O'Hara were not notified or brought into court by their proper names; that fact, however, does not appear from the record. The defendants to the bill were Susan O'Hara and others, the widow and heirs at law of Wm. O'Hara, deceased.

At the first term of court at which the bill was pending, the court found the fact, as shown by the decree, that the defendants were not inhabitants of the State. An order based upon this finding was entered requiring the defendants to be notified by publication in a certain paper. At the next term of the court it was a question for the court to determine whether notice had been given the defendants, from the proof then produced.

The court heard the proof, and found and adjudged that the required notice had been given. What the notice contained the record does not disclose, but when the question arises collaterally, the legal presumption is, that the notice which the court passed upon contained every fact necessary to give the court jurisdiction of the persons of the defendants. As was said in *Reddick et al.* v. *The State Bank*, 27 Ill. 145, "It is to be presumed that no court will state of record the existence of facts which had no existence, or pass a decree, or render a judgment, unless proof of service or notice were actually produced. The record, therefore, stating such facts, and nothing to the contrary appearing, it should be received as evidence of their existence." See, also, *Galena and Chicago Union Railroad Co.* v. *Pound*, 22 Ill. 399; *Rivard* v. *Gardner*, 39 Ill. 129; *Moore* v. *Neil*, 39 Ill. 256.

The decree of foreclosure sought to be impeached was entered October 7th, 1822, by the terms of which the minor defendants had the right, at any time within one year after they became of age, to appear and contest the decree.

Under this decree the mortgaged lands have been sold and passed into the hands of actual settlers, on the faith of the

solemn adjudication of a court of general jurisdiction. Purchasers have improved and rendered the lands valuable, and for more than half a century no effort has been made by the heirs of the mortgagor, or those claiming under them, to impeach the validity of the decree of sale. Under such circumstances, to permit the effect of a judicial record to be overturned without the most cogent reasons, would, in effect, open a wide door to fraud and speculation, destroy all confidence in judicial sales, and remove that protection from innocent purchasers which it has been the doctrine of all courts to uphold and sustain.

In *Voorhees* v. *The Bank of the United States*, 10 Peters, 449, the court, in discussing a question of this character, said, "that some sanction should be given to judicial proceedings, some time limited beyond which they should not be questioned, some protection afforded to those who purchase at sales by judicial process, and some definite rules established by which property thus acquired may become transmissible with security to the possessors, can not be denied."

The objection that the decree does not describe the lands is not well taken. The decree directs the sale of the mortgaged premises mentioned and described in the complainant's bill of complaint, being sixty-six quarter sections of land.

By referring to the mortgages, which were made a part of the bill, an accurate description of the lands is found.

It was not at all necessary that a formal description of the lands should be inserted in the decree.

There is no uncertainty as to the lands decreed to be sold or that were actually sold.

The land in controversy is embraced in one of the mortgages described in the bill. It is contained, also, in the commissioner's report of sale and deed.

The mortgages, and proceedings in the foreclosure of the same in the circuit court of Pike county, and commissioner's deed, which the court excluded, should have been admitted

in evidence, and upon the evidence introduced and offered, the judgment should have been entered in favor of appellant.

The judgment will be reversed, and the cause remanded for another trial consistent with this opinion.

Judgment reversed.

THE BOARD OF TRUSTEES OF THE ILLINOIS INDUSTRIAL UNIVERSITY

v.

THE BOARD OF SUPERVISORS OF CHAMPAIGN COUNTY.

1. TAXATION—*Industrial University exempt from.* Lands held by the trustees of the Illinois Industrial University belong to and are under the control of the State, when it is disposed to exercise the power, and are therefore exempt from taxation, under the act of 1853, relating to revenue.

2. INDUSTRIAL UNIVERSITY—*State control of.* Although the State has created a body corporate to control the Illinois Industrial University, and its property and affairs, yet the State still retains the power of appointing its trustees, and may, through other agents than the trustees, sell and dispose of the property of the institution, or amend or repeal the charter, as public policy or the interest of the university may require.

APPEAL from the Circuit Court of Champaign county; the Hon. A. J. GALLAGHER, Judge, presiding.

This was an application for judgment against certain real estate of the Illinois Industrial University, for taxes.

The case was submitted and heard in the circuit court, upon the following agreed statement of facts: That the lands were assessed for the year 1870 in the sum of $228.52, State, county, road, bridge and school taxes; that the same remained unpaid; that legal notice of the application for judgment had been given; and that the lands had been returned by the collector as delinquent.

On the part of the defendants it was agreed, that the lands were a part of those referred to in section 12 of the act to

charter the Illinois Industrial University, and that they were conveyed to the university on the acceptance of the charter, and that since their conveyance, in 1867, the lands had been regularly rented, and the rents arising therefrom used as funds of the university for the payment of current expenses. The question submitted was, whether these lands were liable to be taxed for the year above named. The court below held that they were, and rendered judgment against the lands for $228.52, and for costs. The defendants appealed.

Messrs. CUNNINGHAM & WEBBER, for the appellants.

Mr. M. B. THOMPSON, State's Attorney, for the appellees.

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

This is an appeal from a judgment for taxes of 1870, assessed against lands belonging to appellants, and conveyed to them in consideration that the Industrial University should be located at Urbana, in this State. It is claimed that the title to these lands is in appellants, in trust, and that the institution and its property is under the control of the State, and is held in trust for the State; that, as it is the property of the State, it is exempt from taxation, and, being exempt, the judgment against the lands is erroneous, and should be reversed.

It is provided by section 3, article 9, of our constitution, that the property of the State, counties, etc., may be exempted from taxation; but such exemption shall be only by general law. And the third section of the revenue law of 1853 exempts real and personal property belonging to the State. (Laws of 1853, sec. 3, p. 5, 37.) And we have failed to find that this enactment has been subsequently changed, but still remains in full force.

The only question, then, presented by this record, is, whether this is the property of the State. If so, then it is exempt from taxation. To determine that question, we must turn to the act which brought this institution into existence.

Congress having donated a large amount of land scrip to the State, for the purpose of founding a university, and the board of supervisors of Champaign county having offered to donate a college edifice and a large quantity of land if the State would locate permanently the "Illinois Industrial University" at Urbana, in that county, the General Assembly, on the 28th day of February, 1867, created a body corporate to govern the fund and university. The trustees were to be appointed by the Governor, and to be confirmed by the Senate. They are styled "The Board of Trustees of the Illinois Industrial University," and perpetual succession was conferred upon them by that name, and to have power to contract and be contracted with, to sue and be sued, to plead and be impleaded, etc. They were required to permanently locate the institution at Urbana, and to provide the requisite buildings, apparatus and conveniences; to fix rates of tuition; to appoint professors, etc. But it is expressly provided that the trustees shall not, in the exercise of any of their powers, create any liability or indebtedness in excess of the funds in the hands of the treasurer.

The General Assembly, at each session since the organization of the institution, have made appropriations for the erection of buildings for the use of the university. At the session of 1871, an appropriation of $150,000 was made for building purposes, and various sums for the different departments of education in the university. And by section 3 of that act it is provided, that "for the construction of said buildings the trustees shall not obligate the State for the payment of any sum of money in excess of appropriations made for that purpose." (Sess. Laws, 1871–2, p. 143.) And other appropriations might be referred to as showing that the General Assembly regard, and have always regarded, this as a State institution.

The fund was donated to the State, in the first place, for the establishment and maintenance of an institution of learning, which this represents; and we fail to find the slightest

indication of an intention, on the part of the State, to part with either the ownership of the property or control of the institution. It is true, that the General Assembly have created a body corporate, as the most convenient mode of controlling the institution, its property and affairs; but it will be observed that the State retains the power of appointing its trustees, and, no doubt, has power, through agents other than the trustees, to sell and dispose of the property of the institution, or they may, at pleasure, amend or even repeal the charter, as public policy or the interest of the university may require.

It will be observed that the persons appointed for the government of the university are created and called trustees. They derive all of their powers from the State, and they act for and on behalf of the State; and the power which conferred authority on them to act, may withdraw or modify it at pleasure. Had the General Assembly intended that the property might be sold for any purpose, some language indicating such intention, no doubt, would have been employed.

In any view in which we have been able to consider the case, we have been irresistibly impelled to the conclusion that this real estate, although conveyed to the corporate body, belongs to and is under the entire control of the State, when disposed to exercise the power; and, being property of the State, we have seen the constitution authorizes its exemption from taxation, and the General Assembly has exempted it. As an irresistible conclusion it follows, that the judgment of the court below is erroneous, and it must be reversed.

*Judgment reversed.**

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*ILLINOIS INDUSTRIAL UNIVERSITY *v.* THE PEOPLE, ETC.

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

This case, in all of its material facts, is similar to the case of *The Board of Trustees of the Illinois Industrial University* v. *The Board of Supervisors of Champaign County*, decided at the present term. We therefore deem it unnecessary again to state the reasons for reversing the judgment. That case controls this, and the judgment of the court below is reversed.

Judgment reversed.

JOHN AMANN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

ABATEMENT—*misnomer—striking plea from files.* A defendant, indicted by the name of John Ammon, filed a plea in abatement, duly verified, setting forth that he was named and called John Amann, and that he had never been named and called John Ammon. The court, on its own motion, struck the plea from the files: *Held*, that the court erred in its action, as the plea was good in form and substance, and the defendant was entitled to have the issue tendered tried by a jury, or otherwise disposed of according to law.

WRIT OF ERROR to the Circuit Court of DeWitt county; the Hon. LYMAN LACEY, Judge, presiding.

This was an indictment against the plaintiff in error for selling intoxicating liquor to a minor.

Messrs. MOORE & WARNER, for the plaintiff in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was a prosecution for selling spirituous liquors to a minor. Plaintiff in error was indicted by the name of John Ammon. When arraigned, he filed a plea in abatement, duly verified by his affidavit, setting forth that he was named and called John Amann, and that he had never been named and called John Ammon. On its own motion, the court ordered this plea to be stricken from the files, which was done. The defendant excepted to the action of the court, and has preserved his exception in the record in due form.

A trial was then had, which resulted in a verdict of guilty. Motions for a new trial and in arrest of judgment having been overruled, the accused was sentenced to imprisonment in the county jail for a period of ten days, and adjudged to pay a fine of $20, together with the costs of prosecution.

It was error in the court, of its own motion, or for any cause appearing in the record, to strike defendant's plea in

abatement from the files. It was good in form and in substance, and he was therefore entitled to have the issue tendered thereby tried by a jury, or otherwise disposed of according to law.

For the error indicated the judgment will be reversed and the cause remanded.

Judgment reversed.

SCHOOL DIRECTORS OF DISTRICT No. 3, T. 9 N. R. 8.

v.

ANDERSON FOGLEMAN, for use, etc.

1. BUILDING SCHOOL HOUSE—*vote necessary before.* Under section 48 of the school law of 1865, it is unlawful for the school directors to build a school house without a vote of the people of the district on the question, and if they do so, their act will be null and void, and their orders drawn on the township treasurer in payment for building the same will be void even in the hands of an assignee, and the successors of such directors may question the same.

2. SCHOOL DIRECTORS—*powers limited.* School directors can exercise no other powers than those expressly granted, or such as may be necessary to carry into effect a granted power.

3 SCHOOL HOUSE—*whether the building of, legalized by subsequent acts.* Where school directors had built a school house for their district, without any vote of the people, it was *held*, that the levying of a tax to defray the expenses, and the acceptance of the building and teaching school therein, could not legalize the act, or bind the tax-payers. The tax-payer was not bound to pay such tax.

4. RATIFICATION OF UNAUTHORIZED ACT. Where public officers do an act in the absence of any power, it is void, and can not be subsequently ratified or made valid for any purpose.

5. ASSIGNEE—*when he takes subject to defense.* Where public officers, such as school directors, issue negotiable paper of the corporation without authority of law, a purchaser of such paper can not be an innocent holder, as he is bound to look to the authority to issue the same.

APPEAL from the Circuit Court of Cumberland county; the Hon. J. C. ALLEN, Judge, presiding.

This was an action of assumpsit, brought by Anderson Fogleman, for the use of Reuben Bloomfield, against the school directors of district No. 3, in township 9 N., range 8, in Cumberland county, Illinois, upon three orders drawn by previous directors on the township treasurer. The defendants pleaded, first, the general issue; secondly, that no vote of the people of the district was ever had, or attempted to be had, authorizing the building of the school house, in part payment for the building of which said orders were issued, and thirdly, failure of consideration. The orders on their face showed that they were given in part payment for building a school house in the district. A trial was had before the court without a jury, who found for the plaintiff and rendered judgment for the amount due on the orders, and from this judgment the defendants appeal.

Mr. J. W. WILKIN, for the appellants.

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

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the Cumberland circuit court, counting upon three orders drawn by a majority of the school directors of district No. 3, in township 9 north, range 8, in that county, in favor of A. Fogleman or order, on the treasurer of that town, one for seventy-five dollars, and two for fifty dollars each, all bearing interest at ten per cent, each of them purporting to be in part pay for building a school house in that district, and drawn payable out of any money belonging to the district specified.

The general issue was pleaded, and also a special plea averring that no vote of the people of the district was had authorizing the building of the school house, and a plea of failure of consideration.

A jury was waived, and the cause tried by the court, who found for the plaintiff and assessed the damages at two

hundred thirty dollars forty cents, and rendered judgment for the same. The school directors appeal.

Appellants are the successors of the drawers of these orders, and have a clear right to question their legality, and the authority of their predecessors to draw them.

It is conceded no vote of the people of the district was had authorizing the building of this school house. The orders purport, on their face, to be for such purpose, and it was no difficult matter for any person about negotiating them to ascertain if a vote had been taken. The returns of such an election are, by law, made to the town treasurer, the officer on whom they are drawn, and if inquiry had been made of him as to this fact, he would have informed the inquirer, as he testified, that no vote had been taken.

Section 48 of the act of 1865, which was in force when this contract was made, is most explicit. It declares it shall not be lawful for a board of directors to purchase or locate a school house site, or to purchase, build or remove a school house, etc., without a vote of the people, at an election to be called, etc. If this is the lawful course to be pursued, any other course to accomplish the object was necessarily unlawful, and the act null and void. These bodies can exercise no other powers than expressly granted, or such as may be necessary to carry into effect a granted power. *Glidden et al.* v. *Hopkins*, 47 Ill. 529. And it is fortunate for the people this power is so restricted. If, in the face of this law, a board of directors can lawfully contract for building a school house, to cost six hundred dollars, the contract price of the one in question, what is to prevent them to contract for a structure to cost sixty thousand dollars, or any other sum, and draw their orders on the treasurer at ten per cent in payment? We know of no limit to their power.

It is said by appellee a tax was levied to defray the expense, but that is not so, and if it was the fact, the action of the directors would not thereby be legalized. No tax-payer would be bound to pay a tax levied for such purpose.

It is also urged by appellee that the school house was accepted by the directors who incurred the debt, and that school was kept in it. That does not legalize the act, or bind the tax-payers. The question here presented is a question of power, and no act of the kind set up can make it valid for any purpose. Nor can the beneficiary in this case resort to such acts in support of his claim. In the absence of power to do the act, there can be no innocent holder of this paper. He should have looked to the authority to make the contract in satisfaction of which the orders are drawn.

There is no ground on which a recovery can be had against this board of directors, the appellants. As to the personal liability of those who drew these orders, and made this contract with appellee, we express no opinion.

For the reasons given, the judgment is reversed.

Judgment reversed.

Mr. Justice Scholfield took no part in the decision of this case.

The Gilman, Clinton and Springfield Railroad Company

v.

Jonathan Spencer.

1. Negligence—*injury to stock by railway company.* Where a railway company is under no statutory liability for injury to stock by its trains by reason of its road not having been fenced, as, when the road has not been open for use six months, the only ground of liability will be that the injury might have been avoided by the exercise of ordinary care and prudence, and its servants in charge failed to exercise such care and prudence.

2. Same—*failure to use care not alone sufficient.* Where a railway company, whose road had not been in operation six months before an accident, was sued for an injury to plaintiff's hogs, the court instructed the

jury that, if they believed, from the evidence, that the hogs were killed by defendant's engine, and that defendant's servants failed to use ordinary care to prevent the killing, the defendant was liable: *Held*, that the instruction was erroneous, as excluding the necessary element that the injury might have been avoided by the exercise of ordinary care and prudence, and made the liability depend upon not attempting to prevent the injury whether it would have availed or not.

Appeal from the Circuit Court of DeWitt county; the Hon. Thomas F. Tipton, Judge, presiding.

This was a suit by Jonathan Spencer, against the appellant, to recover for the killing of plaintiff's hogs. The plaintiff recovered a judgment for $31.50, and the defendant appealed.

Messrs. Fuller & Graham, for the appellant.

Mr. P. T. Sweeney, for the appellee.

Mr. Justice McAllister delivered the opinion of the Court:

The injury to appellee's hogs, alleged to have been inflicted by appellant's engines on different occasions, for which the former recovered in the court below, occurred, as to all except one, within six months from the time appellant's road was open for use. In respect to all killed within the six months, the statutory liability for not fencing did not attach; so that, as to these, it was incumbent upon appellee to make affirmative proof of negligence resulting in the injury complained of. The only evidence of that tendency was that of the plaintiff and one other witness, that they did not hear any bell rung. There was no testimony given tending to show the circumstances under which the hogs, on the respective occasions in question, received any injury by means of appellant's engines or trains. Appellant being under no statutory liability by reason of its road not having been fenced, the ground of liability would be that the injury might have been avoided by the exercise of ordinary care and prudence, and

its servants in charge failed to exercise such care and prudence. *Ill. Cent. R. R. Co.* v. *Middlesworth,* 46 Ill. 494; *Same* v. *Baker,* 47 id. 295; *Rockford, Rock Island, etc. R. R. Co.* v. *Lewis,* 58 id. 49; *T. P. & W. R. R. Co.* v. *Bray,* 57 id. 514; Wharton on Neg. secs. 397, 893.

On behalf of plaintiff, the court instructed the jury that defendant was bound to use ordinary care and diligence in running its trains; that, if the jury believed, from the evidence, that plaintiff's hogs were killed by defendant's engine, at or near defendant's railroad crossing, and that defendant's servants failed to use ordinary care to prevent such killing, then the jury should find for the plaintiff such damages as he proved he had sustained.

This instruction excludes a necessary element of the rule above laid down, viz: that the injury might have been avoided by the exercise of ordinary care and prudence, and declares the liability of defendant for not attempting to prevent the injury, whether such effort would have been of any avail or not.

The case being extremely close upon the evidence, it was peculiarly one where an erroneous instruction would be prejudicial.

The judgment must be reversed and the cause remanded.

Judgment reversed.

NEHEMIAH FAUCHER

v.

THOMAS TUTEWILLER *et al.*

1. SURVEY—*disputed lines—construction of order for.* Where the court, on a petition for the appointment of a commission of surveyors, found that there was a dispute as to a part of a section line, and appointed surveyors, and ordered them to "establish" the line in dispute: *Held,* that

this did not authorize the surveyors to establish the line arbitrarily, without regard to the line of the government survey, but they were to find and establish the line as run by the government.

2. Where the court ordering such survey described the disputed line, which was a section line, as commencing at a certain corner of a quarter and ending at a corner of another quarter section of land, it was *held*, that this did not fix the line for the surveyors, as they were to find where such corners were. Under such order the surveyors were at liberty to survey whatever lines might be necessary, in order to find and establish the true line of the one in dispute.

3. SAME—*judgment for costs.* Where the proceeding for settling a disputed line was commenced against three defendants, and the court found that one of the defendants was not interested in the line, it was proper to enter judgment for costs against those of the parties who were interested.

APPEAL from the Circuit Court of Cumberland county.

This was a petition, filed by Thomas Tutewiller, Edwin Mattoon, Philander Northway, Martha A. Walthrup, Harlow Park and William H. Rissler, against Nehemiah Faucher, Henry D. Faucher and Walter N. Ruffner, asking for the appointment of commissioners to settle and establish a line in dispute. The court approved the surveyors' report, from which order Nehemiah Faucher appealed.

Messrs. T. D. & D. S. MCINTYRE, for the appellant.

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

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a proceeding, under the statute of 1869, to establish a line in dispute between the owners of adjacent tracts of land.

The petition represented that the petitioners were owners of lands in sections 32 and 33, in township 10, range 10, which lie along the line dividing said sections from sections 4 and 5, in township 9, range 10, all in Cumberland county, in this State, and that Nehemiah Faucher, Henry Faucher, and Walter N. Ruffner were the owners of the adjacent lands

on the other side of the line; that the corners and boundary lines between petitioners and the defendants were lost or destroyed, and were in dispute between them, and praying for the appointment of a commission of surveyors to make survey of and to permanently establish said corners and boundaries.

The circuit court found that the line was in dispute; that Nehemiah Faucher and Walter N. Ruffner were the owners of the land on one side of the disputed line and the petitioners on the other, and appointed a commission of surveyors to make survey of and establish the line in dispute, as follows, to-wit: commencing at the south-east corner of section 33, and running west to the south-west corner of section 32, in township 10, range 10 east, dividing the above described sections of land from sections 5 and 4, in township 9, range 10 east, all in Cumberland county, Illinois. At a subsequent term, the commission of surveyors made a report of their survey, accompanied by a plat thereof. The appellant, Nehemiah Faucher, filed his exceptions to the report, and, upon hearing the evidence submitted, the court approved and confirmed the report.

This is substantially all that the record brought here shows. Neither the evidence submitted on the hearing of the petition or on approving of the report under the objections filed, is preserved in the record.

Exception is taken by appellant to the use of the word "establish," in the order of the court, as though that authorized the commission to establish for themselves, and upon their own judgment, a line dividing the lands, without regard to the line of the government survey; whereas, under this proceeding, it is only original corners and boundaries which are to be *re*-established. The word "establish" is that used by the statute in prescribing the notice to be given of the application for the appointment of the commission, it being "to make survey of and to permanently establish said corners and boundaries." We do not consider it the proper construction of this order that it authorized the commission to

establish a line of their own, irrespective of that established by the government. It was the section line they were ordered to find and establish—that is, the line run by the government surveyors. There is no force in this objection.

It is again objected, that the commission were ordered to run but one line, and that they were directed to commence and conclude at a disputed point. We do not so view the judgment of the court. The commissioners were not ordered to make an arbitrary or a new line, but to find and re-establish the section line; and the court, in describing the line to be surveyed, describes it as beginning at the south-east corner of section 33, and running west to the south-west corner of section 32. The court gave no information as to where those corners were, but left it with the surveyors to find them. The line to be found and located was the section line. That line the commissioners were directed to survey, and, of course, they were authorized, under the judgment of the court, to survey whatever lines should be necessary, in order to find and establish the true line which they were ordered to establish. The report of the commissioners shows that their commencing point was an original corner, and at which point the line in dispute commenced.

Objection is taken that the proceeding was instituted against three persons, viz: Nehemiah Faucher, Walter N. Ruffner, and Henry D. Faucher, but that judgment is against two only: Nehemiah Faucher and Walter N. Ruffner.

The court found, upon the hearing, that of the defendants in the court below, Nehemiah Faucher and Walter Ruffner alone were interested in the line, therefore it was proper to enter judgment against them alone.

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

Judgment affirmed.

JAMES M. ADSIT

v.

HERMAN LIEB *et al.*

1. CONSTITUTIONAL LAW—*State Board of Equalization.* Under the constitutional provision which requires the value of property for taxation "to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise," the legislature is not prohibited from creating a State Board of Equalization, and investing it with power to equalize the assessments of the different counties for the purpose of producing uniformity in the valuation.

2. TAXATION—*relief from excessive valuation.* Where the State Board of Equalization increased the valuation of personal property in a county 68 per cent, whereby a party who had given in his moneys, which were assessed by the county assessors relatively too high, was required to pay on a valuation greatly in excess of its real value, it was *held*, that a court of equity could not relieve him, as he had his remedy before the board of review in his township, and also before the board of supervisors, and not having availed of it, he must bear the consequences.

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

This was a bill in chancery, by James M. Adsit against Herman Lieb, county clerk, and P. M. Cleary, collector of Cook county, to enjoin the extension of taxes upon the moneys and funds of the complainant as a banker, upon the value thereof as equalized by the State Board of Equalization. The court below sustained a demurrer to, and dismissed the bill, from which order the complainant appealed.

Mr. EDWARD ROBY, for the appellant.

Mr. JAS. K. EDSALL, Attorney General, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellant was a banker, doing business as such in the town of South Chicago, in Cook county. He was assessed by

the town assessor of that town, for the purpose of taxation, in the year 1873, for money on hand and money on deposit with other banks, etc., subject to draft, in the aggregate $47,300; and for fire and burglar proof safe, $250; making a total of $47,550. This assessment was neither increased nor diminished by the board of supervisors of the county, but the State Board of Equalization, in equalizing the assessments of the different counties of the State, added 68 per cent to the assessment of Cook county, and thereby increased the appellant's assessment from $47,550 to $79,884.

It is argued that the legislature having provided by law for the assessment of property by local assessors, had no authority, under the constitution, to create a State Board of Equalization, and invest it with power to change the values determined by the local assessors.

The part of the constitution which is supposed to relate to this question, is as follows: "The General Assembly shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise."

This is a substantial copy of so much of the constitution of 1848 as relates to this question.

A State Board of Equalization was created by an act approved March 8, 1867, invested with similar powers to those conferred upon that board by the act in force July 1, 1872. That act remained in force until it was superseded by the last named act.

In the case of *The People ex rel. etc.* v. *Salomon*, decided by this court at the January term, 1868, 46 Ill. 333, the principal question argued and decided was, the constitutionality of the act referred to, of March 8, 1867, and it was there held to be within the authority possessed by the legislature under the constitution.

When, therefore, the constitutional convention of 1870 re-adopted the language quoted, and made it a part of the constitution then adopted, it was known that all the departments of the State government held that it did not prohibit the legislature from creating a State Board of Equalization, and investing it with power to equalize the assessments of the different counties, for the purpose of producing uniformity in the valuations, and had it been intended that the legislature thereafter should not possess this power, it is impossible to believe that its exercise would not have been prohibited in unambiguous language. We have, in *Porter et al.* v. *The R. R. I. and St. L. R. R. Co., post* ——, held that it was competent to invest the Board of Equalization with authority to make original assessments of corporate property, and it is unnecessary to repeat what is there said with reference to the power possessed by the legislature in regard to the person or persons by whom assessments shall be made.

The wrong, if such it be, under which appellant suffers, results, as we must presume, from the fact that when his property was assessed by the local assessor, it was assessed relatively too high. There is no averment in the bill by which this presumption is excluded, and it is supported by the action of the Board of Equalization, which proceeded upon the hypothesis that the average valuation in that county was sixty-eight per cent too low.

The Board of Equalization possess no power to redress individual grievances, resulting from improper valuations; their duty is confined to equalizing the general valuations. But by section 86, of the revenue act, in force July 1, 1872, it is provided: "In counties under township organization the assessor, clerk and supervisor of the town shall meet, on the fourth Monday of June, for the purpose of reviewing the assessment of property in such town. And on the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment, and correct the same, as

shall appear to them just. No complaint that another is assessed too low shall be acted upon, until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county. * * Property assessed after the fourth Monday of June shall be subject to complaint to the county board, subject to the rules specified in this section."

The county board is required, by section 97 of the same act, to meet on the second Monday of July, annually, after the return of the assessment books; and, by the 2nd subdivision of the section, it is made its duty then, "on the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, to review the assessment and correct the same, as shall appear to be just," etc.

No effort appears to have been made by the appellant to have relief under these sections, and, having neglected to avail of the legal remedy thus provided him, he can not now have relief in a court of equity. *City of Peoria* v. *Kidder*, 26 Ill. 357. In that case it was said: "It is a rule of uniform application, that where a party has a complete remedy at law, and, having the opportunity, slumbers upon his right, and fails to insist upon it, a court of equity will not afford relief."

The objection that appellant had no notice of the meeting of the Board of Equalization or of its action, is untenable. The law is a public one, which prescribes the duties and designates the time of meeting of the board, and all citizens are bound to take notice of it. The constitution imposes no obligation upon the legislature, requiring that such notice shall be provided for, or that an appeal shall be allowed from the action of the board. *Porter et al.* v. *R. R. I. and St. L. R. R. Co. supra.*

Perceiving no error in the record, the decree of the court below is affirmed.

Decree affirmed.

THE CITY OF SPRINGFIELD

v.

THOMAS DOYLE.

1. MUNICIPAL CORPORATION—*liability for injury from defect in sidewalk.* Where the sidewalk of a city is out of repair, and remains so for a considerable time, actual notice to the street supervisor or city authorities will not be necessary, to hold the city liable for a personal injury sustained by a person in consequence of the dangerous condition of the same, while using due care on his part. Notice of the defective state of the walk will be presumed after the lapse of a sufficient time.

2. DECLARATION—*injury from defective sidewalk.* In an action on the case by a party against a city, to recover damages for personal injuries caused by defects in the sidewalks of the city, if the declaration describes the *locus* as a street of the city known as Jefferson street, it will be sufficiently specific on general demurrer.

APPEAL from the Circuit Court of Sangamon county; the Hon. CHARLES S. ZANE, Judge, presiding.

Mr. E. B. HERNDON, and Mr. JAMES A. KENNEDY, for the appellant.

Messrs. MCCLERNAND & KEYES, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case, against the city of Springfield, to recover damages for an injury occasioned the plaintiff by reason of a defective sidewalk on Jefferson street, in said city.

There were five counts in the declaration, and a demurrer to each, which was sustained as to the first, second and fourth counts, and the plea of not guilty and one special plea pleaded to the third and fifth counts.

There was a demurrer to the special plea, which was sustained, and an issue to the jury on the first plea. There was a verdict of guilty and the damages assessed at two hundred and fifty dollars. A motion for a new trial was denied, and judgment rendered on the verdict.

The city appeals, and makes the point that, by the 10th section of their charter, the city is not liable for any damage or injury arising from the bad condition of its streets, alleys or highways by reason of the neglect of the proper officers of the city to repair the same, until the supervisor of the city shall have been notified thereof, and fails to repair them in a reasonable time after such notice.

It is alleged in the third count of the declaration that the city had notice of the bad condition of this sidewalk, and in the fifth count, that the supervisor of the city had knowledge of its bad condition previous to the injury complained of. The section is silent as to the kind of notification the supervisor shall have. In this case the sidewalk was out of repair for a long time before this accident occurred, so long as to constitute notice, in view of repeated decisions of this court.

Because no person has given actual notice to the supervisor, a person passing carefully along a sidewalk which is in a dangerous condition, and had been so for years, can have no redress for an injury so caused. This is the argument, but it is not founded in justice or right.

Full control is given the city authorities, by the charter, over the streets and sidewalks, and money can be raised in various ways therein provided, to be expended upon them. That they had not the means at hand, was no excuse. The means could have been and should have been provided.

Another objection is made, that the *locus* is not sufficiently specific. On general demurrer, we are inclined to hold it is. It is described as a street of the city known as Jefferson street.

The injury was sufficiently established, and also the loss of time and suffering of the plaintiff, and medical attendance, for all which, the sum found by the jury was not more than adequate compensation.

These are all the points raised on the record, and appellant can take nothing by them.

The judgment is affirmed. *Judgment affirmed.*

DANIEL O. CRIST *et al.*

v.

MARY W. WRAY.

1. PLEADING—*error in sustaining demurrer cured.* If the court errs in sustaining a demurrer to a plea, the error will be cured if the plaintiff subsequently files a replication thereto, and no evidence proper under the plea is excluded on the trial.

2. CONTINUANCE—*when amendment is ground for.* It does not necessarily follow that a cause must be continued because an amendment is allowed to a declaration, and the defendant makes an affidavit that, in consequence thereof, he is unprepared to proceed to or with the trial at the term, especially when no reason is given to show why he is not prepared.

3. Where, after the close of the plaintiffs' evidence, the court allowed the declaration, which was in trespass for taking and carrying away a piano and an organ, to be amended, by striking out all claim for the piano, it was *held*, that the effect of the amendment was to render the defendant better instead of less prepared for trial, and that in such a case it was no error to overrule his motion for a continuance, though supported by affidavit that he was unprepared to proceed with the trial.

4. ERROR—*that works no injury.* Although improper testimony may have been admitted, yet when it appears, from the verdict, that the jury were not influenced by it, and no injury resulted from its admission, the error will not be sufficient to justify a reversal.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was an action of trespass, brought by Mary W. Wray against Daniel O. Crist, Henry Houscheid, and Joseph V. Ater, for the taking and carrying away of a piano and an organ.

Mr. JOHN E. POLLOCK, for the appellants.

Messrs. WILLIAMS, BURR & CAPEN, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of trespass, for the taking and carrying away of one piano and one organ.

The first point made for the reversal of the judgment is, that the court erred in sustaining a demurrer to a plea.

It is enough to say, that if there was any error in that respect, it was cured by subsequently filing a replication to the plea before trial, whereby defendants had the full benefit of the plea, and no evidence proper under it was excluded.

After the plaintiff had introduced all her evidence, the court, on motion, gave her leave to amend her declaration, by striking out all claim for the piano. Thereupon, one of the defendants moved for a continuance of the cause, filing, in support of the motion, his affidavit that, in consequence of such amendment, he was unprepared to proceed with the trial of the cause at that term.

The overruling of this motion is assigned as error. It is claimed that defendant was entitled to a continuance under this provision of the present statute:

"No amendment shall be cause for a continuance, unless the party affected thereby, or his agent or attorney, shall make affidavit that, in consequence thereof, he is unprepared to proceed to or with the trial of the cause at that term, and that he verily believes that if the cause is continued he will be able to make such preparation."

It does not necessarily follow that a cause must be continued when a party makes affidavit in such form.

The affidavit here sets out no reason why the defendant was not prepared to proceed with the trial. The withdrawing one of the two claims which the original declaration embraced, left but one instead of two claims for the defendant to meet. The effect of the amendment was, to render the defendants better instead of less prepared to defend against the amended declaration. When a court sees such to be the effect of an amendment, it may very properly overrule the motion to continue, notwithstanding the affidavit, where it suggests no reason why the defendant was unprepared.

It is next objected, that the court admitted testimony of the rental value of the organ. This was improper. The evidence should have been as to the value of the organ. The rental value was so largely in excess of any ordinary interest

on the price of the organ, that the jury might have been misled thereby to form an exaggerated idea of the value of the article. But testimony was given as to the value of the organ, and, comparing that with the amount of the verdict, we can see that the jury were not influenced, by evidence of rental value, to place an undue estimate upon the value of the instrument, and that no injury resulted from the admission of the evidence, and so it forms no ground for reversal.

Another point is, that the verdict was contrary to the evidence. There was a conflict of testimony as to the ownership of the organ. We can not see that the jury so manifestly erred in their finding as to require that it should be disturbed.

The refusal to give the first instruction asked by defendants, which is complained of, was manifestly right.

The judgment is affirmed. *Judgment affirmed.*

ABRAHAM WOOD *et al.*

v.

ISAAC D. RAWLINGS *et al.*

MECHANIC'S LIEN—*as against prior lien of record.* Where the grantors of land reserved a lien in their deed on the premises for the unpaid purchase money, and after the recording of the deed other parties erected a building on the land for the grantees, and obtained a decree for a mechanic's lien, subject to the vendor's lien, and on the faith of this decree the complainant purchased the notes given for the purchase money, and filed his bill to enforce the vendor's lien, and the court decreed in favor of such lien, declaring it prior to the mechanic's lien, and ordered a sale of the land: *Held*, that the decree enforcing the vendor's lien was proper, and that those holding the mechanic's lien were concluded by the decree in their own case from disputing the priority of the vendor's lien; that the deed reserving the lien being recorded when the mechanics made their contract, was notice to them, and that they were estopped from alleging mistakes in their own proceedings, after the complainant bought the notes on the faith of their decree.

APPEAL from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

This was a bill, filed by Cyrus Matthews against Joseph A. Meeks, Andrew H. Meeks, William G. Gallaher, Alexander Edgmon, Wilson J. Larimore, Abraham Wood, and James Montgomery. The object of the bill and facts of the case are stated in the opinion. The complainant having died, his administrator, Isaac D. Rawlings, was substituted as complainant, and a decree rendered in conformity to the prayer of the bill. From this decree Wood and Montgomery appealed.

Messrs. DUMMER & BROWN, for the appellants.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

August 24, 1869, Gallaher and Edgmon, being the owners, sold and conveyed the premises in question to the two Meeks for the consideration of $4700. All the purchase money (except $500 paid down) was secured by the Meeks giving their seven promissory notes, one being payable in each year, successively, the sellers reserving in their deed a vendor's lien for the unpaid purchase money. That deed was immediately put of record. August 31, 1869, the Meeks executed a mortgage on the premises to one Larimore, to secure the sum of $585, which was recorded the same day; and in the following September entered into contract with Wood and Montgomery to erect a building on the premises; they, furnishing thereunder materials and labor, afterwards filed their petition in the circuit court for a mechanic's lien, making Gallaher and Edgmon, but not Larimore, parties defendant. The former answered, and the court, Feb. 21, 1871, rendered a decree in favor of petitioners, finding an indebtedness from the Meeks for work and materials to the amount of $982, which was declared a lien, but inferior to that of Gallaher and Edgmon reserved by their deed, and the premises were ordered sold, subject to their lien. Matthews purchased the unpaid notes given by the Meeks to Gallaher and Edgmon for the purchase money, after the rendition of and upon the

faith of appellants' decree, and filed the bill in this present case to enforce the vendor's lien reserved by the deed aforesaid. He having died pending the suit, his administrator was substituted, and a decree rendered declaring the lien, its priority over other liens, and for foreclosure and sale. From that decree Wood and Montgomery, who were parties, have appealed to this court.

The court is of opinion that the decree is right. Under no possible aspect of the circumstances of the case could appellants establish any defense. They were concluded by the decree in their own case, and, if they were not, the vendor's lien being reserved in the deed, and that put upon record before their contract with the Meeks, they are chargeable with notice, and the vendor's lien is paramount.

They are estopped from alleging mistakes in their own proceedings, after Matthews was induced to purchase the notes on the strength of that decree making their lien subject to that of the vendors.

The decree of the court below will be affirmed.

Decree affirmed.

NATHANIEL SUMMERS
v.
JOHN W. STARK.

NEW TRIAL—*as to the finding from the evidence.* Where the evidence of the parties upon the controverted points is conflicting, it is the peculiar province of the jury to harmonize and settle the conflicting proof, and if the jury have been properly instructed, and a fair trial had, a new trial will not be awarded, unless there is a clear preponderance of the evidence against the verdict.

APPEAL from the Circuit Court of Adams county; the Hon. JOSEPH SIBLEY, Judge, presiding.

Mr. GEO. W. FOGG, for the appellant.

Messrs. WARREN & GILMER, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by John W. Stark, in the county court of Adams county, against Nathaniel Summers, to recover for labor performed by the former for Summers upon his farm.

A trial of the cause was had before a jury, which resulted in a verdict in favor of Stark for $350. The county court overruled a motion for a new trial, and rendered judgment upon the verdict.

Summers prosecuted an appeal to the circuit court of Adams county, where a trial was had upon the record from the county court, and the judgment affirmed.

Summers brings the record here by appeal, and asks a reversal of the judgment solely upon the ground that the verdict is contrary to the evidence.

It appears from the evidence that appellee had worked for appellant at different times, in all some four or five years.

On or about the 1st of September, 1870, there was due appellee, for work prior to that time, $108.40. Appellee then commenced work for appellant, and remained in his employ until October, 1873, and the controversy between the parties arises in regard to the amount due for labor during that time.

Appellee claimed, under the contract, he was to receive $20 per month, and $2 per day during harvest, while on the other hand, appellant claimed the contract was that he was to pay $20 per month during the months of April, May, June, July and August; $18 per month for September, October and November, and $16 per month for December, January, February and March.

Appellant claimed pay of appellee for boarding in the summer of 1870, while appellee was sick and unable to work, while appellee insisted he had an agreement with appellant by which he was to be boarded for the work he did.

Appellant claimed a set-off for the use of horses and a carriage by appellee, and appellee claimed that he was not to be charged for them.

There was also a clear conflict in the evidence in regard to the amount of payments made by appellant on the work. Neither was the evidence of the parties harmonious as to the time appellee actually worked and for which he should be paid.

The real controversy in the case was, what amount was actually due appellee for his services.

The evidence submitted to the jury by appellant and appellee, on almost every branch of the case, to settle the controverted point, was directly conflicting. Under such circumstances, it was the peculiar province of the jury to harmonize and settle the conflicting proof; and unless we can readily see, which we can not from this record, that the clear preponderance of the evidence is against the verdict, we can not interfere and award a new trial.

It is not pretended that the county court misdirected the jury on any question of law. Neither is it claimed that appellant failed to receive a fair trial. The only error complained of is, that the verdict is contrary to the weight of the evidence.

Upon a careful examination of the evidence in the record, and in view of the conflicting character of the testimony, we are not prepared to say the jury disregarded the weight of the evidence.

The judgment will therefore be affirmed.

Judgment affirmed.

Syllabus.

GEORGE W. MULLINIX

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. INTOXICATING LIQUORS—*sale to one in habit of getting intoxicated.* On the trial of one indicted for selling intoxicating liquor to a person in the habit of getting intoxicated, the court instructed the jury, for the people, "that a person who is in the habit of drinking intoxicating liquors intemperately, is a person who is in the habit of getting intoxicated, within the meaning of the statute:" *Held*, that the instruction was erroneous. Intemperance does not necessarily imply drunkenness.

2. SAME—*liable for act of agent or clerk.* Under the act of 1872, relating to intoxicating liquors, a party keeping liquor for sale is liable, criminally, for sales made by agents, clerks, or servants in his employ, in violation of the act as to one in the habit of getting intoxicated, whether he knew they would make such sales or not. It is the duty of such person to see that his clerks and servants act prudently and discreetly, and observe the statute.

3. But if the proprietor, in good faith, employs a clerk, believing him to have prudence and discretion, and forbids his selling liquor to the persons prohibited, and the clerk should disregard such orders, then, under this statute before its amendment, the proprietor would be protected; but no opinion is given as to what the rule would be, in that regard, under the present statute.

4. SAME—*effect of the repeal of the law.* The statute which repealed the liquor law of 1872, in express terms saved and reserved the rights which had accrued under a repealed statute as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued; therefore the repeal of such act in nowise affected the people's right to prosecute for penalties incurred under it.

5. INSTRUCTION—*as to the jury being judges of the law.* On the trial of one for selling liquor to a person in the habit of getting intoxicated, the defendant asked the following instruction: "The court instructs the jury for the defense that the jury are the sole judges of the law as well as the facts in the case." The court added the following: "But the jury are further instructed, that it is the duty of the jury to accept and act upon the law, as laid down to you by the court, unless you can say, upon your oaths, that you are better judges of the law than the court; and if you can say, upon your oaths, that you are better judges of the law than the court, then you are at liberty to so act:" *Held*, no error in the modification, but that it was eminently just and proper.

6. CRIMINAL LAW—*judgment when defendant is convicted on two counts.* Where a defendant was convicted on two counts of an indictment for selling liquor to one in the habit of getting intoxicated, the punishment being ten days' imprisonment for each offense, it was *held* to be error to render judgment of imprisonment for twenty days in gross. The imprisonment awarded should be for a specified time under each count, the time under the second to commence when the first ends.

7. SAME—*judgment as to imprisonment in a different county.* It is not for the court, in rendering judgment of imprisonment in a criminal case, to order the defendant to be imprisoned in the jail of another county, specifying it. If there be no jail in the county of the trial the court may recite the fact in its judgment, and order the sheriff to imprison the defendant in the nearest sufficient jail of another county; though it is made the duty of the sheriff, when there is no jail in his county or when it is insufficient, to imprison persons committed, in the nearest sufficient jail, without any order of court for that purpose.

WRIT OF ERROR to the Circuit Court of Moultrie county; the Hon. C. B. SMITH, Judge, presiding.

Messrs. CREA & EWING, and Mr. JONATHAN MEEKER, for the plaintiff in error.

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

Plaintiff in error was indicted in the Moultrie circuit court, for selling intoxicating liquor to one Harding, "a person in the habit of getting intoxicated." There were several counts in the indictment. On a trial the jury found the defendant guilty, on the first and second counts. After overruling a motion for a new trial, the court sentenced accused to be imprisoned, for twenty days, in the Shelby county jail, and rendered a judgment for a fine of $80, and costs. To reverse the judgment, this writ of error is prosecuted.

It is first objected, that the court below erred in giving for the prosecution this instruction:

"The court instructs the jury, for the people, that, under the law, a person who is in the habit of drinking intoxicating

liquors intemperately, is a person who is in the habit of getting intoxicated, within the meaning of the statute."

We can hardly see the necessity of giving such an instruction. It would seem only necessary to instruct the jury, in the language of the statute, what constitutes the offense, and leave the jury to determine whether the person was in the habit of getting drunk. The word "intoxicate," means to become inebriated or drunk, but intemperance does not necessarily imply drunkenness. It is defined to be the use of anything beyond moderation—use beyond moderation. Hence this instruction was not precise and definite. It told the jury, in effect, that if Harding used intoxicating liquors beyond a moderate use, he was a person named in the statute to whom liquor could not be lawfully sold. As to what would be a moderate use, intelligent persons widely differ. The instruction may have misled the jury, and should not have been given.

It is next urged, that the court below erred in telling the jury that if plaintiff in error, by himself, agent or clerk, sold intoxicating liquor to Harding within eighteen months from the finding of the indictment, and that he was in the habit of getting intoxicated, they should find defendant guilty.

It is first objected, that the owner of the liquor can not be rendered liable unless he has knowledge that the agent or clerk would make the sale, or he had given authority to make the sale. The 14th section of chapter 43, R. S. 1874, expressly declares that it shall not be necessary to show knowledge of the principal, to convict for an act of the agent or servant. But, it is said, this provision was not in the law as it was first passed, but was inserted for the first time in the revision of 1874. But under the act as it was originally adopted, we have no doubt that the principal was liable for the acts of his agent or servant, although he had no knowledge. He employed the clerk to sell the liquor, and, in doing so, it was his duty to see to it that the clerk was prudent and discreet,

and would observe the requirements of the statute. He could not employ a reckless person, who had no regard for the law, and then shield himself by saying he did not know that the servant was violating the law.

To permit such a defense would be a virtual repeal of the statute. It would be only necessary for the keeper of a dram shop to employ such a servant, and avoid seeing or knowing that he was violating the statute, to escape the punishment imposed.

In the case of *Stevens* v. *The People*, 67 Ill. 587, it was held that the owner of a gaming house might be indicted and punished for the acts of his agent or servant, in carrying on the house. If the proprietor, in good faith, were to employ a clerk, believing him to have prudence and discretion, and were to forbid his selling liquor to the persons prohibited, and the clerk were to disregard such orders, then a different question would have arisen under the statute before it was amended, and the proprietor would have been protected; but no such question is presented by this record, and we abstain from the expression of any opinion as to whether such would be the case under the present statute.

It is further objected, that the act of 1872 was repealed by the act of 1874. This latter law has no repealing clause, but the former act was repealed by the 849th clause of section 5, of the chapter entitled Statutes (R. S. 1044.) The 4th section of this latter statute, in express terms, saves and reserves the rights which have accrued under a repealed statute, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued. Hence the repeal of the former liquor law in nowise affected the people's right to prosecute for penalties incurred under that act, until barred by limitation. We therefore see no error in this instruction.

It is further insisted, that the court erred in modifying the instruction of plaintiff in error. It was this: "The court instructs the jury, for the defense, that the jury are the sole

judges of the law, as well as the facts in the case." To which the court added: "But the jury are further instructed, that it is the duty of the jury to accept and act upon the law as laid down to you by the court, unless you can say, upon your oaths, that you are better judges of the law than the court; and if you can say, upon your oaths, that you are better judges of the law than the court, then you are at liberty to so act." This modification is strictly within what was held in the case of *Fisher* v. *The People*, 23 Ill. 283. And, so long as the statute remains as it now is, we regard such a modification to such an instruction as eminently just and proper.

It is lastly insisted, that the court erred in the rendition of the judgment. The defendant was convicted on two counts, which were specified in the verdict, and the court rendered a sentence that he be imprisoned twenty days generally. It is error to sentence a person on such a conviction to a single term, but it should be for a specified term under each count, the time under the second to commence when the first ends, and so on till the last. In this the judgment was erroneous.

It was also error for the court to order the defendant to be imprisoned in the county jail of another county, specifying it. If there was no jail in Piatt county, it would not have been error for the court, in its judgment, to recite the fact, and to have ordered the sheriff to imprison defendant in the nearest sufficient jail of another county, as the statute requires. Or, had the judgment been that defendant be committed to the county jail, and there was none, or it was insufficient, then it would be the duty of the sheriff, under the statute, to imprison him in the nearest sufficient jail in another county.

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

Judgment reversed

HUGH WRIGHT

v.

ELLEN SMITH.

1. APPEAL—*does not lie from order of circuit court reversing judgment of county court.* The judgment of the circuit court reversing and remanding a cause in the county court is not final, and, therefore, no appeal or writ of error will lie to reverse such judgment of the circuit court.

2. COUNTY COURT—*jurisdiction determined by amount claimed.* Where the declaration in a suit in the county court only claims $500, the court will have jurisdiction, notwithstanding the evidence shows that the interest justly due, when added to the principal, exceeds that sum. The plaintiff in such a case has the clear right to waive any claim for the interest which will make the debt exceed the jurisdiction of the court.

APPEAL from the Circuit Court of Vermilion county; the Hon. OLIVER L. DAVIS, Judge, presiding.

This was an action, brought by Ellen Smith, against Hugh Wright, in the county court of Vermilion county, upon a promissory note and on various loans of money. On the trial in the county court, the plaintiff, by counsel, remitted all the interest due which would make the demand over $500, but the court refused to allow the plaintiff to throw off the interest, and instructed the jury that "they must consider all the evidence without regard to any drawback offered by either party." The jury then returned a verdict for $616.30, whereupon the plaintiff offered to remit $116.30, which the county court refused to allow, and dismissed the suit for want of jurisdiction. The plaintiff took the case by appeal to the circuit court, where the judgment of the county court was reversed and the cause remanded. From this judgment of the circuit court the defendant appealed to this court.

Mr. D. D. EVANS, for the appellant.

Messrs. TOWNSEND & YOUNG, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This appeal is prosecuted from the judgment of the circuit court reversing and remanding a cause pending in that court on appeal from the county court. It has been held, in two or three cases in this court, such judgments are not final in the sense that term is used in the statute, and, therefore, no appeal or writ of error will lie. For this reason the present appeal must be dismissed.

Inasmuch as there must be a new trial of the cause, it may not be improper to say the judgment of the circuit court reversing the judgment of the county court is entirely correct. The county court had jurisdiction of the cause. Only the sum of $500 was claimed in the declaration and summons, which was within the jurisdiction of the court. Notwithstanding it may have appeared from the evidence, when the interest to which plaintiff was justly entitled on the principal sum was added, the aggregate amount would exceed $500, yet she disclaimed the right, before the case was submitted, to recover for any sum beyond that claimed in the declaration. This she had a clear right to do, and her cause of action was within the jurisdiction of the court. The decisions of this court are conclusive on this point. *Ellis* v. *Snider*, Breese, 336; *Korsoski* v. *Foster*, 20 Ill. 32; *Bates* v. *Bulkley*, 2 Gilm. 389; *Raymond* v. *Strobel*, 24 Ill. 113.

The appeal will be dismissed, at costs of appellant.

Appeal dismissed.

TREVIOR SLATTERY

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. ABORTION—*statute relating to, construed.* The section of the criminal code in the Revised Statutes of 1874, which provides that whoever, by means of any instrument, medicine, drug, *or other means whatever*,

causes any woman pregnant with child, to abort or miscarry, or attempts, etc., shall be punished in the penitentiary, etc., was evidently aimed at professional abortionists, and at those who, with the intent and design of producing abortion, shall use any means to that end, no matter what those means may be, but not at those who, with no such purpose in view, should, by a violent act, unfortunately produce such a result. The intent to produce an abortion must exist when the means are used.

2. SAME—*violence without intent to produce.* Where a party assaulted and beat his wife, then about three months in pregnancy, and who had miscarried on several times before, and shortly after such beating she miscarried, and the proof failed to show that the miscarriage was the result of the beating, or that the husband had the least idea such would be the result, or that he desired or intended such a result, it was *held*, that a conviction of the husband for producing the abortion could not be sustained.

3. CRIMINAL LAW—*intent necessary to crime.* A criminal offense consists in a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, and the intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.

4. ADMISSIONS—*by party's silence.* Where a defendant, whose wife had left him and gone to her father, got a neighbor to go with him to see his wife, on his promise to keep his temper and be upon his good behavior, and, while at his wife's father's house, the father stated to him many acts of violence and unkindness to his wife, which he did not deny, and this was claimed, on his trial for producing an abortion on his wife, as an admission of the facts stated by the father, it was *held* not an admission of the truth of such facts, as the defendant was not in a position to deny them, owing to his promise to be on his good behavior.

WRIT OF ERROR to the Circuit Court of Hancock county; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was an indictment against Trevior Slattery, for producing the miscarriage of his wife, Celestia Slattery, by beating her, etc. The defendant was convicted, and sentenced to three years' imprisonment in the penitentiary.

Mr. HENRY W. DRAPER, and Mr. GEO. EDMUNDS, Jr., for the plaintiff in error.

Mr. B. F. PETERSON, State's Attorney, and Mr. JAS. K. EDSALL, Attorney General, for the People.

Mr. JUSTICE BREESE delivered the opinion of the Court:

Plaintiff in error was indicted, at the June term, 1874, of the Hancock circuit court, for feloniously, unlawfully and maliciously beating, striking, kicking, pinching and crushing one Celestia Slattery, a pregnant woman, with intent unlawfully, feloniously and maliciously to cause her to miscarry, and by means whereof she did miscarry.

The jury found the defendant guilty, and fixed his imprisonment in the penitentiary at three years. A motion for a new trial was denied, and judgment rendered on the verdict.

The record is brought here by writ of error, and various errors assigned. Those which are deemed important will be noticed.

The section of the statute under which the indictment was found is as follows: "Whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman pregnant with child to abort or miscarry, or attempts to procure an abortion or miscarriage, etc., shall be imprisoned in the penitentiary not less than one year nor more than ten years." Rev. 1874, p. 352.

This statute is evidently aimed at professional abortionists, and at those who, with the intent and design of producing abortion, shall use any means to that end, no matter what those means may be, but not at those who, with no such purpose in view, should, by a violent act, unfortunately produce such a result. The intent to produce an abortion must exist when the means are used. That is the charge in the indictment. It is there charged the prisoner did feloniously and maliciously beat this pregnant woman, with intent unlawfully, feloniously, etc., to cause her to miscarry.

The party alleged to have been so beaten is the wife of the prisoner, who, by his own confession, had not treated her in the kindest manner, but there is not a particle of proof in the record going to show that her miscarriage was caused by any violence he at any time used towards her, or that he had the

least idea such would be the result, or that he desired or intended such a result.

A felonious and malicious intent to cause a miscarriage being charged in the indictment, circumstances sufficient to satisfy the jury of the intent, should be shown. A criminal offense consists in a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, and the intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.

The only marks upon the person of Mrs. Slattery were a discoloration about a finger's length of one thigh, a mark on one of her arms, and a slight discoloration at one spot on her face, but how these were produced no witness testified. It was in proof she was about three months gone in pregnancy, and had three or four miscarriages previously, and but a short time before this last one she had rode some miles in a lumber wagon to a dancing party, where she danced all night and into the morning, and rode home in the same conveyance.

One Taylor, claiming to be a doctor, gave it as his opinion that these marks appeared to have been made three or four days previous to the miscarriage, and, in his opinion, produced it; whilst Drs. Thompson and Carlton testify, the bruises, as described by Taylor, would not cause miscarriage to a healthy woman. They further testify, after three or four miscarriages it becomes habitual, and the chances are against the woman carrying a child the full time; and they further say that, with such a woman, lifting heavy weight, any hard work, fast walking, riding in a lumber wagon, dancing, or anything of that kind, would be liable to induce a miscarriage.

There is no question that the great preponderance of the evidence sustains the position taken by the prisoner's counsel, that miscarriage had become habitual with her, and the

chances were all against her carrying this fœtus the full time. We have said there was no evidence to show this miscarriage of the prisoner's wife was caused by any act of violence of his toward her. The weight of the testimony is the other way.

It is argued by the counsel for the people, it sufficiently appears from the testimony of her father, Joseph Larrimore. Neither he, nor Mrs. Larrimore, the mother, testify to any act of violence of their own knowledge, but claim that at Larrimore's house, where Mrs. Slattery then was, after her miscarriage, at an interview there held by the prisoner, at which was present his wife, her father and mother, a Mr. Bliss and a Mrs. Davis, the prisoner admitted many acts of violence which Larrimore specified, by not denying the accusations. No time was specified when these acts were done—whether years before or quite recently; and the prisoner was not in a position to deny, for he had promised Bliss, if he would go with him and be present at the interview, he would keep his temper—would be on his good behavior. He felt pledged to make no denial of any statement Larrimore should make, but to keep his temper under strict control, and let his father-in-law say what he pleased. At this interview not one word was said by Mr. or Mrs. Larrimore, or by Mrs. Slattery, or by anybody else, that her miscarriage had been caused by the prisoner's violence toward her. It is strange, indeed, if such was the fact, the miscarriage so recent, and all the prisoner's enormities narrated with much apparent *gusto* by Larrimore, that he should not have charged this miscarriage as having been produced by the prisoner's violence. There is nothing of it in the proof.

We fail to find in this record anything connecting the prisoner with the crime charged, as it is defined in the statute book.

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

Judgment reversed.

THOMAS BATES

v.

JANE DAVIS.

INTOXICATING LIQUORS—*exemplary damages.* In a suit by a wife against a party, for selling liquor to her husband, to recover damages for an alleged injury to her means of support, where the evidence tended to show that the defendant endeavored to prevent the husband from getting liquor at his place; that he frequently refused him, and instructed his clerk to refuse him liquor, but showed that the husband procured it through others, concealing his name, and there was no attempt to show how or in what manner the plaintiff's means of support was affected by defendant selling liquor to her husband, it was *held*, that there was no foundation laid for exemplary damages; and where the only instruction given for plaintiff was based upon exemplary damages, which resulted in a verdict of $300 damages, the judgment thereon was reversed.

APPEAL from the Circuit Court of Vermilion county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Mr. J. B. MANN, for the appellant.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was a suit brought by appellee, as wife of Milton Davis, under the fifth section of the act to provide against the evils resulting from the sale of intoxicating liquors, to recover damages for alleged injury to her means of support in consequence of the sale by the appellant of such liquors to her husband, he being, as the declaration alleges, a common drunkard.

The cause was tried by a jury on the plea of not guilty, and verdict and judgment for plaintiff for $300, to reverse which this appeal is prosecuted.

We have attentively read the evidence in this case. It tends to show that Milton Davis has been a drinking man for upwards of thirty years, and, for many years prior to the

time of any alleged sale of liquor to him by appellant, had been a thorough drunkard, neglecting his business, letting his property go to waste, spending his money in getting and his time in keeping drunk. But there is not discoverable in the evidence any purpose of showing how or in what way the plaintiff's means of support was affected in consequence of liquor alleged to have been sold him by the defendant.

The evidence tends to show that defendant endeavored to prevent Davis from getting liquor at his place; frequently refused him, instructed his clerk to refuse him; and the plaintiff having introduced her husband as a witness in her behalf, he testified to the fact of defendant refusing to let him have liquor, and that he resorted to the strategy of employing others to go and get it for him, instructing them to conceal the fact that it was for him. The evidence wholly fails to lay any foundation for exemplary damages. When concluded, the plaintiff's counsel, not submitting any instruction as to actual damage, asked and the court gave this instruction:

"Exemplary damages mean damages given by way of punishment for the commission of a wrong or tort willfully. They are not the measure of the price of property or valuables, but are given as smart money in the way of pecuniary punishment, to make an example, not only for the private good of the person suing, but for the public good, by way of example, and to teach other persons not to do likewise."

This being the only instruction upon the question of damages, the jury, as it would be natural for them to do, merely assessed a fine of $300 against the defendant, for the private good of the party suing.

The rule as to exemplary damages in this class of cases has been heretofore fully discussed and settled by this court.

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

Judgment reversed.

Syllabus.

DAVID BLALOCK

v.

STEPHEN A. RANDALL.

1. TRESPASS—*for act done under legal process.* Trespass will not lie for an act done under a legal process regularly issued from a court, or by an officer of competent jurisdiction. Case only will lie, and that on the ground only of malice and want of probable cause.

2. PLEADING—*statute abolishing distinction between trespass and case.* The statute abolishing the distinction between the actions of trespass and case, does away with the technical distinction only, but does not affect the substantial rights and liabilities of the parties, so as to operate to give any other remedy for acts done than before existed.

3. SAME—*plea justifying trespass under legal process.* To a declaration in trespass for an assault and false imprisonment, the defendant pleaded three special pleas, in substance, that on a complaint made by the defendant, before a justice of the peace, of the commission of a forgery by the plaintiff, a warrant issued, upon which plaintiff was arrested and brought before the justice, and, on examination, was required to give bail for his appearance at the next term of the circuit court, and in default of giving the bail, plaintiff was committed to jail by the justice, which was the trespass and imprisonment complained of. The second plea also averred that there were reasonable grounds to believe that plaintiff had committed the offense: *Held*, that the pleas, especially the second, were good on demurrer, and presented a sufficient answer to the counts in trespass.

4. MALICIOUS PROSECUTION—*termination of prosecution.* In order to maintain an action for malicious prosecution, it must be shown that the alleged malicious prosecution has been legally terminated. Striking the cause from the docket, on motion of the State's attorney, with leave to reinstate the same, is not a legal termination of the prosecution.

5. EVIDENCE—*of similar acts in respect to others.* In trespass and malicious prosecution against one for procuring the arrest and imprisonment of the plaintiff on a charge of forgery, the defendant claiming that he was imposed on, and led to believe he was signing contracts making him agent to sell certain patented machinery when he signed the note alleged to have been forged by the plaintiff, which the plaintiff denied, it was *held*, that proof by other persons in the same neighborhood, that about the same time the same fraud was practiced upon them by the plaintiff, was admissible, as characterizing the employment of the plaintiff, and showing the manner in which the fraud was accomplished, its feasibility, and as corroborating the testimony of defendant.

Statement of the case.

6. CRIMINAL PRACTICE—*striking cause from docket.* An order striking a criminal cause from the docket, with leave to reinstate the same, does not discharge the defendant from the indictment. It may again be placed upon the docket, and the defendant subjected to a trial upon the same indictment.

APPEAL from the Circuit Court of Sangamon county; the Hon. CHARLES S. ZANE, Judge, presiding.

This was an action of trespass, brought in the Macon circuit court, by Stephen A. Randall against David Blalock, the declaration containing seven counts, the last two being in case for malicious prosecution. The defendant pleaded the general issue, and two special pleas of justification to the counts in trespass. The venue was changed to Sangamon county. The following is a copy of the special pleas, omitting formal parts:

"2. *Actio non*, because he says, that on, etc., one George Goodman was then, and now is, a justice of the peace in and for said county of Macon, and State of Illinois, and that on the day and year aforesaid, at the county and State aforesaid, the said defendant made oath before said Goodman that the said plaintiff did, on the 17th day of August, 1868, commit a criminal offense, to-wit, feloniously and falsely make, forge and counterfeit a certain promissory note, purporting to be the promissory note of the said David Blalock to one J. B. Severance for the payment of $360, with intent to damage and defraud the said defendant, and said defendant had just and reasonable grounds to suspect and believe that said plaintiff had committed said offense; whereupon, the said George Goodman did, on said 8th day of May, 1871, issue a warrant in the name of The People of the State of Illinois, directed to all sheriffs, coroners and constables of said State of Illinois, commanding them, by the authority of said people of the State of Illinois, to arrest the said plaintiff, and bring him forthwith before the said George Goodman, or some other justice of the peace of said county, to answer said complaint of said David Blalock, of the criminal offense of

forgery aforesaid; which said warrant was then and there delivered to George M. Wood, the then sheriff of said Macon county, and the said sheriff did then, to-wit, on the 18th day of May, 1871, execute said writ by arresting the said plaintiff, and bringing him before said justice of the peace; whereupon the said justice, after associating with him one John P. Post, one of the then acting justices of the peace in and for said county of Macon, proceeded to the trial of said plaintiff, and the said plaintiff was, on, to-wit, the 18th day of May, 1871, before said George Goodman and said John P. Post, tried and examined, and the said plaintiff was then and there, by said justices of the peace, committed to the county jail of said county of Macon, and unavoidably imprisoned, and kept and detained in prison, for the space of time in said declaration mentioned, which are the said several supposed trespasses in the said plaintiff's declaration mentioned; wherefore, etc.

"3. And the said defendant, for a further plea in this behalf, says *actio non*, because he says, that on, to-wit, the 8th day of May, 1871, one George Goodman was then, and is now, a justice of the peace in and for the said county of Macon, and State of Illinois, and that on the said 8th day of May, 1871, at the county and State aforesaid, the said defendant made oath before said Goodman that the said plaintiff did, on the 17th day of August, 1868, commit a criminal offense, to-wit, that the said plaintiff did feloniously and falsely make, forge and counterfeit a certain promissory note, purporting to be the promissory note of said David Blalock to one J. B. Severance, for the payment of $360, with intent to damage and defraud the said defendant, and the said defendant avers that he, said defendant, had just and reasonable grounds to suspect and believe that said plaintiff had committed the crime of forgery, as above mentioned; whereupon the said George Goodman did, on said 8th day of May, 1871, issue a warrant in the name of The People of the State of Illinois, and directed the same to all sheriffs, coroners and

constables of said State of Illinois, commanding them, by the authority of said People of the State of Illinois, to arrest the said plaintiff, and bring him forthwith before the said George Goodman, or some other justice of the peace of said county, to answer said complaint of said David Blalock, of the crime of forgery aforesaid, which said warrant was then and there delivered to George M. Wood, the then acting sheriff of said Macon county, and the said sheriff did, on, to-wit, the 18th day of May, 1871, execute said writ by arresting the said plaintiff, and bringing him before said justice of the peace, whereupon said justice of the peace, after associating with him one John P. Post, one of the justices of the peace of said county, proceeded to the trial of said plaintiff on said criminal charge, and the said plaintiff was, on said 18th day of May, 1871, before the justices aforesaid, tried, and held to bail in the sum of $1000, to appear at the July term of the circuit court of Macon county, 1871, and in default of giving said bail, he, the plaintiff, was then and there committed to the jail of said county of Macon; and the said defendant avers that afterwards, to-wit, at the July term, 1871, the grand jury of said county of Macon preferred an indictment against the said plaintiff, for making, forging and counterfeiting a certain promissory note, being the same note described in the oath before mentioned in this plea, and that said plaintiff was, at the July term, 1872, tried in this court for the crime of forgery, and found guilty of the same, and sentenced to the State's prison for the term of one year, and on motion then and there made by the plaintiff for a new trial, which the court then and there refused; which are the several supposed trespasses in the said declaration mentioned," etc.

The plaintiff demurred to the two special pleas, assigning as special cause of demurrer, 1st, that the pleas only amounted to the general issue; 2d, that they were double. The court sustained the demurrer.

A trial was had, resulting in a verdict and judgment in favor of the plaintiff for $500. The defendant brings the case to this court by appeal.

Messrs. JOHN M. & JOHN MAYO PALMER, for the appellant.

Mr. A. B. BUNN, and Mr. H. CREA, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The declaration in this case contains seven counts. Five are in trespass, and charge an assault and unlawful imprisonment, and the sixth and seven counts are for a malicious prosecution.

The court below sustained a demurrer to three special pleas to the counts in trespass, and this is assigned for error.

The matter of defense set up in the pleas was, in substance, that on a complaint, made by the defendant before a justice of the peace, of the commission of a forgery by the plaintiff, a warrant issued upon which plaintiff was arrested and brought before the justice, and, on examination, was required to give bail for his appearance at the next term of the circuit court, and in default of giving the bail, plaintiff was committed to jail by the justice of the peace, which was the trespass and imprisonment complained of. The pleas show that plaintiff was arrested and imprisoned upon regular legal process. Trespass will not lie for an act done under a legal process regularly issued from a court, or by an officer of competent jurisdiction. Case only will lie, and that on the ground only of malice and want of probable cause. 1 Chit. Pl. 214, 152; *Belk* v. *Broadbent*, 3 Term Rep. 183; *Luddington* v. *Peck*, 2 Conn. 700; *Plummer* v. *Dennett*, 6 Greenl. 421.

We do not see that the statute abolishing the distinction between the actions of trespass and trespass on the case changes the rule, as is contended by appellee. The statute does away with the technical distinction between the two

forms of action, but does not affect the substantial rights and liabilities of parties, so as to operate to give any other remedy for acts done under legal process issuing from a court or officer of competent jurisdiction than before existed, an action on the ground of malice and want of probable cause.

We are of opinion the pleas presented a sufficient answer to the counts in trespass, especially the second plea, which averred that there were reasonable grounds to believe that plaintiff had committed the offense, and that the court erred in sustaining the demurrers.

Another objection taken is, to the exclusion of testimony by the court below. The cause of action was the procuring of the arrest and imprisonment of the plaintiff on the charge of forgery of a note against the defendant for $360.

There was no dispute that the note bore the genuine signature of the defendant. Defendant's claim by his testimony was, that it was fraudulently obtained from him by some device.

He testified that the transaction he had with plaintiff, at which the pretended note was obtained, was one of appointing him agent of certain territory for the sale of Ingall's seeder and cultivator; that to required papers for constituting the agency, defendant signed his name four times; that he did not sign any note knowingly; that he never intended to do so; that there was no talk about a note, and that he only supposed he signed the necessary papers for the assuming of the agency. Plaintiff's testimony was in contradiction; that defendant signed the note as a note, and that understandingly. They were the only witnesses to the transaction.

Defendant offered to prove, by several witnesses, that at about the same time with defendant's transaction, and in the same neighborhood, they had the same kind of transactions with the plaintiff, and which resulted in their pretended notes having been fraudulently obtained from them in the same way by the plaintiff. The court excluded the testimony. There had been testimony in regard to blanks—defendant

describing those in plaintiff's possession, and that were used. A witness was introduced, and testified that the employer of plaintiff had certain blanks printed at his office, such as were produced, from which the inference might be that plaintiff had none such as defendant described; and plaintiff testified he had no such blanks as could be used in the manner defendant's testimony went to show the blank signed by him was used by plaintiff. The excluded testimony was to show also that plaintiff practiced upon the witnesses by the use of blanks in his possession.

We think this excluded testimony should have been admitted. This evidence of the fraudulent obtention, by plaintiff from other persons, of notes by means of the same device, in the same neighborhood, near the same time, and while engaged in the same employment, would appear to be admissible to characterize the employment of the plaintiff, and would illustrate the manner in which the alleged fraud upon the defendant might have been accomplished—the feasibility of it—and would tend to corroborate the testimony of the defendant.

Under the counts for malicious prosecution, objection is made that the alleged malicious prosecution was not shown to have been legally determined, as was necessary. The prosecution was a complaint, before a justice of the peace, for forgery, upon which an indictment had been found by the grand jury. One conviction was had, which was reversed by this court, and the cause remanded for further proceedings.

The cause was re-docketed in the circuit court at the July term, 1872, and the defendant entered into recognizance for his appearance at the next term. The only entry of record made in the case afterward, is, that the cause, by the order of the court, is stricken from the docket, with leave to reinstate it. That did not discharge the defendant from the indictment. The order of the court, directing the cause to be removed from the docket with leave to reinstate, justified the clerk in omitting it from the docket of cases for trial.

The indictment, however, remained undisposed of; the cause might be again placed upon the docket, and the defendant subjected to a trial upon the same indictment. This court, in *Tibbs* v. *Allen*, 1 Scam. 547, remarked upon this subject, as follows: "In those (criminal) cases, a practice has long obtained in this State, now near half a century, after ineffectual attempts to arrest a defendant in an indictment, to remove, on motion of the State's attorney, the cause from the docket, with leave to reinstate it on his own suggestion at any future time. It is all one motion—to remove, subject to be reinstated—thereby excluding the conclusion that the case is at an end, but implying that it is still subject to the action of the court."

We are of opinion that there was no legal determination of the criminal prosecution shown.

The judgment must be reversed and the cause remanded.

Judgment reversed.

THE CITY OF QUINCY

v.

LAURA JONES *et al.*

1. REAL ESTATE—*right to lateral support of adjacent soil.* It is a well settled rule of law, that the owner of land has a right to have the soil of his premises sustained by the lateral support of the natural soil of the adjoining land, but this right is limited to the soil in its natural state, and does not extend to the support of any additional weight which the owner of the soil may place upon it, such as a building or other superstructure, near his boundary line.

2. SAME—*no servient right in respect to use of adjacent premises.* The owner may use his land in such reasonable way as his judgment shall dictate, either by making excavations or superstructures thereon, subject, however, to the implied condition that he shall not thereby interfere with his neighbor in the enjoyment of the same right in respect to his adjacent

land. Each is entitled to have his soil in its natural state sustained, when necessary, by the lateral support of the adjacent soil of the other, but neither has the right to burden the land of the other with the support of any additional weight, as that would be to make the land of the one servient to that of the other.

3. SAME—*right to remove lateral support of soil to a building of another, must be for a legitimate use, and exercised in a careful manner.* Where a party has erected a building upon his own land, but very near the land of another, such other will not be protected in making an excavation on his land so as to injure the building out of malice or mere caprice, but such excavation must be consistent with a reasonable and legitimate use of the party's own property, and the right must also be exercised with reasonable skill and care, in view of the character of the building and the nature of the soil, so as to avoid doing unnecessary injury to the building.

4. If injury is sustained to a building in consequence of the withdrawal of the lateral support of the neighboring soil of another, where it has been withdrawn with reasonable skill and care to avoid unnecessary injury, there can be no recovery; but if injury is done the building by the careless and negligent manner in which the soil is withdrawn, the owner will be entitled to recover to the extent of the injury thus occasioned.

5. RIGHT TO SERVITUDE—*by contract or prescription to lateral support of building.* The owner of a building situate upon the line or boundary of his land may acquire a right to the lateral support of the same from the soil of the adjacent owner by contract or by prescription. This right will constitute a burden upon the adjacent property.

6. PRESCRIPTION—*subject of, must be subject of a grant.* A prescription can not be for anything which can not be raised by grant; for the law allows a prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have been made.

7. SAME—*right by, can not exist in use of a street.* As an incorporated town or city holds the title to its streets and alleys for the use of the public, and have no rightful authority to grant them for any purpose inconsistent with the public use, it follows that an individual can not acquire a prescriptive right therein for any private use.

8. The doctrine seems well settled that an adverse right to an easement can not grow out of a mere permissive enjoyment for any length of time.

9. STREETS—*liability for injury to lot owner in opening and grading.* A municipal corporation, while acting within the scope of its authority in making excavations in a street for the purpose of opening or improving it, using proper care and skill, is not liable to a lot owner for an injury resulting to his buildings from the removal of the lateral support of the soil in the street.

Statement of the case.

WRIT OF ERROR to the Circuit Court of Adams county; the Hon. JOSEPH SIBLEY, Judge, presiding.

This was an action on the case, by Laura Jones, Carrie E. Jones, Harry E. Jones and Charles F. Jones, by Owen Thorn, their guardian, against the City of Quincy.

The first count of the declaration alleged, in substance, that at the time of the injury complained of, one Caroline Thorn, who was formerly the widow of Jehu P. Jones, deceased, was in the possession of a dwelling house and grounds, being the south half of lot 1, in block 5, of the original town, now city of Quincy, and in which said Jehu P. Jones resided at his death, in 1868, as his home and homestead; that the dower of the said Caroline, his widow, had never been assigned in the premises; that said Jehu P. Jones died owning the premises, and leaving the said Caroline, his widow, and the plaintiffs his heirs at law, and that they are entitled to the reversion in said premises upon the death of said Caroline; that after the death of the said Jehu P. Jones, and while said Caroline was in possession as his widow, in December, 1868, the defendant carelessly and negligently made a deep cut in the earth adjoining said premises, whereby said house became undermined and of little value, and had to be removed, and the lot caved and fell in, and became of little value and unfit to be built upon, etc.

The second count was substantially the same, except that it alleged that the premises had been occupied by Jehu P. Jones and his widow more than twenty years, and adjoined Second street of said city, and that the earth in said street for said time had been, and was the lateral support of said house and premises, and that the earth in said street was removed by the city, so that such lateral support was destroyed and the damage occasioned.

The third count was substantially the same. The plea of not guilty was filed and a trial had, resulting in a verdict and judgment for $2000 in favor of the plaintiffs. The city appealed.

Messrs. SKINNER & MARSH, for the plaintiff in error.

Messrs. WHEAT & MARCY, and Messrs. WARREN, WHEAT & HAMILTON, for the defendants in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The several errors assigned upon the rulings of the court below, present, in our opinion, but two material questions:

First. Are municipal corporations, while acting within the scope of their municipal authority in making excavations in streets for the purpose of opening or improving them, liable to property owners for injuries to buildings erected on lots abutting on the streets, resulting from the removal of the lateral support of the soil in the streets?

Second. Does the owner of a city lot, abutting on a public street, acquire a prescriptive right to have the buildings and structures on such lot sustained by the lateral support of the soil in the street, by the mere failure of the city to remove the soil within such time as would, in a proper case, afford evidence of a prescriptive right against an individual?

In *Nevins* v. *Peoria*, 41 Ill. 507, which was an action on the case for negligence in grading a street, whereby the flow of water was diverted from its natural channel, and thrown on the plaintiff's property, this general principle, equally applicable to the present case, was announced:

"The city is the owner of the streets, and the legislature has given it power to grade them, but it has no more power over them than an individual has over his land, and it can not, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property, in a mode that would render a private individual responsible in damages, without being responsible itself."

In support of the rulings of the court below, defendants in error insist that it is a well settled rule of law, that the owner of land has a right to have the soil of his premises sustained

by the lateral support of the natural soil of the adjoining land, and they cite *Humphries* v. *Brogden*, 12 Q. B. 743; *Thurston* v. *Hancock*, 12 Mass. 229; *Farrand* v. *Marshall*, 21 Barb. 409; Rolle's Abr. 665. An examination of these authorities, however, will show that this right of lateral support is limited to the soil in its natural state, and that it does not extend to the support of any additional weight which the owner of the soil may place upon it.

The reference found in Rolle is this:

"If A be seized in fee of land next adjoining the land of B, and A erect a new house on the confines of his land next adjoining the land of B, and if B afterwards dig his land so near the foundation of A's house, but no part of the land of A, that thereby the foundation of the house and the house itself fall into the pit, yet no action lies by A against B, because it was A's own fault that he built his house so near to B's land, for he, by his act, can not hinder B from making the best use of his own land that he can. But *semble*, that a man who has land next adjoining my land, can not dig his land so near mine, that thereby my land shall go into his pit; and, therefore, if the action had been brought for that, it would lie."

The facts in *Thurston* v. *Hancock*, were, briefly, these: In 1802, the plaintiff purchased a lot upon Beacon Hill, in the city of Boston, and in 1804 built a valuable house on it within two feet of his line. In 1811 the defendant became the owner of the adjoining lot, and began to dig down the hill, and had dug within five or six feet of the plaintiff's lot, when the earth gave way and exposed the foundations of plaintiff's house, and he had to take it down. The court held that the plaintiff was without remedy for the injury to his house, saying: "A man, in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor. If he digs too near his line, and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequence of his act, and not for the value

of a house put upon, or near, the line by his neighbor. For in so placing the house, the neighbor was in fault, and ought to have taken better care of his interests. * * * He built at his peril, for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. * * For the loss of or injury to the soil merely, his action may be maintained. The defendants should have anticipated the consequences of digging so near the line, and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damages arising from putting his house in a dangerous position."

Humphries v. *Brogden*, was an action for injury to plaintiff's land by the removal of the minerals under the surface, so that the land subsided, cracked, and was materially injured. Lord CAMPBELL, after reviewing the English cases upon the subject, among other things, said: "Where there are separate freeholds, from the surface of the lands and the minerals belonging to different owners, we are of the opinion that the owner of the surface, while *unincumbered by buildings, and in its natural state*, is entitled to have it supported by the subjacent mineral strata."

Farrand v. *Marshall* simply decides, that a man may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into the pit, and is not in conflict with the rule that the owner of a building, in the absence of a grant or prescriptive right, is not entitled to have it sustained by the lateral support of his neighbor's soil. After a somewhat extended and careful examination, we have been unable to find any serious conflict in the decisions, either English or American, on this particular question, and, therefore, deem it necessary to refer to but a few additional cases in its further elucidation.

In *Panton* v. *Holland*, 17 Johns. 92, plaintiff was the owner of a house and lot in the city of New York, and the defendant, in erecting a house on an adjacent lot, in order to lay

the foundation, dug some distance below the foundation of the plaintiff's house, in consequence of which one of the corners of the plaintiff's house settled, the walls were cracked, and the house, in other respects, injured. It was held that the plaintiff was not entitled to recover, unless on the ground of negligence in the defendant in not taking reasonable care to prevent the injury.

In *Lasala* v. *Holbrook*, 4 Paige, 169, complainants were seized of certain lots in the city of New York, on which was a church, erected many years before the filing of the bill. The defendant was the owner of an adjoining lot, and commenced the erection of a building which was intended to cover the whole lot, and to be six stories high. He was sinking the foundations of the building sixteen feet below the natural surface of the ground, and ten feet lower than the foundation of the church. It was claimed that, by excavating the lot in this manner, the defendant would greatly endanger the church; that one corner of the walls thereof, opposite which the excavation had been completed, had settled so as to leave a crack in the wall, and it was prayed that the defendant be enjoined from making the excavation.

Chancellor WALWORTH said: "I can readily believe, from the nature of the soil, and from the great depth of the defendant's intended excavation, below the foundation of the church, that the complainants' fears for the safety of their building are not entirely groundless. * * * It is not, however, alleged in the bill that the defendant is proceeding to improve his property in an unreasonable or unusual manner, or with any intention of injuring their wall or building. * * * I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots; and the owners of those lots will not be permitted to destroy my land by removing this natural support. * * * But my neighbor has the right to dig the pit upon his own land, if necessary to its convenience and beneficial use, when it can be done without injury to my land

in its natural state. I can not, therefore, deprive him of this right by erecting a building on my lot, the weight of which will cause my land to fall into the pit which he may dig in the proper and legitimate exercise of his right to improve his own lot." And it was held that the complainants were not entitled to relief.

In *O'Connor* v. *Pittsburgh*, 18 Penn. 187, a church had been built according to the direction of the city regulator, and by a grade previously established. Afterwards, in pursuance of an ordinance, the grade of the street was reduced seventeen feet, and the church had to be taken down and rebuilt at a cost of $4000. It was held that the plaintiffs were not entitled to damages. The court say: "We had the case reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only by Pennsylvania, but by every decision in the sister States except one."

The exception alluded to is Ohio, where it has been held that a party whose property has been injured by a change in an established grade of a street, is entitled to recover. But even the rule, as held in that State, is not consistent with the claim here made for defendants in error. In the *City of Cincinnati* v. *Perry*, 21 Ohio St. 499, suit was brought for injuries to the dwelling house of the plaintiff, which was situated on a lot abutting on an alley, by reason of the construction of a public sewer in the alley by the defendant. The jury found specially that the defendant, in making the sewer, excavated to the depth of thirteen feet; that the plaintiff's building was injured by reason of the excavation; that all reasonable and ordinary care was taken, in making the sewer, to avoid injury to plaintiff's property; that plaintiff's foundation was about four feet in the ground, and was suitable for sustaining such a structure at the time of its erection. The court say: "At the time the house was built, and for many years before that time, Berden Alley, by the laws of this State, was in the possession, and under the control, of the city, for the purpose

of drainage; and sewerage was a legitimate mode of drainage, within the scope of its authority. Before the plaintiff below built his house, the city had not, in any manner, as far as the record shows, indicated the nature or extent of drainage by sewers or otherwise, that would be required for the public use. The plaintiff, without exercising any judgment or discretion as to the reasonable and proper future use of the alley for sewerage purposes, erected his house on a foundation suitable only for sustaining such a structure at that time, and under the then existing condition of the alley. This was his own wrong, and he has no right to complain of an injury from the construction of the sewer, (which was built in a proper manner,) having neglected, on his own part, to exercise reasonable care."

In *Nevins* v. *Peoria, supra,* this court, in discussing the question then before it, said: "A man can not do anything upon his own soil, under the plea of ownership, which amounts to a nuisance, and works injury to his neighbor, but within that limit he may do whatever his whim may dictate. He may excavate to any depth, or raise the surface to any height, and the neighboring owner has no right to complain, because his enjoyment of his own lot is not thereby prejudiced. Even if a building erected by me near the boundary of my lot is injured or endangered by an excavation made by my neighbor in his premises, I can not complain, because I have no right to the use of his soil for the support of my building."

See also, to the same effect, *Mamer* v. *Lussem,* 65 Ill. 484. But counsel argue that the rule recognized by these cases might do well enough in the rural districts, where such questions rarely arise, but that it totally fails to meet the necessities arising in cities.

For precisely the same reason the distinguished jurist who delivered the opinion in *Radcliffe Exrs.* v. *The Mayor, etc. of Brooklyn,* 4 Comstock, 197, claimed that Chancellor Walworth went too far in *Lasala* v. *Holbrook, supra,* in following the dictum in Rolle's Abridgment, and holding that even the soil in its

natural state was entitled to the lateral support of the adjacent soil, when this was essential. He said: "If the doctrine were carried out to its legitimate consequences, it would often deprive men of the whole beneficial use of their property. An unimproved lot of land in the city of Brooklyn would be worth little or nothing to the owner, unless he were allowed to dig in it for the purpose of building; and if he may not dig because it will remove the natural support of his neighbor's soil, he has but a nominal right to his property, which can only be made good by negotiation and compact with his neighbor. A city could never be built under such a doctrine. I think the law has superseded the necessity for negotiation, by giving every man such a title to his own land that he may use it for all the purposes to which such lands are usually applied, without being answerable for consequences, provided he exercise proper care and skill to prevent any unnecessary injury to the adjoining land owner. The saying of Rolle may have been a wise one in his day, but it is not well adapted to our times." This we quote simply as giving the extreme view of the other side of the question, and it would seem to be quite as plausible as that of defendants in error. The more reasonable rule, however, and the one best sustained by authority, lies, in our opinion, between these extremes, and is that declared by the preceding cases to which we have referred. I have the right to use my land in such reasonable way as my judgment shall dictate, either by making excavations or superstructures thereon, subject, however, to the implied condition that I shall not thereby interfere with my neighbor in the enjoyment of the same right in respect to his adjacent land. Each is entitled to have his soil, in its natural state, sustained, when necessary, by the lateral support of the adjacent soil of the other; but neither has the right to burden such support by any additional weight, because this would, to that extent, appropriate the use of the property of the one, to the benefit of the other.

No danger is to be apprehended from malicious or capricious excavations, to be made as a mere means of injury or annoyance to an adjacent owner of the soil, for this is inconsistent with a reasonable and legitimate use of property, and such an excavation would not be within the protection of the rule. Moreover, it is required of the owner of the soil, having the right to excavate notwithstanding there are buildings upon the adjacent soil, that he shall exercise the right with reasonable skill and care, in view of the character of the buildings and the nature of the soil, so as to avoid doing unnecessary injury to the buildings. *Foley* v. *Wyeth*, 2 Allen, 131; and whether reasonable skill and care have been exercised, in view of all the circumstances in a given case, is a question of fact for the jury.

If injury is sustained to a building in consequence of the withdrawal of the lateral support of the neighboring soil, when it has been withdrawn with reasonable skill and care to avoid unnecessary injury, there can be no recovery; but if injury is done the building by the careless and negligent manner in which the soil is withdrawn, the owner is entitled to recover to the extent of the injury thus occasioned.

What has been said applies only to cases where the owner of the soil has no other right to the lateral support of the adjacent soil than results from the naked ownership of the soil, and does not apply where there is a valid right to burden the adjacent soil with the claim of lateral support resulting from contract or prescription.

Where a common owner of the soil originally held both parcels, that on which the plaintiff's house was built, and that which the defendant subsequently excavated, it is held the defendant is charged with the duty of supporting, not merely the soil, but the house of plaintiff's parcel. *Harris* v. *Ryding*, 5 M. and W. 71; *McGuire* v. *Grant*, 1 Dutcher, 356. Likewise, where the buildings are ancient, or those which have been erected on ancient foundations, and which, by prescription, are entitled to the special privilege of being

exempted from the spirit of reform, the owner is said to be entitled to full protection against the consequence of any new excavation. *Hide* v. *Thornborough*, 5 Car. and K. 250; *Story* v. *Olden*, 12 Mass. 157; *Lasala* v. *Holbrook*, *supra*. No claim is made that the present case falls within the first exception, but it is argued that it is within the last, and this brings us to the second question in the order of the argument.

Blackstone says, in Sharswood's Ed. vol. 2, 263: "A prescription can not be for a thing which can not be raised by grant, for the law allows prescriptions only in supply of the loss of a grant, and, therefore, every prescription presupposes a grant to have existed."

The platting of the streets was a solemn dedication of the ground thus embraced to the corporation, for the uses and purposes of the public. *Canal Trustees* v. *Haven*, 11 Ill. 555; *Hunter* v. *Middleton*, 13 id. 54. "They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For those purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but she can not alien or otherwise dispose of them." *City of Alton* v. *Transportation Company*, 12 Ill. 60.

It is the unquestioned duty of the city, in controling and improving the streets, to prepare them for public use, as streets, at such time and in such manner as the public necessities may require. Holding them in trust for the public and having no authority to convey or divert them for other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the street which might in any way interfere with the duty of preparing them for the public use, to meet the public necessities; for it is obvious that if such rights may be granted, then the practical use of the streets may become so burdened with private rights as to place it beyond the pecuniary ability of the city to discharge its duty to the public, with reference

to them. It is not consistent to say that the city owes a duty to the public, and yet that it may voluntarily place it beyond its power to discharge that duty.

In *Gozler* v. *Corporation of Georgetown*, 6 Wheaton, 593, claim was made for injury to plaintiff's property by reason of a change of the grade in the street, and it was insisted that a promise had been held forth by the corporation to all who should build on the graduated streets, that the graduation should be unalterable.

Chief Justice MARSHALL, in delivering the opinion of the court, said: "But it can not be disguised that a promise is held forth to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying that this ordinance can operate as a perpetual restraint on the corporation.

"When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law which the legislature enables it to enact, may well be questioned. We rather think that the corporation can not abridge its own legislative power."

In *Smith* v. *Corporation of Washington*, 20 Howard, 135, the same question was again before the Supreme Court of the United States, and the court, per Mr. Justice GRIER, said: "Streets can not be opened and kept in repair, or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or, in other words, the road must be '*graded*,' or 'reduced to a certain degree of ascent or descent, which is the proper definition of the verb,' 'to grade.' If the duty imposed on the corporation requires this to be done, the power must be co-extensive with

the duty. If charged with neglect of their duty, as public officers, bound to keep the streets in repair, it would not be a sufficient excuse to allege that the fences and obstructions are removed, and, therefore, the street is opened, or that it has been kept in as good 'repair' as it was found.

"A Court of Quarter Sessions would probably not receive a defense founded on such astute philological criticism of the terms of the statute; nor could the allegation be admitted that, having once fixed the grade which is now found improper and insufficient, the corporation has exhausted its power, and has no authority to change the level or grade, in order to keep the street in repair. As the duty is a continuing one, so is the power necessary to perform it."

Says Dillon (Munic. Corp. sec. 541): "The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its chief and primary but by no means sole use."

Other authorities bearing upon the question might be referred to, but we deem it unnecessary. If the simple proposition were submitted, has a municipal corporation power to grant to the abutting property holders on an unimproved street the lateral support of the soil in the street, to the most ordinary apprehension it would but present, in another form, the question, may a municipal corporation, by contract with private parties, bind itself, through all time, not to improve a public street? It is not claimed that, by the charter of Quincy, such unusual and extraordinary powers are conferred; and, under the ordinary powers to lay out, open and repair streets, the idea is, in our opinion, preposterous.

We must, then, hold that defendants in error can claim no right to the lateral support of the soil in the street, by prescription, because it is impossible that they could have obtained such right by grant.

Moreover, it seems well settled that an adverse right to an easement can not grow out of a mere permissive enjoyment for any length of time; and that is all that defendants in

error claim to have had. *First Parish in Gloucester* v. *Beach*, 2 Pickering, 60 (note); *Medford* v. *Pratt*, 4 ib. 222, 228; *Parker* v. *Framingham*, 8 Metc. 260; *Thomas* v. *Marshfield*, 13 Pickering, 240.

Inasmuch as the rulings of the court below were not in harmony with the views we have expressed, the judgment must be reversed and the cause remanded.

Judgment reversed.

JOHN C. SHORT & Co.

v.

MICHAEL D. COFFEEN.

ASSIGNOR OF NOTE—*measure of damages in recovery against.* In a suit by the assignee against the assignor of a promissory note, the measure of damages is the amount paid for the note to the assignor, with interest, but the recovery in no case can exceed the amount of the note and interest; and when the note requires the maker to pay an attorney's fee, in case of suit, the assignor, it seems, is not liable for such fee in a suit against him.

APPEAL from the Circuit Court of Vermilion county; the Hon. OLIVER L. DAVIS, Judge, presiding.

Messrs. HENRY & PENWELL, for the appellants.

Messrs. MALLORY & BLACKBURN, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by appellee against appellants, as endorsers of a promissory note, which read as follows:

"DANVILLE, ILL., *May* 6, 1873.

"Ten months after date, for value, I promise to pay John C. Short $150, at the Exchange Bank of John C. Short & Co.,

Danville, Illinois, with interest, at the rate of ten per cent, from date, and, in addition thereto, an attorney's fee of ten per cent on amount due, as liquidated damages, in case of the collection thereof by suit at law or otherwise, to be added to and made a part of the amount due, or of the judgment.

"F. M. WELSH."

John C. Short endorsed the note to appellants, and they endorsed it to appellee.

A jury having been waived, a trial was had before the court, and judgment rendered in favor of appellee for $186.89, which exceeded the amount of the note and interest $17.

We regard the evidence before the court as sufficient to authorize a recovery against appellants, as endorsers of the note; but the judgment rendered is too large.

In an action brought by the endorsee of a promissory note against the endorser, the measure of damages is the amount paid by the assignee to his assignor, with interest.

The recovery, however, can, in no case, exceed the amount of the note and interest. *Raplee* v. *Morgan*, 2 Scammon, 564; *Shœffer* v. *Hodges*, 54 Ill. 337; *Munn* v. *Commission Co.* 15 Johns. 55.

It was therefore error for the court to render judgment in favor of the endorsee against the endorsers, for $17 in excess of the amount of the note and interest, for which the judgment must be reversed and the cause remanded.

Judgment reversed.

ANN CORWIN *et al.*

v.

HENRY SHOUP.

1. RELEASE OF ERRORS—*accepting proceeds of sale.* When a party accepts the benefits of a decree, he can not, afterwards, prosecute a writ of error to reverse it. Such act operates as an estoppel, and may be treated

as a release of errors. And any act by a party which would render it fraudulent to reverse a decree, may be relied on as a release of errors.

2. So, where the lands of minors were sold under proceedings for partition, and the minors, after coming of age, settled with their guardian and received their share of the proceeds of the sale, this was held sufficient to bar them from prosecuting a writ of error to reverse the decree in the partition suit.

3. SAME—*plea of.* A plea to a writ of error which simply avers that the errors were released, without stating in what manner, or whether by deed, by parol, or by acts *in pais*, is too general. It should state the facts that are relied on as a release of errors.

4. PRESUMPTION—*as to knowledge of facts.* Where a party, after arriving at age, settles with his guardian, and receives moneys in the hands of the guardian belonging to him, and derived from a sale of his real estate, it will be presumed that he received the same with a knowledge of the source from whence it came, and did the act deliberately.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. DAVID DAVIS, Judge, presiding.

This was a petition for partition, filed by Henry Shoup against Mary Shoup, Sarah Shoup, Ann Shoup, Samuel Shoup, Emma Shoup, Josephine Shoup, Polly Shoup, and Samuel Shoup, Sr. The proceeding was commenced in 1856, and a decree of sale was had, under which the lands described in the petition were sold. This writ of error was prosecuted by Ann Corwin (formerly Shoup), Samuel Shoup and Emma Shoup, who were minors at the rendition of the decree and sale in partition. The other facts bearing upon the questions decided, are stated in the opinion.

Messrs. MORRISON & PATTON, for the plaintiffs in error.

Messrs. STUART, EDWARDS & BROWN, for the defendant in error.

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

This was originally a petition for partition, filed by defendant in error, in the Sangamon circuit court, against plaintiffs in error, for the division of several tracts of land and

for the assignment of dower to the widow of the ancestor of plaintiffs in error. Process was sent to Christian county, and service had. An appearance was entered by an attorney for the defendants, who were minors, who acted under power of attorney from their guardian. A hearing was had, and a partition was decreed, and in the same decree it is recited that a guardian *ad litem* was appointed for the minor heirs, and that he filed an answer. Commissioners were appointed to make partition, but they reported that the land was not susceptible of division, and the widow did not desire the assignment of dower.

Thereupon, the court decreed the sale of the land, and directed the division of the money received on its sale. The record is now brought to this court, and numerous errors are assigned.

Defendant in error does not join in error, but pleads a release of errors in three different modes, in as many several pleas. The third plea is this:

"And for further plea defendants say, by their attorneys, as to all of said errors assigned by said plaintiffs, that plaintiffs in error their writ of error to maintain ought not, because he says that the said plaintiff, Samuel Shoup, after he was twenty-one years of age, to-wit: on the 13th day of June, 1872, to-wit: at the county aforesaid, upon full settlement with Samuel H. Melvin, his guardian, received of said Melvin the sum of $17, balance, in full, of the amount of his share of the purchase money of said land allotted and apportioned to said Samuel, (except his share in the amount set apart for the use of said widow), the said Samuel well knowing that the same was for the proceeds of the land sold under and by virtue of said decree in said record mentioned; and that heretofore, to-wit: on the 22d day of December, 1871, and after the said Emma had attained the full age of eighteen years, she received of said Melvin, her guardian, upon full settlement with him, the sum of $91.32, in full of the balance of her share of the proceeds of the sale of said lands, except as

aforesaid, well knowing that the said money so received by her was from and of the said proceeds of the said sale of said lands; and the said Anna, alias Annie, heretofore, to-wit: on the 12th day of August, A. D. 1868, at the county aforesaid, and after she had attained the full age of eighteen years, received, on full settlement, from her guardian, said Melvin, the sum of $256.38, balance of her share of the proceeds of the sale of said lands, except as aforesaid, and with full knowledge that the said sum of money was of and from said proceeds. Said defendant in error avers, that the said shares of the said proceeds had been theretofore paid to the guardian of said plaintiffs, and that the amount, except the several sums above stated as paid to each of said plaintiffs on settlement, had been theretofore paid to or for the use of said plaintiffs, and at the time of such settlement each of said plaintiffs was apprised of and knew that such application had been, by their guardian, appointed by the county court of said county, made for their use and benefit of their said portion of such proceeds, whereby each of said plaintiffs in error has released, waived and for naught held the said errors, if any, to-wit: at the said several times above mentioned, to-wit: at the county aforesaid, and this he is ready to verify; wherefore, etc."

Whilst this is not, according to the ancient forms, a plea of release of errors, it is, according to various decisions of this court, a sufficient bar to the writ of error. *Morgan* v. *Ladd*, 2 Gilm. 414; *Thomas* v. *Negus*, ib. 701; *Austin* v. *Bainter*, 40 Ill. 82. In the first two of these cases, it was held that where a party accepts the benefit of the decree, he can not afterwards prosecute error to reverse it—that it operates as an estoppel, and may be treated as a release of errors. In the last of these cases it was said, that any act by a party which would render it fraudulent to reverse a decree, might be relied on as a release of errors. And the third plea in this case is fully within the principle of these decisions.

The second plea sets up the same facts, but not so fully as the third, but, on an issue joined under that plea, the same *quantum* of proof would be required. Although it does not aver that the plaintiffs in error were of age, and capable of binding themselves by their acts, still that would have to be proved on the trial. That being proved, the presumption would then be, that the parties receiving the money under the decree did so with full knowledge of the source from whence it came, and did the act deliberately.

The first plea is too general: it only avers that the errors were released, without stating in what manner. It does not aver that it was by deed, by parol, or by acts *in pais*. A plea of this kind should state the facts that are relied on as a release of errors.

The demurrer will be sustained to the first plea, but overruled as to the second and third pleas, and the writ of error dismissed and the judgment affirmed.

Judgment affirmed.

SIDNEY M. PITT *et al.*

v.

DAVID M. SWEARINGEN.

1. APPEAL BOND—*in forcible entry and detainer.* The sixth section of the "Act to amend chapter 43, of the Revised Statutes of 1845, entitled 'Forcible Entry and Detainer,'" in force February 16, 1865, does not repeal that part of the amended statute which requires the appeal bond in cases of forcible entry and detainer to contain a clause for the payment of all rents becoming due, etc., but simply requires the bond to contain additional guaranties for the benefit of the plaintiff.

2. SAME—*recovery of rent in suit on.* When the appeal bond given by the defendant in an action of forcible entry and detainer contains no clause for the payment of rent, as required by the statute, or any words from which the payment of rent can be implied, no recovery of rent can be had in a suit upon the same.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

This was an action of debt, by David M. Swearingen against Sidney M. Pitt and John Phiper, upon an appeal bond, given on appeal in a forcible entry and detainer suit. The bond was the common, ordinary appeal bond, conditioned for prosecuting the appeal with effect, and the payment of the judgment, costs, etc., rendered on the trial or dismissal of the appeal. In the circuit court the plaintiff recovered for rents of the premises.

Mr. J. S. WOLFE, for the plaintiffs in error.

Mr. S. F. WHITE, for the defendant in error.

Per CURIAM: The sixth section of the "Act to amend chapter 43, of the Revised Statutes of 1845, entitled 'Forcible Entry and Detainer,'" in force February 16, 1865, does not repeal so much of the statute amended as requires, in cases of appeals in forcible entry and detainer, that the bond shall contain a clause conditioned for the payment of all rents becoming due, etc., but simply contains additional guaranties, to be observed by the defendant appealing, for the benefit of the plaintiff.

The bond in suit in the present case contains no clause providing for the payment of rent, as required by that statute, nor can it, by legal implication, be held to embrace rents.

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

Judgment reversed.

ST. PATRICK'S ROMAN CATHOLIC CHURCH OF EAST ST. LOUIS

v.

STEPHEN ABST.

1. CHURCH SOCIETY—*liable for services performed.* Where the plaintiff was employed as sexton of a church organized under the statute, by a majority of the trustees, and as such performed services for nearly a year, it was *held*, that he was entitled to recover for his services, and the fact that the ladies of the Altar Society were to contribute one-half of the sum will not affect the right to recover the whole from the church, nor will the fact that the officers of the church violated its by-laws in contracting the indebtedness.

2. SAME—*temporal affairs defined.* The temporal affairs of a church are understood to be the revenues, lands and tenements, in other words, secular possessions, with which it is endowed. The hiring of a sexton to perform the duties incident to his office has nothing to do with the management of the temporalities of the church.

3. It matters not whether the by-laws of a church were observed in the employment of one as sexton, if the church accepts the services and work done by him. In such case it will be liable to pay for the same.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. CHARLES CONLON, and Mr. LUKE H. HITE, for the appellant.

Mr. E. A. MCCONAUGHY, and Mr. W. E. WARD, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the St. Clair circuit court, tried by a jury on the general issue, and resulting in a verdict and judgment for the plaintiff. The defendant corporation appeals, and makes the single point that the corporation is not liable, citing sections 14 and 15 of the act of 1869, under which it was organized, and also section nine of the by-laws of the corporation.

We do not understand sections 14 and 15 as controling this case, or affecting it in any way. Hiring a sexton to perform the duties incident to such an office, has nothing to do with the management of "the temporalities" of the church. They are understood to be, the revenues, lands and tenements, to be managed according to the charter and the by-laws; in other words, secular possessions with which a church may be endowed. The sexton is a subordinate officer of the church, whose duty it is, as plaintiff testified, to clean the church, fixing it up, keeping it in order; go of errands for the priest in relation to church matters, and generally, about such matters, to obey the directions of the priest. The sextons of some churches take care of the building, the furniture, utensils, etc.

This employment of plaintiff was procured by the priest, one of the three trustees, and known and approved by another, and the church, without making any objection, has received, for nearly one year, the services of appellee. The fact that the ninth section of the by-laws of the corporation has not been complied with by the trustees, can not prejudice the plaintiff. A majority of the trustees employed him to do these services for the church, and the church should pay their value. The fact that part of the stipulated sum was to be made up by the ladies of the Altar does not change the nature of plaintiff's undertaking. As we understand it, the priest was to pay him twenty dollars per month, one-half of which the ladies of the Altar were to contribute to the priest.

We see no objection to the instruction given for the plaintiff, as it was in conformity with the views here presented.

The judgment is just, and must be affirmed.

Judgment affirmed.

ALBERT SMITH

v.

HEIRS OF JAMES JACKSON.

1. NOTICE—*possession by tenant is notice of landlord's equities.* The actual possession of land by a tenant is constructive notice of the equities of the landlord in the same, especially when it is notorious that the tenant is paying rent to the landlord.

2. Where the owner of land, to secure his attorney in becoming his bail in a criminal prosecution, and his fees and expenses, conveyed the same by an absolute deed, which was recorded, taking back a defeasance, and the owner appeared and kept the grantee harmless as bail, and afterwards paid him his fees and expenses, and the attorney sold and conveyed the land to another, who claimed to be an innocent purchaser, it was *held*, on bill to have the deeds canceled, that the actual occupancy of the land by the owner's tenant at the time of the second conveyance, was constructive notice to the purchaser of the original grantee's equities, and that the conveyances were properly set aside.

3. SAME—*character of possession necessary to afford notice.* The possession of land, to afford notice of the party's rights, must be as open, notorious and exclusive as is required to constitute adverse possession under the limitation laws, but it is not necessary that it should have all the characteristics of an adverse possession.

4. PRACTICE IN SUPREME COURT—*evidence excluded must be preserved.* No error can be assigned upon the exclusion of a deposition when it is not contained in the record brought to this court, so that it can be seen whether the testimony was material.

APPEAL from the Circuit Court of Logan county; the Hon. LYMAN LACEY, Judge, presiding.

April 15, 1870, James Jackson, being under indictment in the Logan county circuit court for an alleged criminal offense, and required to give bail in $1000, being the owner of the quarter section of land situate in that county, and having retained the law firm of Wyatt & Hackney to defend him, entered into an arrangement with his counsel, or Hackney, whereby the latter should become bail, and Jackson was to secure him as such bail, and the firm, for their costs and fees

in his defense, by mortgage upon said land. Accordingly, Hackney had him execute a deed, in form absolute, of the land, reciting a consideration of $3000, he (Hackney) giving a formal defeasance upon a separate paper. Hackney filed the deed for record on the day of its date, being that above mentioned. The defeasance was not filed for record, but Jackson remained in possession of the land by his tenants, who continued afterwards paying rent to him. July 20, 1870, there having been no breach of condition, and Jackson being in possession by his tenants, in fact paying rent to him, Hackney and wife executed a deed of the same land to Smith, who had never seen it, who bought without making any inquiry, and, as he claims, paid Hackney for the land the sum of $3500, that being the consideration recited in his deed. Jackson having appeared to the indictment, saved his bail harmless. The prosecution having been dismissed by the court, and Wyatt & Hackney paid their costs and charges by Jackson, in full, he brought this bill in the court aforesaid to have said deeds set aside, on the ground that his conveyance to Hackney was but a mortgage, and had been fully satisfied; that, although the defeasance was not recorded, yet the circumstance of his being in possession by tenants, and Smith having bought without seeing the property or making inquiry, was sufficient to charge him with notice of complainant's equities; also on the ground of fraud. Hackney absconded, but he and his wife were made parties defendant with Smith—were brought in by publication and their default entered. Smith answered. Before hearing, Jackson died, and his administrator and heirs were made parties by supplemental bill. Upon the hearing on pleadings and proofs, a decree passed, declaring the mortgage satisfied and canceled, and setting aside the conveyance to Smith. He brings the record to this court by appeal.

Messrs. HAY, GREENE & LITTLER, for the appellant.

Messrs. BEASON & BLINN, for the appellees.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

The only question in this case is, whether the circumstances in evidence were sufficient to warrant the court below in holding that Smith, the purchaser from Hackney, was affected with constructive notice of Jackson's equities.

The deed from Jackson to Hackney was, in form, an absolute warranty deed, and by the latter filed for record on the day of its execution. It was, however, given under an arrangement for a mortgage, and a formal defeasance was executed by the grantee. The transaction being between attorney and client, and the former having, as the evidence clearly shows, conceived the design of cheating his client out of the property at an early stage of the business, it was put in a form to enable him to accomplish that result, and the defeasance was not filed for record.

It is a justifiable inference that a party thus dealing with his confidential legal adviser acts upon his advice. But Jackson remained in possession by his tenants and was in the receipt of rents from them at the time of Hackney's conveyance to Smith. As between Jackson, the grantor, and Hackney, the grantee, and between the grantor and Smith, the alleged *bona fide* purchaser, if he is affected with constructive notice, Jackson's possession at the time of the conveyance to Smith was that of a mortgagor before condition broken, and was consistent with the actual state of the title. But counsel for appellant say, that when their client purchased, the records showed an absolute warranty deed from Jackson to Hackney, from whom he purchased; that possession will be considered as following ownership; that, although, by the common law, the vendor must, himself, have obtained possession by livery of seizin before he could pass any interest in land, yet, by force of our statute, livery of seizin is dispensed with, and by the Statute of Uses the possession is transferred in all cases to the use of the *cestui que use*, who may, if there is no adverse

possession, make a lease for years, or absolute conveyance, without actual entry.

They further insist, that it follows, from this view, the possession of the occupants was consistently and apparently that of Hackney; that, in order to affect their client with constructive notice, it must be adverse in the sense required to ripen into a bar under the Statute of Limitations.

It is unquestionably true, that a vendor who has not obtained possession by livery of seizin may, if there is no adverse possession, make a lease for years, sell and convey without entry; and it is a legal inference that the ownership carries with it the possession. But does such legal presumption ever arise except in cases where the land is vacant and unoccupied? Or, in other words, can it arise where another is in the actual occupation?

It must be borne in mind, that there is a distinction between actual possession and the right of possession, and those presumptions which are subject to rebuttal and those which are not. If a grantor remain in possession after conveyance absolute, it is not as owner, but as tenant to his grantee, subject to ouster by ejectment or proceedings for forcible detainer, and no matter how long such possession is continued by the sufferance of the landlord, it can not be regarded as adverse without a clear, unequivocal and notorious disclaimer of the landlord's title. *Jackson* v. *Burton*, 1 Wend. 341; *Swart* v. *Service*, 21 id. 36.

Now, it is maintained by appellant's counsel that, regarding the absolute deed of record and the possession of Jackson as the only ingredients, then, inasmuch as the possession of the grantor was not adverse to Hackney in the sense necessary to ripen into a bar by lapse of time, it can not be regarded as any notice affecting the purchaser, Smith. We understand that, so far as regards the openness, notoriety and exclusiveness of the possession to operate as notice of the rights of the occupant, it must be the same as required to constitute adverse possession. But that it must wear all the characteristics of

an adverse possession in the sense expressed in the authorities just cited, can not be the law.

Suppose the mere circumstance of the grantor remaining in possession, after conveyance absolute, does place him in the position of tenant at will or sufferance to the grantee, so that his possession is not adverse to the grantee, still there is no law against his establishing by convention a different kind of tenancy under the grantee. Now, suppose, in the case at bar, instead of the transaction being that of a mortgage, Jackson had given a conveyance intended to be an absolute one, but had taken back from his grantee a lease for life, remained in possession under that lease, but failed to have it recorded. This is no unusual transaction. His possession would be no more adverse in that case than that of a mere tenant at sufferance. But would counsel contend that a purchaser, while Jackson was so in possession, would not be affected with constructive notice of his title under such life lease? But why should any different rule be applied in the case of a mortgagor in possession who, through the circumvention of his confidential legal adviser and mortgagee, had failed to have a defeasance recorded?

It is the tendency, and properly so, of the American courts, under the policy of our recording acts, not to extend the doctrine of constructive notice from possession beyond its proper limits. The doctrine itself is firmly established, and yet not favored. There is nothing unreasonable in a rule which requires a purchaser of land in the open, visible and exclusive possession of a person other than his vendor, to make inquiry as to that person's rights, and to take subject to those rights if he neglects to do so. It has been the rule of all the courts, so far as we are aware, that, in case of a tenancy, the possession of the tenant would amount to constructive notice to a purchaser of such tenant's title. The divergence of authority has been upon the question whether notice of a tenancy would affect the purchaser with constructive notice of the lessor's title, and that question is involved in this case. Jackson was

not in the actual occupation of the premises, but in possession by others, and known to be in the receipt of rents from the persons in actual occupation. This latter is an important circumstance, for, while it might not be an unusual circumstance for a vendor to remain in possession, after conveyance, as a mere tenant at sufferance of his grantee, yet it is an unusual circumstance for him to not only remain in possession but to be in the receipt of rents, after conveyance, as in this case.

It is true, this fact was not known to Smith, but he, according to his own testimony, purchased without even going or employing an agent to see the land, or make inquiry of the persons in occupation. Had inquiry been made, the fact would readily have been ascertained that they were paying rents to Jackson. The counsel who appear for him in this court were his legal advisers, he says, and to whom he presented the abstract for examination. It is not likely that counsel of such eminence would have failed to advise him of the necessity of inquiry whether there was any tenancy by others; for the law had been laid down by this court, as early as the case of *Pittman* v. *Gaty*, 5 Gilm. 186, that possession by the tenant was the possession of the landlord, and constructive notice of the landlord's title. That is the settled law in Pennsylvania, also in Iowa. See *Dickey* v. *Lyon*, 19 Iowa, 544, where the principal cases upon both views of the question are collected and ably commented upon.

In *Barnhart* v. *Greenshields*, 9 Moore, P. C. 18, referred to in the Iowa case, it was held that, in all the cases, the possession relied upon was the *actual occupation* of the land, and that the equity sought to be enforced was on behalf of the party so in occupation; and it was further said, there was no authority for the proposition that notice of a tenancy is notice of the title of the lessor, or that a purchaser, neglecting to inquire into the title of the occupier, is affected by any other equities than those which such occupier may insist on. This doctrine has since been modified in its application, and it has been laid down that the court, in the

passages of that judgment in which they speak of the *person in occupation*, did not mean merely the person who, by himself or his laborers, tilled the land, but also meant the person who is known to receive the rents from the persons in occupation of the land. 2 Sug. on Vend. & P. 8 Am. Ed. 774, 775; *Knight* v. *Bowyer*, 23 Beav. 609; 2 DeG. & J. 421.

Smith lived in Springfield, the distance of only a few miles from the county seat of Logan county, where the land is situated, accessible by railroad. It is a singular and suspicious circumstance that he purchased without ever having seen the land, or made, or caused to be made, any inquiry of the persons in occupation in respect to their or their lessor's title. Common experience teaches us that, unless the purchase is a mere sham, men do not conduct in that way. What man of common prudence would pay $3500 cash for a quarter section of land so easy of access, without any view of the property or inquiry as to possession? Under these circumstances, the proof of payment of the consideration is not satisfactory. It was done by merely producing drafts with Hackney's indorsement upon them. Smith was on the stand and could have shown, if such was the truth, that Hackney received and retained the proceeds of these drafts. He did not do it, nor did he testify that he, in fact, had no notice of Jackson's equities.

The court are of opinion that he was clearly affected with constructive notice of those equities, if he did not have actual notice.

He can take no advantage, either, from the order of May 21, 1870, which Hackney palmed off upon his victim. Smith could not have purchased upon the faith of a paper in the hands of Jackson, and which he never saw. The only effect of that order is, to show Hackney's design to defraud Jackson out of the property. Nor has he bettered his position by putting improvements on the property. He had notice, in fact, of Jackson's equities before putting them on.

No error can be assigned upon the exclusion of Hackney's deposition, for the reason that the deposition is not contained in the record, and the court can not see whether anything testified to was material.

The decree of the court below must be affirmed.

Decree affirmed.

ALEXANDER WATT

v.

BRYANT T. SCOFIELD.

1. LANDLORD'S LIEN—*purchase of crop with notice will not defeat the lien.* The statutory lien given a landlord upon the crops growing or grown upon the demised premises in any year for the rent that shall accrue for such year, is not defeated by a sale of such crop or any portion thereof by the tenant to a person who has notice of the fact of the tenancy, and that it was raised on the demised premises, but the landlord may enforce his lien upon such crops as against such purchaser.

2. SAME—*when the lien attaches.* The landlord's lien attaches upon the crops grown upon the demised premises in any given year, for the rent of such year, from the time of the commencement of their growth, whether the rent is then due or not.

3. NOTICE—*facts sufficient to charge purchaser of crops from a tenant with notice of landlord's lien.* Where a purchaser of corn from a tenant knows the fact of the tenancy, and that his vendor, as such tenant, had raised the corn on the demised premises, this will be notice to him of any lien the landlord may have upon the same for unpaid rent.

4. SAME—*what will amount to.* It is the common doctrine, that what is sufficient to put a purchaser upon inquiry, is good notice of whatever the inquiry would have disclosed.

5. TROVER—*when it lies.* To maintain trover there must exist the right of immediate possession. Where a tenant sold and delivered corn, upon which his landlord had a lien for rent, not then due, and the landlord made a demand of the same before the rent was due, and upon refusal to deliver brought an action of trover against the purchaser: *Held*, that, as the landlord was not then entitled to possession, he could not maintain trover for a conversion of his property.

APPEAL from the Circuit Court of Hancock county; the Hon. JOSEPH SIBLEY, Judge, presiding.

Messrs. MACK & BAIRD, for the appellant.

Messrs. SCOFIELD & HOOKER, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of trover, brought by appellee, Scofield, against appellant, Watt, on the 23d day of February, 1871, for the alleged conversion of a quantity of corn.

The cause was tried by the court below, without a jury, upon an agreed statement of facts, whereby it appeared that one Kenny raised the corn in question, in the year 1870, on the farm of Scofield, in Hancock county, in this State, and demised by Scofield to Kenny for that year, under a written lease, at a cash rent of $660, to be paid November 25, 1870; that Watt, a merchant, residing and doing business at Elvaston, in said county, and one mile from the farm, about November 10, 1870, as agent of one Green, living without the State, bought from Kenny the corn, being 350 bushels, of the value of $90, which was then delivered and paid for; that Kenny, as such tenant, lived upon said farm with his family, and cultivated it during the year 1870; that the corn was raised by Kenny on said farm in that year; that Watt, at the time he purchased the corn, knew that Kenny was the tenant of Scofield, and raised the corn on the latter's farm as such tenant; that Kenny, on October 18, 1870, paid Scofield on the rent $277, and at the time of Watt's purchase Kenny was indebted to Scofield, for balance of rent, $383, which became due November 25, 1870, and he has ever since been so indebted, except $42 of it, which has been made, and that is all that could have been made, by distress or otherwise, since the sale to Watt; that Scofield, immediately after learning of the sale to Watt, on November 15, 1870, made demand on the latter for the corn, notifying him the rent had

not been paid, and that he would be held responsible for the corn. The corn was not, at that time, in Watt's possession, but had been sent by him out of the State to market. Scofield did not issue his warrant to distrain for the rent until after the commencement of this suit.

The court found the issue for the plaintiff, and assessed his damages at $90, and rendered judgment therefor, and defendant appealed.

The main question presented is, whether the landlord can enforce his statutory lien upon crops against a purchaser from the tenant, who had notice that his vendor was such tenant and that the crop purchased was grown in that year on the demised premises.

Our Landlord and Tenant act provides that "every landlord shall have a lien upon the crops growing or grown upon the demised premises in any year, for rent that shall accrue for such year." Another provision exempts from distress for rent the same articles of personal property which are by law exempt from execution, except the crops growing or grown upon the demised premises.

It is unnecessary to decide, here, how it might be with a *bona fide* purchaser without notice; but unless the purchaser of crops be such an one, we can have no doubt that he buys subject to this statutory lien.

And in this case we are of opinion that Watt was not a *bona fide* purchaser without notice.

A *bona fide* purchaser is one without notice of a prior claim or incumbrance. *Robinson* v. *Rowan*, 2 Scam. 499.

Watt knew, when he purchased the corn, that his vendor was the tenant of Scofield for the year 1870, and that as such tenant he had raised the corn on the demised premises. He knew that Scofield had a lien upon the crops grown upon the premises that year, for the rent for such year, because it was given by the statute, and every one is presumed to know the law.

Watt, then, had full knowledge, at the time he purchased the corn, of Scofield's lien upon it for his rent, except, may be, actually knowing that the rent was unpaid; but he had reason to believe that it was unpaid—at least there was enough to excite his suspicion that it was not paid, and put him upon inquiry to ascertain the fact in that regard. It is the common doctrine, that what is sufficient to put a purchaser upon an inquiry is good notice of whatever the inquiry would have disclosed. Knowing, as he did, that Scofield had a security upon all corn grown upon the land for the rent that should accrue for the year, Watt should not be allowed to protect himself under the plea that he did not know but that the landlord might have been paid his rent. The reasonable apprehension would be that the rent was not paid; and good faith on the part of Watt, and a proper regard for the rights of another, demanded an inquiry whether the rent was paid or not, before making the purchase which would be so likely to impair the landlord's security.

We can not accede to appellee's construction of the statute, that the landlord's lien does not attach until the time at which the rent becomes due and payable—as in this case, not until the 25th of November, the time at which the rent was agreed to be paid. This would operate to give no security upon the crops for the rent until after it had become due, whereas the statute gives the lien upon the crops "growing or grown" for rent that "shall accrue" for the year. We think the statute gives security upon the crops for the rent, and that it attaches from the time of the commencement of their growth.

A majority of the court, however, not including the writer hereof, being of opinion that trover does not lie in this case, on the ground that at the time of Scofield's demand of the corn from Watt, Scofield was not entitled to its possession, as the rent had not at that time become due, the judgment will be reversed and the cause remanded.

Judgment reversed.

Mr. CHIEF JUSTICE WALKER: I am unable to concur in the decision announced in the above case, believing that trover should be held to lie, on the facts disclosed in the record before us.

Mr. JUSTICE MCALLISTER: I concur in reversing, on the ground that trover will not lie. It is true, the plaintiff had a lien given by the statute, but it is a mere lien. The landlord had not, by virtue of the lien alone, and without levy of a distress warrant, a right of possession. He could not take possession of the tenant's crops at any time he chose, before the rent was due, nor could he, after it was due, by virtue of the lien alone. The statute gives no such authority. The remedy is, therefore, by action on the case for a fraudulent act, intended to impair the landlord's security, when the circumstances warrant, like the cases of a lien by mortgage or execution. *Powers* v. *Wheeler et al.* 63 Ill. 29.

To maintain trover there must exist the right of immediate possession. The plaintiff here had no such right.

Mr. JUSTICE CRAIG: I concur in the views expressed by Mr. JUSTICE MCALLISTER.

THOMAS BLEMER, alias, etc.

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. CRIMINAL LAW—*illegal steps before finding indictment.* Illegal steps taken, or even oppression, by the prosecution, anterior to the finding of the indictment, in no way affecting the fairness of the trial, can not be urged to set aside a conviction fully warranted by the evidence under the law of the case.

2. Where, during the progress of the trial of one indicted, the State's attorney entered a *nolle prosequi*, and the defendant, on the State's attorney's motion, entered into recognizance for his appearance on the first

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day of the next term, and from day to day thereafter, to answer to any indictment that might be preferred, and was discharged, and on the same day the judge ordered the summoning of a special grand jury, and issued his warrant for the arrest of the defendant, and on the return of an indictment, placed the defendant upon trial against his objection, and refusing to continue the case, it was *held*, that these acts furnished no ground of reversing a judgment of conviction, there being no other cause for a continuance shown.

3. JURY—*special venire in criminal case.* Where it appeared, by stipulation in a criminal case, that, there being no jury in attendance on court summoned according to law, it was ordered that a special *venire* issue for a petit jury to try the case, and that on such *venire* the jury were summoned who tried the case, to which order the defendant excepted: *Held*, that if the stipulation stated the fact, the precise contingency contemplated by the statute to authorize the impanelling of a special jury existed, and there was no error.

4. INDICTMENT—*obtaining money by game or device by the use of cards.* An indictment charging that the defendant, "by a certain game or device by the use of cards, did unlawfully, feloniously and fraudulently obtain of one J. A. thirty four-dollar bank bills, current money of the Dominion of Canada, value four dollars each, the property of," etc., is good.

5. SAME—*using the word "or," as in the statute.* The rule is, where the word "or" in a statute is used in the sense of "to-wit," that is, in explanation of what precedes, and making it signify the same thing, an indictment is well framed which adopts the words of the statute.

6. SAME—*where the disjunctive should be charged conjunctively.* Where a statute forbids several things in the alternative, it is usually construed as creating but a single offense, and the indictment may charge the defendant with committing *all* the acts, using the conjunction "*and*" where the statute uses the disjunctive "*or*."

7. CRIMINAL LAW—*statute construed.* The words game, device, sleight-of-hand, trick, etc., in sec. 100, division 1st, of the Criminal Code of 1874, allude directly to and are qualified by the words "use of cards," and are intended to describe, in different words, the same thing. The gist of the offense is the obtaining of property by the fraudulent use of cards, the details by which this is effected being unimportant.

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

This was an indictment against the plaintiff in error. The first count charged that the defendant, "on, etc., at, etc., by a certain game or device by the use of cards, did unlawfully,

feloniously and fraudulently obtain of James Armstrong thirty four-dollar bank bills, current money of the Dominion of Canada, of value of four dollars each, thirty four-dollar bank notes, current money of Canada, of value of four dollars each, thirty four-dollar bank notes of the Merchants' Bank of Canada, valued at four dollars each, current money in Dominion of Canada, five dollar current bank notes of Canada money, of value of five dollars each, one ten dollar current bank bill, Canada money, of value of ten dollars, one hundred and twenty dollars in bank notes and current bank bills of the current money of the Dominion of Canada, of divers issues and denominations to the grand jurors unknown, of value of one hundred and thirty dollars, the property of said Armstrong, contrary," etc.

The second count charged that the defendant, on, etc., at, etc., "by a certain game, device or trick, by the use of cards and other implements, did then and there unlawfully, feloniously and fraudulently obtain of and from the said James Armstrong the moneys and personal property aforesaid, of the value aforesaid, of the money and personal property of the said James Armstrong, contrary to the statute," etc.

The third count charged that the defendant, on, etc., at, etc., "by a certain game, device, sleight-of-hand, or trick, by the use of cards and other implements and instruments, the names and descriptions of which are to the grand jurors aforesaid unknown, did then and there unlawfully, feloniously and fraudulently obtain of and from the said James Armstrong the money and personal property aforesaid, of value aforesaid, the money and personal property of the said James Armstrong, contrary," etc.

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

Mr. JAS. K. EDSALL, Attorney General, for the People.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellant and one Lee having been indicted for feloniously and fraudulently obtaining from James Armstrong, by the

game of "three card monte," certain bank bills, etc., were, on the 16th of September, 1874, placed on trial therefor, before a jury, in the criminal court of Cook county; and after the trial had progressed some time, but before the case was finally submitted to the jury, the State's attorney entered a *nolle prosequi*. Thereupon, on motion of the State's attorney, the defendants, severally, entered into recognizance in open court, with sureties, in $2000, for their appearance on the first day of the next term of court, and, from day to day thereafter, to answer to any indictment that might be preferred against them, etc.; and the defendants were then released from custody.

It appears, by stipulation in the record, that, on the same day, on motion of the State's attorney, because, as alleged by him, the prosecuting witness had been in jail two weeks, and lived in Manitoba, 1000 miles away, and was anxious to depart for home, and the court believing that the interests of public justice required that a grand jury should be impanelled as soon as practicable, it was then ordered that a special *venire* issue to the sheriff to summon twenty-three grand jurors to attend the next morning; that on the same day there was presented to the judge of the court the complaint, on oath, of James Armstrong, charging that appellant, Lee, and another person whose name was unknown, fraudulently obtained from him money by means of a device by use of cards, upon which the judge issued his warrant, and the accused were arrested and imprisoned.

On the next day, the 17th of September, the grand jury previously ordered were impanelled, and soon thereafter returned into court the indictment on which appellant was tried and convicted. The warrant previously issued by the judge for the arrest of appellant and others was then indorsed by the judge: "These parties having been indicted for the same offense, and arrested, this warrant is dismissed."

After the return of the indictment, and on the same day, the parties were arraigned and required to proceed to

trial. Motion was made in their behalf, but overruled by the court, that they be discharged by reason of their having given recognizance. A motion was then made for the continuance of the case until the next term, because of their having entered into recognizance, and because the action of the judge in causing their arrest was illegal. This was also overruled by the court. Proper exceptions having been taken to these rulings, it is now argued they constitute such error as renders illegal the conviction of appellant.

We do not think the authorities cited by appellant's counsel are in point. None of them assert that illegal steps taken, or even oppression by the prosecution anterior to the finding of the indictment, in no way affecting the fairness of the trial, can be urged to set aside a conviction fully warranted by the evidence, under the law. There is nothing in the record to show that appellant was not as completely prepared for trial, when he was tried, as he could have been had the case been postponed to any future time; nor is it shown that the circumstance of his having entered into recognizance for his appearance at the next term of the court, and his arrest on the warrant issued by the judge, in the slightest degree prejudiced him on his trial. The subsequent arrest of appellant, doubtless, discharged the recognizance into which he had entered (*People* v. *Stager*, 10 Wendell, 431); provided, however, that it was for the same offense; but not if it was for a different one. *State* v. *Shaw*, 4 Ind. 428. Cases might also exist where, by oppressive preliminary proceedings, officers would be liable to be punished for their conduct; and if it should be shown that, by reason thereof, the accused had been deprived of the means of proving some substantial defense which he would otherwise have been able to have proved, he would be entitled to a continuance. But, however improper the preliminary proceedings may have been, if the accused is in nowise prejudiced on his final trial thereby, his grievances can not be heard to affect the validity of his conviction.

The following stipulation is in the record with regard to the impanelling of the jury before whom appellant was tried:

"That on said 17th of September there was, and had been on and from the commencement of the September term, a panel of thirty jurors, summoned by special *venire* and not drawn, which panel remained in attendance in court until the 19th of September, when it was discharged; that on the 17th of September the case was passed, on motion of defendants, until the 18th of September; that on the 17th of September, on motion of the State's attorney, and in the absence of defendants and their counsel, for the reason that there was no jury in attendance on court summoned in the manner required by law, and for the reason that twelve of the panel had heard the evidence on the previous partial trial, it was ordered that a special *venire* issue for a petit jury to try the case, and on such *venire* came the jurors summoned by the sheriff, who were impanelled and tried the cause—to which order defendants excepted."

The objection urged is, that the panel was already full, and the contingency did not exist which authorized the court to direct the sheriff to fill the panel, as provided by section 12, chapter 78, of the Revised Statutes of 1874. The clause in the section referred to, bearing upon the question, is as follows: "In case a jury shall be required in such court for trial of any cause, before the panel shall be filled in the manner herein provided, the court shall direct the sheriff to summon from the bystanders, or from the body of the county, a sufficient number of persons having the qualifications of jurors, as provided in this act, to fill the panel, in order that a jury to try such case may be drawn therefrom; and when such jury is drawn, the persons selected from the bystanders, or from the body of the county, and not chosen on the jury, shall be discharged from the panel, and those who shall be chosen to serve on such jury shall also be discharged from the panel at the conclusion of the trial."

We must accept the stipulation as the parties have made it. By it, the *venire* was issued "for the reason that there was no jury in attendance on court summoned in the manner required by law. A jury was required to try this case, and thus the precise contingency contemplated by the statute to authorize the impanelling of a special jury existed. It would seem that we would scarcely be warranted in holding that the panel had been previously legally filled, when it is stipulated in the record, as a fact not to be controverted, that it had not been.

It is also insisted that the court erred in overruling the motion to quash the indictment.

The objection taken to the first count is, it charges "that, by a certain game or device by the use of cards, they did," etc., whereas, it is argued, the "device" referred to in the statute is distinct from its antecedent word, "game," etc.

The language of the statute is, "Whoever, by the game of 'three card monte,' so-called, or any other game, device, sleight-of-hand, pretensions to fortune telling, trick, or other means whatever, by use of cards, or other implements or instruments, fraudulently obtains from another person property of any description, shall be punished," etc. Revised Statutes of 1874, chapter 38, division 1st, section 100.

We are of opinion that the words "game," "device," etc., here allude directly to and are qualified by the words "use of cards," and that they are intended to describe, in different words, the same thing. The meaning would be precisely the same, in our opinion, if the phraseology were thus: "or any other game, that is to say, device, sleight-of-hand, pretensions to fortune telling, trick, or other means whatever, by the use of cards," etc., "fraudulently obtains from another," etc. Tho rule is, when the word "or," in a statute, is used in the sense of "to-wit," that is, in explanation of what precedes, and making it signify the same thing, an indictment is well framed which adopts the words of the statute. *Commonwealth* v. *Grey*, 2 Gray, 501; *Brown* v. *Commonwealth*, 8 Mass. 59.

The gist of the offense charged is, the obtaining of property by the fraudulent use of cards, and the details of the particular process by which it was done, and the name applied to it, were unimportant.

If we are correct in the view taken of the first count, the objection urged against the other counts can not be sustained. Where a statute forbids several things in the alternative, it is usually construed as creating but a single offense, and the indictment may charge the defendant with committing all the acts, using the conjunction "and" where the statute uses the disjunctive "or." 1 Bishop's Criminal Procedure, 819; *State* v. *Whitted*, 3 Ala. 102; *Ray* v. *Bowen*, 1 Dev. C. C. 22; *The People* v. *Adams*, 17 Wend. 475.

The remaining errors assigned relate to the sufficiency of the evidence to sustain the verdict, and the giving and refusal of instructions. We are not inclined to disturb the judgment on either of these grounds. The instructions, as a whole, fairly presented the law to the jury, and the evidence is sufficient to authorize the verdict as returned. The questions raised in this respect are such that their discussion at length in this opinion could subserve no useful purpose in the future, and it will therefore be omitted.

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

Judgment affirmed.

CHARLES V. LODGE

v.

L. GATZ & CO.

INSTRUCTIONS—*errors in, will not always be cause to reverse.* Although the law of a case may not be accurately stated in instructions given for the successful party, yet, if the law is clearly and forcibly given in the

instructions for the other party, so that the court can see that the jury were not misled by the faulty instructions, the judgment will not be reversed.

APPEAL from the Circuit Court of Edgar county; the Hon. OLIVER L. DAVIS, Judge, presiding.

Mr. JOHN G. WOOLLEY, and Mr. JAMES A. EADS, for the appellant.

Messrs. SELLORS & DALE, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action, brought by the appellees against appellant, to recover for a bill of goods furnished to one Odenbaugh, who was, at the time, in the employ of appellant.

The cause was tried before a jury in the county court of Edgar county, the trial resulting in a verdict in favor of appellees, for $111. Appellant prosecuted an appeal to the circuit court, where the judgment rendered in the county court was affirmed. Appellant brings the record here, and relies upon two grounds to obtain a reversal of the judgment:

First—That the verdict is not sustained by the evidence.

Second—That the court erred in giving instructions Nos. 1 and 2 for appellees.

The evidence introduced by appellees tends to prove the goods in question were furnished to Odenbaugh, by virtue of an agreement, previously made, by which appellees were to furnish appellant and his employees goods, which were to be paid for by appellant.

The testimony of appellant tends to prove that no agreement was made by which he should be responsible for the goods.

The evidence upon this point, which was the vital question in the case, was conflicting, which it was the province of the jury to reconcile. And while we are free to concede, the testimony is not as satisfactory in favor of appellees' theory of the case as we could desire, yet, in view of the conflicting

character of the evidence, and the further fact that the questions of fact were submitted in the county court to three juries, and each returned a verdict in favor of appellees, we do not feel disposed to interfere with the verdict of the jury.

The instructions given for appellees, to which exceptions were taken, are as follows:

"1st. The court instructs the jury, that if they believe, from the evidence in this case, that Lodge promised to pay the account sued upon, or any part thereof, to Gatz & Co., and that, upon the faith of such promise, Gatz & Co. sold the goods which make up the account, then such promise is an original promise, and is not within the Statute of Frauds, but renders Lodge liable to pay the whole of such account, or such part thereof as he thus promised to pay.

"2d. If the jury believe, from the evidence, that the goods, or any part thereof, charged in this account, were furnished to Odenbaugh upon the promise of Lodge to pay for the same, then Lodge is liable in this action to pay for the same, or such part thereof as were so furnished."

While the law involved in the case was not accurately stated in these instructions, yet, we are satisfied the jury were not misled by them. We are more free to adopt this view, from the fact that the law was clearly and forcibly given to the jury in the instructions of appellant.

Perceiving no substantial error in the record, the judgment will be affirmed. *Judgment affirmed.*

WILLIAM PARRIS *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. INFORMATION—*in county court—requisites of.* When the statute dispensed with an indictment in the county court, and substituted an

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information, it was not designed to dispense with all the previous requirements of the law. The accused is still entitled to be informed of the offense with which he is charged, and not only so, but with the same certainty as is required in an indictment.

2. SAME—*not sufficient to charge on belief.* An information in the county court should charge the accused positively with the commission of the offense. It is not sufficient to charge that he is believed to be guilty, or that the prosecutor has reason to suspect his guilt.

3. SAME—*constitutional requirements.* An information for a criminal offense in the county court, like an indictment, should be carried on "in the name and by the authority of the People of the State of Illinois," and conclude "against the peace and dignity of the same."

4. MALICIOUS MISCHIEF—*destruction of growing crop.* The destruction of growing wheat is a trespass, but not a criminal offense. The statute makes the malicious destruction of any barrack, cock, crib, rick or stack of wheat punishable criminally. An information, therefore, which charges the destruction of a part of twelve acres of wheat, is fatally defective.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

This was an information in the county court of Champaign county, against William Parris, Isaac Jones, John Parris, George Parris, and Walker Richards. The following is a copy of the information:

"STATE OF ILLINOIS, } ss.
Champaign County. }

"The complaint and information of Albert Coons, of Ogden township, in said county, made before the Hon. A. M. Ayres, judge of the county court in and for said county, on the 10th day of October, 1873, at Ogden township, in the said county, the criminal offense of malicious mischief, destroying and causing to be destroyed a part of twelve acres of wheat, the same being the property of Albert Coons, and unlawfully and maliciously, and for mischief, shooting and wounding a certain dog, the same being the property of Albert Coons, was committed, and he has just and reasonable grounds to suspect that William Parris, Isaac Jones, John Parris, George

Parris and Walker Richards committed the same; he therefore prays that the said William Parris, etc., may be arrested and dealt with according to law.

"ALBERT COONS.

"Subscribed and sworn to before me this 10th day of October, 1873.

"J. W. SHUCK,
"*Clerk of the County Court.*"

A trial was had in the county court, where the defendants were found guilty, and fined each $3. They appealed to the circuit court, where the judgment of the county court was affirmed.

Messrs. CUNNINGHAM & WEBBER, for the plaintiffs in error.

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

The record shows that plaintiffs in error were prosecuted in the county court for malicious mischief. The information charges, that "on the 10th day of October, 1873, at Ogden township, in said county, the criminal offense of malicious mischief, destroying and causing to be destroyed a part of twelve acres of wheat, the same being the property of Albert Coons, and unlawfully and maliciously, and for mischief, shooting and wounding a certain dog, the same being the property of Albert Coons, was committed, and that he has just and reasonable grounds to suspect that William Parris, Isaac Jones, John Parris, George Parris and Walker Richards committed the same."

When the statute dispensed with an indictment in the county court, and substituted an information, it was not designed to dispense with all the previous requirements of the law. The accused is still entitled to be informed of the offense with which he is charged, and not only so, but with the same certainty as is required in an indictment. The accused should be positively charged with the commission of the offense, and

not that he is believed to be guilty or that the prosecutor has reason to suspect his guilt. Such loose and indefinite averments, if they may be denominated as such, are unknown to pleadings in any court or any class of cases. It may well be doubted whether the paper in this case, called an information, charges even a suspicion of anything against the accused.

Again, this information attempts to charge the offense of destroying a part of twelve acres of wheat. The reasonable construction of this language is, that the wheat was growing, and attached to and a part of the soil; but if in this we are mistaken, then it is at least doubtful whether it was growing wheat or wheat in shock or stack. There is no positive averment that it is the one or the other.

If this was intended as a prosecution, as we presume it was, under section 156 of the Criminal Code of 1845, then the destruction of growing wheat is not embraced in its provisions. That only includes any barrack, cock, crib, rick or stack of wheat, etc. The destruction of growing wheat is a trespass, but not a criminal offense. Hence the complaint was bad for the reason that, so far as it related to wheat, it did not embrace an indictable offense. A person can not be punished criminally for a mere trespass.

The constitution, article 8, section 33, provides, that "all prosecutions shall be carried on in the name and by the authority of the People of the State of Illinois," and conclude "against the peace and dignity of the same." There can not be the slightest pretense that there was any effort in this case at a compliance with this provision of the constitution. In fact, there is nothing that even resembles conformity. It seems that there has been an entire disregard both of legal and constitutional requirements in preparing the information in this case.

The instruction complained of tells the jury, that if they believe, from the evidence, that defendants maliciously and for mischief drove a herd of cattle upon the wheat, thereby injuring and damaging the wheat, then the jury should find

the defendants guilty. This instruction was manifestly wrong. It authorized the jury to convict for a trespass, which we have seen is not the subject of a criminal prosecution.

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

Judgment reversed.

The Toledo, Wabash and Western Railway Company

v.

Andrew J. Miller.

1. Negligence—*care measured by the hazard and circumstances of the case.* No obligation rests upon a railroad company to slacken the ordinary speed of its trains before reaching a highway crossing in an open level country where persons seldom pass. Neither the law nor the public safety demands such precautionary measures. But a different duty is imposed in crossing a street or highway in a city or village where persons are constantly passing and repassing. Under such circumstances, a much higher degree of care is necessary to insure the public safety.

2. Same—*death by negligence of boy's attendant.* In a case where the parents of a boy aged about nine years, intrusted him with a neighbor, and the two latter, in the neighbor's wagon, while crossing a railroad track, were struck by a passing train, going at its ordinary speed, and the boy killed, and the proof showed that the train was in plain view for a considerable distance before reaching the crossing, and that a bell was rung as required by law, and where a recovery was had against the company for causing the death of the boy, this court reversed the judgment, holding that the company was not responsible.

Appeal from the Circuit Court of Macon county; the Hon. C. B. Smith, Judge, presiding.

This was an action on the case, by Andrew J. Miller, administrator of the estate of James D. Miller, deceased, against the Toledo, Wabash and Western Railway Company,

to recover damages for negligently and wrongfully causing the death of the intestate.

A trial was had, the jury finding the defendant guilty, and assessing plaintiff's damages at $3500. The circuit court overruled a motion by defendant for a new trial, and rendered judgment on the verdict, and the defendant appealed.

Messrs. Nelson & Roby, and Mr. A. J. Gallagher, for the appellant.

Messrs. Crea & Ewing, and Messrs. Park & Lee, for the appellee.

Mr. Justice Scott delivered the opinion of the Court:

This action was brought by the administrator, under the statute, to recover damages resulting to the next of kin of James D. Miller, whose death was caused by a collision of the wagon, on which he was riding, with a passenger train on appellant's road.

It will not be necessary to consider all the points raised upon the record, for the reason that, in no view that can be taken, can the judgment be maintained. Our conclusion is, from a careful consideration of the entire case in all its phases, the verdict is contrary to the weight of the evidence.

When the accident occurred, deceased was on the wagon with the witness Jones. The road on which they approached the crossing ran east and west, and was crossed nearly at a right angle by the railroad. Some complaint is made as to the condition of the crossing and its approaches. But conceding they were defectively constructed, we do not see how that fact tended to produce the injury. The accident is not attributable to that cause, but to the thoughtless conduct of the witness Jones in driving his team upon the crossing without observing due caution. His attention must have been absorbed with other thoughts, and perhaps it never occurred

to him he was approaching a railroad crossing until he was in the midst of dangers from which he could not extricate himself and his little companion.

Whether the team suddenly became unmanageable and ran upon the track in front of the advancing train, according to the account the witness Jones gave of it at the time, is immaterial. All the witnesses concur that, had he been on the look-out, he could have seen the train when it emerged from the woods to the north in ample time to have stopped his team to allow it to pass. It will avail nothing to assert that he did not see it. There was nothing to prevent him from seeing it, and as he knew he was approaching a railroad crossing, the law made it his duty to look in either direction for it.

Positive testimony was given that the bell was rung for the requisite distance before reaching the crossing, and notwithstanding there were witnesses in the immediate vicinity who did not hear it, we must believe it was rung. Attention was called to the fact in the presence of the parties injured, and when witnesses say they then remembered the bell had been rung, it is hardly possible they can be mistaken. Implicit reliance must be placed on their testimony, or else it is corruptly false, and there is no reason shown for the latter belief. Nor is it shown the employees of the company were guilty of any negligence in running the train. It was behind time, but it was not being run at an unusual rate of speed. No obligation rested upon them to slacken the speed of the train before reaching a crossing, in the country, like this one, where persons seldom pass. Neither the law nor the public safety has demanded any such precautionary measures. But a different duty would be imposed in crossing a street or highway in a city or village where persons are constantly passing and repassing. Under such circumstances a much higher degree of care is necessary to insure the public safety. *St. L. A. and T. H. R. R.* v. *Manly*, 58 Ill. 300.

The deceased was a boy about nine years of age. He was too young to exercise much care for his personal safety. Perhaps no great degree of negligence could be imputed to him. But his parents had intrusted him, at least suffered him to be in the wagon with Jones on the highway, and if he failed to observe due care for their personal security, or thoughtlessly drove into dangers that were apparent to any ordinary observer, the railroad company is not responsible for the results.

Sad as was this accident to the plaintiff and his family, the evidence shows no ground for a recovery. The verdict is so plainly against the weight of the evidence, the judgment, for that reason alone, without passing on any other questions arising in the case, must be reversed.

Judgment reversed.

DAVID GILCHRIST

v.

JOHN R. GILCHRIST.

1. CONTRACT—*to make a hedge, construed.* Where a person taking a lease of a quarter section of land for the term of five years, covenanted to plant and grow a good and substantial hedge fence by the close of the term, it was *held*, that the true meaning of the contract was, that a hedge as good as could reasonably be made before the expiration of the lease, should be made. It did not impose the duty of making a hedge that would turn stock, but only that the lessee should plant and faithfully cultivate it during the term.

2. INSTRUCTIONS—*critical exactness will not always be required.* Although there may be objections to part of the instructions given, when criticised, yet if taking them together, as a whole, the law of the case is fairly presented, and justice is done by the verdict, the judgment will not be reversed.

3. BILL OF EXCEPTIONS—*evidence must be shown to have been offered.* In a suit upon a lease for a breach of its covenants, where the bill of exceptions fails to show that the lease was offered in evidence, it can not be considered by this court, although the clerk has copied it into the record.

APPEAL from the Circuit Court of Ford county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was an action of covenant on a lease, brought by David Gilchrist against John R. Gilchrist. The lease was for a term of five years, commencing March 1, 1869, and provided that the lessee should plant and grow a hedge around the quarter and a hedge through the center, the same to be planted in the spring of 1870, and to be cultivated in a good and husband-like manner, and "make said hedge a good and substantial fence by the close of the term," etc.

Mr. JOHN R. KINNEAR, for the appellant.

Messrs. GRAY & SWAN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of covenant on a lease, brought to the Ford circuit court, assigning as breaches that the defendant did not plant and grow a hedge around the premises leased, nor divide the land into two equal parts by growing a hedge through the center thereof, nor did he cultivate the same in a husband-like manner, nor make a good and substantial fence by the close of his term, nor did he throw up all low places along the line where the hedge was to be planted, so as to make a suitable place to grow a hedge; nor build a post and three plank fence, with posts six feet apart, where the ground was so wet as not easily drained and made suitable to grow a hedge.

The lease is set out *in hæc verba* in the declaration, and contains all the covenants above specified.

The defendant pleaded *non est factum*. 2. Performance. 3. Infancy; upon which issues were joined. The cause was tried by a jury, who rendered a verdict for the defendant, which the court refused to set aside on plaintiff's motion, and rendered judgment against plaintiff for the costs, to reverse which he appeals.

The lease was from March 1, 1869, to March 1, 1874, as appears from the declaration, but it does not appear from the bill of exceptions that it was offered in evidence. The clerk has inserted in the record what purports to be a lease, but it was not in evidence, and is not a part of the record as evidence. It would follow, therefore, that the lease is not before us for examination, and what its terms may have been we have no means of ascertaining.

But, regarding the instrument described in the declaration as a covenant between these parties, the question for consideration under the plea of performance is, did the defendant perform the covenants in the lease by him to be performed?

There is no complaint of a breach of any other covenant than the covenant to make a good and sufficient hedge around the quarter section described, and to divide the tract by a hedge row through the center. There is no covenant that the hedge shall be sufficient to turn stock. This demise was for five years, within which time the hedge was to be planted and grown. What, then, is the true interpretation of the contract? Is it anything more than this, that the lessee shall plant and faithfully cultivate the hedge during that time? There is no guaranty beyond this. Paul may plant and Apollos water, but Nature, in her wonderful and mysterious operations, can alone give the increase. The clear meaning of the contract is, that a hedge, as good as could reasonably be made in five years, shall be made. What is the proof? There is some conflict on the point, but there was sufficient testimony before the jury to satisfy them such a hedge had been made. So two juries have found, and we think the evidence in the record justifies the finding.

But appellant contends that this finding was the result of erroneous instructions given on behalf of the defendant, and by refusing a proper instruction asked by him.

Appellant takes the position, and it is a correct one, when a party binds himself to perform an act, he is held to its performance. But there are some qualifications even to this

proposition, and the nature of the contract must be considered, and its making tested by attendant circumstances.

The true meaning of this contract can be no other than this, that the lessee would make as good a hedge as could be made, by proper planting and cultivation, within the duration of the lease, that is, in five years. Every one knows, who has any knowledge of this branch of agriculture, that a perfect hedge is not the growth of five years. Such a hedge as could be produced in five years was the substance of the undertaking, and that this is such a hedge, a jury has found to be true.

This is not like the case of *Taylor* v. *Beck*, 13 Ill. 386, so much relied on by appellant. There, the contract was to deliver "an entire lot of broom brush," and it was held the delivery of a part of it was not a performance.

Appellant, as to the instructions, complains that the sixth instruction asked by him was refused.

As to this instruction, and all others to which exception is taken, we have to say, although there may be objections to them when criticised, yet, taking them together, the law of the case was fairly stated, and justice seems to have been done by the verdict.

A substantial compliance with this contract, by making a good and sufficient hedge, is shown by a preponderance of the evidence, and that is all the covenant required.

The judgment is affirmed.

Judgment affirmed.

Syllabus.

The Indianapolis, Bloomington and Western Railway Company

v.

John H. S. Rhodes.

1. Error—*when record must show an exception.* Where the record fails to show that any exception was taken to the admission or exclusion of testimony, or to the giving of instructions, no error can be assigned in respect thereto.

2. Same—*must be assigned.* When the refusal of instructions is not assigned for error, they will not be considered by this court, although the record shows their refusal and an exception taken to such refusal.

3. New trial. Under an assignment of error for refusing a motion for a new trial, the question whether the evidence is sufficient to sustain the verdict is properly raised.

4. Pleading—*when consideration must be stated.* In declaring upon a contract not under seal, and not being a bill of exchange or promissory note, implying a consideration, it is necessary to expressly state the particular consideration upon which it is founded.

5. Consideration—*must be proved as laid.* In a case where it is necessary to state a consideration in the declaration, if it be not proved on the trial as alleged, the variance will be fatal, if taken advantage of on the trial; and if no legally sufficient consideration be shown by the evidence, a necessary element of the cause of action will be wanting, and no recovery can be had.

6. Same—*if not shown a recovery can not be upheld.* In a suit against a railway company, for a breach of a simple contract to make culverts and fences along its right of way, the declaration alleged two considerations: a waiver by plaintiff of a right of appeal from the assessment of damages for right of way, and plaintiff's agreement to convey the right of way by deed. The plaintiff testified that he did not agree to give a deed, and that nothing was said about one, and the proof failed to show that anything was said about waiving any right of appeal, and no proceedings were shown to condemn the land, so as to show there was any right of appeal: *Held*, that no recovery could be had upon the contract, for the want of proof of a sufficient consideration.

Appeal from the Circuit Court of McLean county; the Hon. Thomas F. Tipton, Judge, presiding.

Statement of the case.

This action was assumpsit, in the McLean circuit court, by appellee against appellant, to recover damages for the breach of an alleged parol contract, whereby the latter promised to construct certain culverts and a fence upon appellee's land, and along appellant's right of way through the same. The declaration has but one count, and, by way of inducement, it is alleged that, January 1, 1870, the defendant petitioned the judge of that court to appoint commissioners to assess damages, amongst others, to plaintiff, for the right of way of defendant's railroad across his premises; and the commissioners, having been duly appointed by said judge, *agreed* to allow plaintiff the sum of $1000 as compensation for the right of way across said premises; whereupon, the defendant, at, etc., in consideration for said right of way across said premises, and that the plaintiff would not appeal from the decision of the commissioners, and that the plaintiff, on the fulfillment of the promises and undertakings next hereinafter mentioned, would make a good and sufficient deed of said right of way to the said defendant, promised the plaintiff to pay him the sum of $1000, and to construct, etc. It avers the payment of the $1000, but a failure to construct the culverts and fences. There was a plea of the general issue and Statute of Frauds, the latter plea averring that the supposed promise was not in writing, but to which the court sustained a demurrer. Upon the trial, under the general issue, it appeared, from the plaintiff's own testimony, that at the time of making the supposed contract there was nothing said about his giving a deed for the right of way; and he says, defendant's agent promised to have the culverts and fences constructed, if he (plaintiff) would receive the $1000. No competent evidence was introduced of the condemnation proceedings mentioned in the declaration, nor is there anything in the record tending to show that, at the time of making the alleged promise, the plaintiff had any right of appeal to be waived. The other witnesses, testifying as to the contract, do not vary the facts. There was a verdict for plaintiff, with damages at $1408, on

which the court, overruling defendant's motion for a new trial, gave judgment, from which an appeal was taken to this court.

Mr. J. C. Black, Mr. L. Weldon, and Mr. T. B. Aldrich, for the appellant.

Mr. Henry A. Ewing, for the appellee.

Mr. Justice McAllister delivered the opinion of the Court:

The case argued by counsel, and that presented by the record, seem to be quite different. The testimony, claimed to have been outside of any proper rule of damages, was admitted without objection. No exception was taken to either the admission or exclusion of evidence. The point is argued, that the court permitted plaintiff to amend his declaration after defendant's counsel had concluded their argument. Nothing of the kind is shown by the bill of exceptions. Again, it is objected that the instruction given on behalf of plaintiff was improper. Perhaps it was; but it was not excepted to by defendant. And, still further, it is urged that the court erred in refusing instructions asked for defendant. The record shows that the court did refuse three instructions so asked, and to such refusal exception was taken; but there is no assignment of error for giving or refusing instructions. A motion was made for a new trial, and, being overruled, exception was taken, which is preserved by the bill of exceptions, and on which error is assigned. Under that assignment of error the question is properly raised, whether the evidence is sufficient to support the verdict, the bill of exceptions purporting to contain all the testimony. The action is brought to recover for the breach of an alleged parol contract, on the part of defendant, to construct certain culverts and fences along its right of way through plaintiff's land. It is indispensable to the right to maintain an action for such breach,

that the alleged contract be upon a legally sufficient consideration, which may consist of either benefit to the defendant or detriment to the plaintiff, or the promise will be regarded as *nudum pactum*. And in declaring upon a contract not under seal, and not being a bill of exchange or promissory note, implying a consideration, it is necessary to expressly state the particular consideration upon which it is founded, and if the consideration be not proved on the trial, as alleged, the variance will be fatal, if taken advantage of upon the trial; or, if no legally sufficient consideration be shown by the evidence, a necessary element of the cause of action will be wanting.

No error being assigned for refusing an instruction which properly raised the question of variance, this court is limited to the inquiry whether any legally sufficient consideration to support the promise was shown by the evidence, or anything which the testimony tended to prove.

Two considerations were alleged in the declaration, viz: (1.) Waiver by plaintiff of a right of appeal from decision of commissioners. (2.) An undertaking, on his part, that he would convey the right of way to defendant by good and sufficient deed.

On the trial the plaintiff testifies, in his own behalf, (and there is no testimony showing differently) that, at the time of the making the promise, he did not agree to give a deed—that there was nothing at all said about it. It is equally clear, from his account of the transaction, that nothing was said about waiving any right of appeal. Indeed, there was no evidence tending to show that, at the time of the alleged promise to make the culverts and fences, he had any right of appeal. No record or papers in any condemnation proceedings were produced in evidence. The substance of the testimony is, that the defendant paid the plaintiff $1000, and, as he says, agreed, besides, to make the culverts and fences. Can it be said that the payment, by defendant to plaintiff, of $1000, was a detriment to the plaintiff and benefit to the defendant? We could understand how that act would support

a promise from plaintiff, but not how it will sustain one on the part of the giver in favor of the receiver. The court is of opinion that no legally sufficient consideration for the promise was shown, that it was *nudum pactum*, and no recovery could be had upon it under the evidence in this record.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

GEORGE C. PEAK

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. WRIT OF ERROR—*to county court, in case of bastardy.* Under the new constitution, the Supreme Court has appellate jurisdiction in all cases except where it has original jurisdiction, and art. 6, sec. 19, of the constitution, provides that, "appeals and writs of error shall be allowed from final determinations of county courts, as may be provided by law." The statute having provided no appeal or writ of error from the judgment of the county court, in bastardy proceedings, to the circuit court, it follows that such judgments may be reviewed by this court on writ of error to the county court, to prevent a failure of justice.

2. EVIDENCE—*instruction as to the preponderance.* On the trial of one for bastardy, the court instructed the jury that, "it is not incumbent upon the people to show, by a *clear* preponderance of evidence, that the defendant, etc., is the father of the child charged to be his in the complaint; but it is sufficient if the evidence creates probabilities in favor of that opinion, and that the weight of evidence inclines to that side of the question:" *Held*, that the instruction was erroneous, and calculated to mislead the jury to understand that they might find for the prosecution, though it might not be clear that the testimony preponderated on that side.

3. BASTARDY—*degree of proof required.* While it may be true that, in a prosecution for bastardy, the evidence need not, as in criminal cases, be of such sufficiency as to generate full belief of the fact, to the exclusion of all reasonable doubt, yet it must be sufficient in degree to produce in the minds of the jury a belief of the truth of the charge. It is error to instruct the jury that it is sufficient if it creates mere probabilities in favor of that opinion.

4. SAME—*instruction as to the credibility of a witness.* An instruction that the maxim, "false in one statement, false in all," should be applied

in cases where a witness wilfully and knowingly gives false testimony; and "if the jury believe, from the evidence, that the defendant, or any other witness, has intentionally sworn falsely as to one matter, the jury may properly reject his whole statements and testimony as unworthy of belief," was held to be erroneous, for want of the words "unless corroborated," and as not requiring that the matter sworn to should be material.

WRIT OF ERROR to the County Court of Scott county; the Hon. THOMAS P. ROWEN, Judge, presiding.

This was a prosecution against George C. Peak, for bastardy, on the complaint of Elzina Laws. The defendant was convicted, and this writ of error is prosecuted by him to reverse the judgment.

Mr. JOHN G. HENDERSON, Mr. N. M. KNAPP, and Mr. JAMES M. RIGGS, for the plaintiff in error.

Mr. JAMES M. EPLER, for the People.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

A preliminary question is raised here as to whether the writ of error lies, it having been sued out to the county court from a judgment of conviction there, in a bastardy proceeding. This case was once before this court on appeal from the circuit court, and the judgment of that court was reversed, and that of the county court left in force, the court holding that, as no appeal to the circuit court had been provided by statute in this class of cases, none would lie to the circuit court, or thence to this court. The plaintiff has now sued out a writ of error from the judgment in the county court.

The "Act concerning Bastardy," Laws 1871–2, p. 198, under which the case was instituted and prosecuted to judgment, does not provide for any review whatever of the proceedings of county courts in such cases. Unless this writ of error lies, the judgment of the county court is final and beyond review.

Section 8, article 6, of the present constitution provides that, "Appeals and writs of error may be taken to the Supreme Court held in the grand division in which the case is decided."

There is no limitation to any particular class of courts. Sec. 2, art. 6, provides that the Supreme Court shall have original jurisdiction in cases relating to the revenue, in *mandamus* and *habeas corpus*, "and appellate jurisdiction in all other cases." If this writ of error can not be maintained, then there is one class of cases in which this court has not appellate jurisdiction. It is not claimed that writs of error must be allowed, or that they are allowable, directly, to the county courts in all cases.

Where appeals to the circuit court are provided for, a party can avail himself of his constitutional right to have his case reviewed by this court by coming here through the circuit court. But in this case no appeal to the circuit court was provided, nor writ of error. Art. 6. sec. 19, of the constitution, provides that, "Appeals and writs of error shall be allowed from final determinations of county courts, as may be provided by law."

No writ of error here has been provided by statute. But, "A writ of error is a writ of right by the common law, and lies in all cases, civil and criminal, except capital cases, but can, of course, be regulated by statute." *Unknown Heirs of Langworthy* v. *Baker*, 23 Ill. 487. See also *Bowers* v. *Green*, 1 Scam. 42; *McClay* v. *Norris*, 4 Gilm. 370.

If provision by law, further than the constitution, be needed to authorize the writ, it is to be found in the common law. A right of appeal exists only by virtue of some statute giving it, being merely a statutory right. But it is otherwise with a writ of error. A writ of error to the circuit court, it is true, is expressly provided for by statute, but it was said, in *Unknown Heirs of Langworthy* v. *Baker*, *supra*, that, without the statute, it could be prosecuted as a writ of right belonging to all persons by the common law; and it was there

held that, no appeal being allowed from the final order of the county court to the circuit court in that case—being an application by an administrator for the sale of the real estate of a decedent to pay debts—it would follow, necessarily, to prevent a failure of justice, that error should lie to this court.

In *Schlattweiler* v. *St. Clair County*, 63 Ill. 449, the right to a writ of error was held to be a constitutional right.

Holden et al. v. *Herkimer et al.* 53 Ill. 258, which has been cited as an opposing authority, is consistent. That case was one of a writ of error to the Common Pleas Court of the city of Mattoon, and the writ was held not to lie. But there the statute gave a right of appeal to the circuit court. There was no necessity for the writ of error to prevent a failure of justice. An appeal might have been taken to the circuit court, and from the decision there, by appeal or writ of error, the judgment of this court might have been had on the case. Had there been no appeal to the circuit court, the decision would have been to the contrary, to be in conformity with *Unknown Heirs of Langworthy* v. *Baker*, *supra*, and there was no intention to overrule the latter case. We hold that the writ of error lies.

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

"The court instructs the jury that, in this case, it is not incumbent upon the people to show, by a *clear preponderance* of evidence, that the defendant, George Peak, is the father of the child charged to be his in the complaint, but it is sufficient if the evidence creates probabilities in favor of that opinion, and that the weight of evidence inclines to that side of the question."

"The court further instructs the jury, for the people, that the maxim, 'false in one statement, false in all,' should only be applied in cases where a witness wilfully and knowingly gives false testimony. And if the jury believe, from the evidence, that the defendant, or any other witness, has intentionally

sworn falsely as to one matter, the jury may properly reject his whole statements and testimony as unworthy of belief."

The first instruction is, doubtless, suggested by the ruling in *Crabtree* v. *Reed*, 50 Ill. 206, that it was erroneous to instruct that there must be a clear preponderance of evidence in favor of the plaintiff, to entitle him to recover.

But if the instruction in that affirmative form was improper to be given for the defendant, it does not follow that it would be proper to give for the plaintiff the instruction in the negative form, as in this case. The objection to the affirmative form is, that it is calculated to lead the jury to understand that the preponderance must be clear, beyond a reasonable doubt. The objection to the negative form, as here, is, that though the testimony may leave the mind so in doubt that the jury can not tell which way it preponderates, yet, as it is not necessary that the preponderance should be clear to their minds, they may justify themselves, without seeing a preponderance, in deciding in the direction of their partialities. The instruction here was calculated to mislead the jury to understand that they might find for the prosecution, though it might not be clear that the testimony preponderated on that side. A preponderance was necessary, and there should have been nothing of a hint to the jury that anything less would do.

We think the instruction was erroneous in this respect, and also in the further respect, that "it is sufficient if the evidence creates probabilities in favor of that opinion, (that Peak is the father of the child,) and that the weight of evidence inclines to that side of the question."

We think it was erroneous to say that the hypothetical proof stated would be sufficient, without any reference to the degree of the probability, or strength of the evidence, as being sufficient to satisfy the jury of the truth of the charge. It was for the prosecution to make proof of their case to the satisfaction of the jury. The evidence, perhaps, need not, as

in criminal cases, have been of such sufficiency as to generate full belief of the fact to the exclusion of all reasonable doubt, but it must have been sufficient in degree to produce in the minds of the jury a belief of the truth of the charge. Had there been evidence producing merely a slight probability in favor of an opinion of guilt, or any evidence, however weak, tending to its proof, and no evidence on the other side, there would have been created a probability in favor of the plaintiff, and the weight of evidence would have inclined that way, and upon such evidence, under the instruction, the jury would have been justified in finding for the plaintiff. The jury should not be so instructed that, by an artificial rule laid down to them, they may feel warranted to find one way or the other, without their minds being satisfied as to the truth of the fact in dispute. See *Parker* v. *Johnson*, 25 Ga. 577; *Mays* v. *Williams*, 27 Ala. 268; *Long* v. *Hitchcock*, 9 Carr. & Payne, 619; 1 Stark. Ev. 543.

The second instruction is erroneous, as being too broad, in not having added to it the words, "unless corroborated," as this court has often decided.

In *Blanchard et al.* v. *Pratt*, 37 Ill. 243, in reference to a similar instruction, the court say: A witness may swear falsely as to one important fact, but in regard to other facts he may be corroborated by the testimony of other witnesses. In such case the jury would not be justified in discarding his whole testimony; therefore, the court should have added to the words, "unless corroborated;" and so in *Crabtree* v. *Hagenbaugh*, 25 Ill. 233; *Meixwell* v. *Williamson*, 35 id. 529.

Another defect in the instruction is, in not requiring the matter sworn to, to be material. No liability to the legal punishment of perjury results from wilful false swearing to an immaterial fact. The full obligation of the compulsory power of a judicial oath does not bear, in such case, upon the witness.

The judgment is reversed and the cause remanded.

Judgment reversed.

JAMES WELSH

v.

WILLIAM D. JOHNSON.

REMITTITUR *in Supreme Court—costs.* Where judgment in the circuit court was rendered for too large a sum upon a promissory note, and the appellee, the plaintiff below, on appeal to this court, and on the first day of the term, entered a *remittitur* for the excess above the true amount, the judgment was affirmed, the costs in this court being taxed against the appellee.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was an action of assumpsit, by William D. Johnson, against James Welsh, upon a promissory note. The court, in assessing the plaintiff's damages, found $28.10 more than was due on the note, which was assigned for error. The appellee, on the first day of this term of this court, appeared and remitted $28.10 of the judgment.

Mr. O. T. REEVES, for the appellant.

Messrs. ROWELL & HAMILTON, for the appellee.

Per CURIAM: The only error complained of, is, that the judgment was for too much by $28.10. The appellee, on the first day of the term, entered a *remittitur* of that amount, thus curing the error complained of. The judgment will, therefore, be affirmed, and the costs in this court will be taxed against appellee.

Judgment affirmed.

FRANCIS M. HALL *et al.*

v.

SHEER, TOMPKINS & CO.

MORTGAGE—*as against one perfecting title in trust for the person owing the mortgage debt.* Where a married woman conveyed land owned by her, to A, taking back notes secured by mortgage on the land for the purchase money, but her husband did not unite with her in the deed under the belief it was not necessary, and A afterwards sold to the defendant, who went into possession, promising to pay the notes of A, and gave his mortgage on the premises to A for the balance due above the notes of A outstanding, and the defendant afterwards, on learning of the defect in his title, sent his son to procure a deed from the original vendor and her husband, which they gave to remedy the defect, but the son took the deed in his own name: *Held*, on bill by the assignee of the first notes and mortgage to foreclose, and on cross-bill by A to foreclose, that the acquisition of the legal title in the manner stated presented no bar to the foreclosure, and that the title claimed by the son was subject to both mortgages, he being but a trustee for his father.

WRIT OF ERROR to the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Mr. LAWRENCE WELDON, and Mr. S. S. LAWRENCE, for the plaintiffs in error.

Messrs. WILLIAMS, BURR & CAPEN, for the defendants in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill filed by Wm. Sheer, Philip H. Tompkins and Artemus O. Sheer, to foreclose a mortgage on a certain quarter section of land in Livingston county.

The land originally belonged to Martha Wilson, a married woman, who, on the 11th day of February, 1867, sold and conveyed the land to Laura Templeton. The husband of Mrs. Wilson was present and consented to the sale, but did not join in the deed, as he was told by the party who drafted

the papers it was unnecessary for him to join in the conveyance.

Mrs. Templeton, upon receiving the deed, gave Mrs. Wilson her notes, and a mortgage on the premises, to secure the unpaid balance of the purchase money. This mortgage and the notes were transferred to the complainants in the original bill.

Subsequently, Mrs. Templeton sold and conveyed the premises to Timothy Hall, who, by the contract of purchase, assumed the payment of the notes and mortgage given by Mrs. Templeton to Mrs. Wilson, and gave his own note and a mortgage on the premises to Mrs. Templeton to secure the balance of the purchase price of the land over and above the notes and mortgage by him assumed.

Laura Templeton, Timothy Hall, Francis M. Hall and C. E. Hall were made defendants to the bill.

Laura Templeton, in her answer to the bill, admits, substantially, all the allegations therein contained, and sets up the second mortgage given by Hall to her as a second lien upon the premises. She also filed a cross-bill in which she prayed a foreclosure of her mortgage.

C. E. Hall answered, disclaiming any title or interest whatever in the premises.

The defense interposed by Francis M. Hall to the bill and cross-bill, as we understand it, is, that the deed of Martha Wilson conveyed no title; that, subsequently, her husband died, and she married one Thomas LeFevre; and that, on the 30th day of September, 1870, in consideration of $30, he procured a quit-claim deed of the premises from Martha and Thomas LeFevre, which vested the legal title in him.

Timothy Hall bases his right to defeat the foreclosure of the mortgages on the ground, that no title passed from Martha Wilson to Laura Templeton, and none from Laura Templeton to him, and hence the consideration for his agreement to assume and pay the notes and mortgage first given on the land, as well as the consideration for the mortgage given by him, have failed.

We have given the evidence preserved in the record a careful consideration, and it is apparent that the defense interposed by the Halls is totally devoid of all merit, either legal or equitable.

It appears, from the evidence, that Timothy Hall went into possession of the land at the time he purchased, and still occupies it. In the winter of 1869 or 1870, he applied to a Mr. Hotchkiss to obtain a loan of money, and desired to give security upon the land. He then, for the first time, learned of the defect in the chain of title. Some time after this, he informed Hotchkiss that he had "got the title to his land straightened up;" that he had sent to Iowa and found Mrs. Wilson (then Mrs. LeFevre,) and obtained a quit-claim deed of her and her husband; that the deed was made to his son; that he sent his son, for the reason he was a railroad man and could travel cheaper than he could.

Thomas LeFevre, and Martha, his wife, testified that, in the month of September, 1870, Francis M. Hall came to them in DesMoines, Iowa, and stated he was the son of Timothy Hall, and had been sent by him to them to procure a quit-claim deed for his father, in order to perfect his father's chain of title, which was defective; that he was doing business for his father, and came for him; that, as soon as the deed was procured, the mortgages on the land would be paid and discharged. They further testified, they executed the deed, supposing it was made to Timothy Hall; that they received no consideration for the deed, but made it for the purpose of curing a defect in the title; that, after the deed had been executed, Francis M. Hall made a present of $5 to Martha LeFevre, but it was not paid or received as a consideration for the deed.

It is true, this evidence is contradicted by Francis M. Hall, who testifies that he went to Iowa and purchased the land, and paid $30 for it on his own account and for his own benefit; yet his story is so unreasonable and so thoroughly in

conflict with other facts established by the record, that it can not be regarded as of much force.

The land was worth $7000 when Francis M. Hall obtained the deed. He says that Martha LeFevre knew the conveyance she had previously made was worthless, and she did not wish to convey, but wanted to leave it as it was so that her children could get the land when they became of age; and yet, she finally conveyed to him for $30, as she was in need of money.

It is unreasonable to suppose that Mrs. LeFevre would have conveyed property worth $7000 for the sum of $30, with a full knowledge of all the facts in regard to the title and value of the land, unless the conveyance was made with the intent and for the purpose of confirming the deed she had originally made.

It is possible, although not probable, that Francis M. Hall would have conceived the notion, and carried it into execution, of ferreting out defects in the title to his father's farm and then speculating out of those defects at the expense of his father.

The clear weight of the evidence establishes the fact that the consideration for the deed to Hall was the original purchase. Mrs. LeFevre knew she had conveyed the land, but, by a misdirection of the scriviner, her husband did not execute the deed, and the title did not pass. When her attention was called to the fact, she was willing to rectify the mistake and perfect the title in Timothy Hall, who had purchased of her grantee.

The deed was made to Francis M. Hall for Timothy Hall; the former holds the title for the latter, and subject to the two mortgages.

The decree of the circuit court, directing a sale of the land to pay and satisfy the two mortgages, was clearly right. The decree will, however, be modified as to C. E. Hall, who disclaimed; he will be dismissed from the bill. In all other respects the decree will be affirmed. *Decree affirmed.*

TILMAN LANE *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. RECOGNIZANCE—*no order necessary for issuing scire facias.* No order of court is necessary for the issuing of an *alias scire facias* upon a forfeited recognizance. It is made the duty of the clerk to issue a *scire facias* upon the order of the court declaring a forfeiture.

2. PRACTICE—*time for objecting to evidence for variance.* An objection to evidence, on the ground of variance, should be made when the same is offered. If this is not done, the question can not be raised in this court.

3. LIMITATION—*after reversal.* Under the statute prohibiting any further action in a cause after reversal in this court, unless the transcript of the final order is filed in the court below in two years from the time of making such order, the limitation will not begin to run until after final judgment is rendered in the Supreme Court. It will not commence from the adjournment of the term at which the cause is submitted.

WRIT OF ERROR to the Circuit Court of DeWitt county; the Hon. LYMAN LACEY, Judge, presiding.

Mr. E. H. PALMER, for the plaintiffs in error.

Mr. JAMES K. EDSALL, Attorney General, for the People.

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

This case was before us at the January term, 1870, 53 Ill. 434, and the *scire facias* was then held insufficient, because it was against the sureties and not against Way, the principal cognizor, as a party. It comes here again, and it is objected that the *scire facias* upon which this judgment was rendered is insufficient. It is first urged, that it was issued without an order of court. The judgment of forfeiture directs that a *scire facias* shall issue, returnable to the next term of the court. Such a writ was issued and a trial was had, judgment recovered, which, as we have seen, was reversed, and the cause was remanded. Here was an order for a *scire facias*,

which was ample authority to the clerk to issue this writ. Why obtain such an order at each term, if, from any cause, an alias writ becomes necessary? Counsel have suggested no reason, nor can we perceive any, for such practice.

The act of 1869, by section 9, provides, that on the failure of the accused to appear at the time and place required by his recognizance, the court shall declare a forfeiture; and "the clerk of the court shall thereupon issue a *scire facias* against such person, and his or her securities, returnable on the first day of the next term of the court, to show cause why judgment should not be rendered against such person and his or her securities for the amount of the recognizance." From this provision it will be seen, that the court need not order a *scire facias*, but the statute imposes the duty on the clerk when the court declares the forfeiture. Nor does it matter that this forfeiture was declared before the adoption of this act, inasmuch as the statute was intended to regulate the practice and apply to all cases in which writs were to be issued after its adoption. But if it were not so, we have been referred to no authority which holds such an order was necessary at the common law.

It is insisted that there is a variance between the averment in the writ and the record when it was produced. The writ avers the indictment was found on the 6th of November, when the record shows it was on the tenth of that month. On turning to the transcript, we find the writ recites that the grand jury came into open court on the former date, and presented the indictment in the case, and it is averred that it was filed on that day, and the indictment was read in evidence. A complete answer to this is, that this objection was not made when the indictment was offered in evidence. The defendants should have objected, because of the variance. They can not raise the question for the first time in this court, as has been frequently held by this court.

The third point urged, that the court erred in refusing to quash the writ because of the want of an order for it to issue,

has already been considered. But, as a further ground for quashing the writ, it was urged that more than two years had expired after the reversal of the former judgment before suing out the present writ. We are referred to the 84th section of the act entitled "Courts of Record," Laws 1871–2, p. 351, in support of the proposition. It is this: "If neither party shall file such transcript within two years from the time of making of the final order of the Supreme Court reversing any judgment or proceeding, the cause shall be considered as abandoned, and no further action shall be had thereon." The transcript here referred to, is a copy of the order remanding a cause made by the Supreme Court.

After an examination of the transcript in this case, we are unable to find when the final order reversing the former judgment in this case, and ordering the cause to be remanded, was made. It is true, there may be evidence that that case was tried at the January term, 1870, and it is averred in one of the pleas that the term adjourned on the 4th day of February, 1870, and the writ in this case issued on the 6th of February, 1872, two days after the two years had expired, according to the averment of the plea. By the statute of 1851, Pub. Laws, p. 153, sec. 1, full power is conferred on the judges of the Supreme Court to make orders and render judgments in vacation, in cases which have been submitted for decision. Now, there is nothing to show that this case was not submitted at that term for decision, the judgment rendered and entered up in vacation weeks or months after the adjournment of the term. The motion was properly disallowed, as it did not appear when the judgment was rendered. The plea, for the same reason, was vicious, and the demurrer was properly sustained to it.

It is urged that the jury found against the weight of evidence on the question of the death of Way. There was a large number of witnesses examined, to prove that issue. The evidence as to the identity of the person who committed suicide in Ohio, with Way, is by no means so clear and satisfactory as to

be free from serious doubt. But it was a question for the determination of the jury. They saw and heard the witnesses testify, and they have found the issue for the people; and we are unable to say that the finding is so clearly against the weight of the evidence as to require a reversal. It is only in cases where it appears to us that the finding is manifestly against the evidence that we interfere.

Failing to perceive any error in the record, the judgment of the court below is affirmed.

Judgment affirmed.

CHARLES MONTELIUS *et al.*

v.

JOHN H. CHARLES.

1. BILL OF EXCHANGE—*presentment and notice to hold drawer.* All drafts, whether foreign or inland bills, must be presented to the drawee within a reasonable time, and in case of non-payment, notice must be given promptly to the drawer to charge him.

2. SAME—*time of presentment.* Where a bill of exchange, payable on sight, is immediately put in circulation, there is no fixed period in which it must be presented for payment in order to hold the drawer. The only rule is, that it must be presented in a reasonable time, and what is a reasonable time depends upon the peculiar facts of each case viewed in the light of commercial usage.

3. In this case, the draft, drawn upon a bank in Chicago, was mailed on the same day it bore date, to the proper address of the payee, in Dacotah territory, and was received by him after some delay in the mail, and he, upon the first opportunity, put the same in circulation, and it was kept in circulation, and no delay was suffered other than that incident to the transaction of business in a sparsely populated territory, and the same was presented for payment thirty-five days after its date, and payment being refused, it was protested, and notice given by mail to the drawer, and it was held that the drawer was liable.

4. EVIDENCE—*certified copy of notary's record.* The statute, making a notary's record of the protest of bills which he is required to keep, or a

certified copy thereof, *prima facie* evidence of the facts therein stated, applies to all bills, whether domestic or foreign. Such record or copy is *prima facie* evidence of demand of payment of the drawee, and of notice of dishonor to the drawer, liable, however, to be rebutted by other competent evidence.

APPEAL from the Circuit Court of Ford county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was an action of assumpsit, brought by John H. Charles, against Charles Montelius and John A. Montelius, upon a draft for $291. The facts of the case will appear in the opinion, except that the following is a copy of the notary's protest and certificate:

"STATE OF ILLINOIS, } ss.
County of Cook, City of Chicago. }

Be it known, that, on this 13th day of October, A. D. 1873, I, Joseph M. Bowman, a notary public, duly commissioned and sworn, and residing in the city of Chicago, in said county and State, at the request of Merchants' National Bank, went with the original draft, which is above annexed, during business hours, to the office of Franklin Bank, and demanded payment thereof, which was refused. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly protest, as well against the drawers and indorsers of said draft as against all others whom it doth or may concern, for exchange, re-exchange and all costs, charges, damages and interests already incurred by reason of the non-payment of the said draft. And I, the said notary, do hereby certify that, on the same day and year above written, due notice of the foregoing protest was put in the postoffice at Chicago, as follows: Notice for Franklin, Chicago; notice for C. Montelius & Son, Piper City; notice for John Strank, John H. Holsey, John H. Charles and Thos. J. Stone, First National Bank, Sioux City, Iowa, each of the above named places being the respective place of residence of the person to whom this notice was directed.

In testimony whereof, I have hereunto set my hand and affixed my official seal the day and year above written.

[L. S.] JOSEPH M. BOWMAN,
Notary Public."

"STATE OF ILLINOIS, }
County of Cook. }

I, Joseph M. Bowman, a notary public, for the county and in the State aforesaid, do certify that the within is a true copy of the record of protest described therein, as appears on my docket.

In witness whereof, I hereunto set my hand and seal this 24th of February, 1874.

JOSEPH M. BOWMAN,
[L. S.] *Notary Public.*"

Messrs BROWN & MOSNESS, for the appellants.

Messrs. BEACH & KINNEAR, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This action was upon an inland bill of exchange, in the name of a remote assignee, against the drawers. One important question is, whether the holders had been guilty of such *laches* before presenting it to the drawee for payment, as would bar a recovery against the drawers.

Defendants were engaged in the banking business at Piper City, in this State. On the 8th day of September, 1873, on the application of James McBride, they drew their draft on the Franklin Bank of Chicago, payable at sight, to the order of John Strank, who then resided at Canton, in Dakotah. It was, on the same day, deposited in the postoffice, directed to the payee at Canton, who received it after some delay, attributable alone to the fault of the mails. Having passed through the hands of several holders, it was presented on the 13th day of October, 1873, to the bank for payment, which, being refused, it was protested, and notice given through the postoffice to the drawers and the several indorsers. In the

meantime, the Franklin Bank, on which the draft had been drawn, had failed and gone into bankruptcy.

The law is settled, by an unbroken line of decisions, that all drafts, whether foreign or inland bills, must be presented to the drawee within a reasonable time, and in case of non-payment, notice must be given promptly to the drawer, to charge him. But what is a reasonable time, under all the circumstances, is sometimes a most difficult question. The general doctrine is, each case must depend on its own peculiar facts, and be judged accordingly.

In *Strong* v. *King*, 35 Ill. 9, it was declared to be a general rule, the holder of a sight draft must put it in circulation or present it for payment, at farthest, on the next business day after its reception, if within the reach of the person on whom it is drawn. In the case at bar, the draft was put in circulation, and the point is made, the mere fact it was not presented for payment until after the lapse of thirty-five days, is *per se* such *laches* on the part of the holders as would discharge the drawers.

In *Muilman* v. *D'Eguino*, 2 H. Black. 565, EYRE, C. J., said: "Courts have been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance, and it seems to me more necessary to be cautious with respect to foreign bills payable in that manner. If, instead of drawing their foreign bills, payable at usances in the old way, merchants choose, for their own convenience, to draw them in this manner, and make the time commence when the holder pleases, I do not see how the courts can lay down any precise rule on the subject. I think, indeed, the holder is bound to present the bill in a reasonable time, in order that the period may commence from which the payment is to take place. The question, what is a reasonable time, must depend on the peculiar circumstances of the case, and it must always be for the jury to determine whether *laches* is imputable to the plaintiff."

BULLER, J.: "Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at sight, at so many days after, or in any other manner. But here I must observe, that I think a rule may thus far be laid down with regard to all bills payable at sight, or at a certain time after sight, namely: that they ought to be put in circulation. If they are circulated, the parties are known to the world and their credit is looked to; and if a bill, drawn at three days' sight, were kept out in that way for a year, I can not say there would be *laches*. But if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say he was guilty of *laches*."

Bills, both inland and foreign, having the quality of negotiability, are intended, in some degree, to be used as a part of the circulation of the country, and are indispensable in the conduct of extended commercial transactions. They afford a safe and convenient mode of making payments of indebtedness between distant points. Banking houses that, for a consideration, issue such bills, must be understood to do so in accordance with the known custom of the country—that they will be put in circulation for a limited period. If this were not so, their value would be greatly depreciated, and their utility in commercial transactions would be destroyed. Were it understood the purchaser of such a bill was bound to make all possible dispatch to present it to the drawee or lose his recourse on the drawer, no prudent man would feel safe in taking one. He may know the drawer from whom he purchases the bill, and be willing to rely on his responsibility, but in many instances he has and can have no knowledge of the drawer's correspondent, the drawee. Commercial usage has, therefore, placed the responsibility upon the drawer, and he is presumed, in consideration of the premium paid, to assume all risks as to the solvency of the drawee, for such reasonable time as the bill shall be kept in circulation. There can be no doubt, if the holder locks it up and keeps it out of

circulation, he assumes all risks, and in case the bill is dishonored, his *laches* in that regard would bar a recovery against the drawer. Such bills are not issued with a view to be held as a permanent security, with a continuing liability on the drawer. Illustrative of the law of this branch of the case, is *Shute* v. *Robbins*, 3 C. & P. 80.

The difficulty is, to determine for what length of time such a bill may be kept in circulation, consistently with a continuing liability on the drawer. The rule adopted, as we have seen, is, it must be presented in a reasonable time under all the circumstances. But courts, not infrequently, experience great perplexity in making a distinction between a reasonable time for the presentation of such paper, and *laches* on the part of the holder. Every case differs so essentially in its facts, it has given rise to many apparently contradictory decisions, but through all of them is noticeable the efforts of the courts to ascertain whether the bill was kept in circulation for only a reasonable period in the regular course of business. When that fact is once established, the liability of the drawer is regarded as continuing. It will be found the decisions differ only in what the various courts deemed reasonable in each particular case.

In *Robinson* v. *Ames*, 20 Johns. 147, the bill declared on was drawn on the 6th of March, but not presented for payment to the drawees until the 20th of May. In the meantime the drawees had failed, but in a well reasoned opinion the court came to the conclusion there was no such *laches* as would discharge the drawer.

In *Jordon* v. *Wheeler*, 20 Tex. 698, the bill in suit was put in circulation and indorsed by defendants without having been presented for acceptance before it came to the hands of the plaintiff; that a little more than a month elapsed before he presented it for payment, and that was declared to be according to usage.

In *Nichols* v. *Blackmore*, 27 Tex. 586, the court was of opinion a delay of forty-seven or forty-eight days was not such

laches as would forfeit the right of the holder to recourse against the drawer in default of payment by the drawees.

Many other cases of the same import might be cited, but these are sufficient for our present purpose. They establish, beyond doubt, the fact, there is no fixed period in which the bill must be presented for payment, but that each case must be decided on its own peculiar facts in the light of commercial usage.

In the case at bar, the bill was immediately put in circulation. It was mailed to the payee on the day it bore date, to his proper address in Dacotah. Some delay occurred, attributable to interruption in the transmission of the mails, but this fact could not be imputed to the payee as *laches*. On the receipt, the payee immediately undertook and availed of the first opportunity to negotiate the bill. It was kept in circulation, and no delay was suffered other than that incident to the transaction of business in a sparsely populated territory like Dacotah. The facts and circumstances proven show no *laches* on the part of any holder that would operate to discharge the drawers.

Aside from the presumption that will be indulged, the drawers must have known the bill was liable to be put in circulation for a limited period. The evidence, though conflicting, warranted the court in finding the draft was sold with the knowledge it was to be sent to the payee in Dacotah. That being so, on every principle of justice, waiving all considerations of commercial usage, defendants ought to be held to have taken upon themselves the risk of the failure of the drawee for such reasonable time as it would take the bill to go there and be returned in the usual course of business, all things considered, and to be presented to the drawee at Chicago. We entertain no doubt, their obligation is to this extent. It would be absurd to suppose it was within the contemplation of the drawers the bill was to be sent directly to the drawee at Chicago for payment. The law imposed no such

duty upon the party procuring it. He could rightfully send it to his creditor and be guilty of no *laches*.

Our statute has made the record, or a certified copy by the notary public, *prima facie* evidence of the facts therein stated, viz: of demand of payment and of refusal by the drawee. and notice of dishonor to the drawer, of "any bill of exchange, promissory note or other written instrument" by him protested.

This is an inland bill, and whether the notarial protest will be received as *prima facie* evidence of demand of payment on the drawee, and notice of dishonor to the drawer, must depend on the construction that shall be given to the statute. At common law, in cases of inland bills of exchange, the notarial protest was not competent evidence of such facts. *Kaskaskia Bridge Co.* v. *Shannon*, 1 Gilm. 15. But our view is, the statute has changed the common law in this particular. By the 10th section, it is provided, every notary public, whenever any bill of exchange, promissory note or other written instrument shall be by him protested for non-acceptance or non-payment, shall give notice thereof, in writing, to the maker and every indorser; and, by the 13th section, his record of the protest, which he is required to keep, is made *prima facie* evidence of the facts therein stated. Session Laws, 1872, p. 574.

Construction can not make this section of the statute plainer than it is. It must include within its provisions all bills of exchange, whether domestic or foreign, and was, no doubt, enacted by the legislature to obviate the difficulties and inconveniences to which the collection of inland bills was subjected at common law under the decisions of the courts. Statutes similar to ours have been enacted in other States, and this construction has been given to them in their courts of last resort. *Kean* v. *Von Phul et al.* 7 Minn. 426; *Rushmore* v. *Moore*, 36 N. H. 188; *Simpson* v. *White*, 40 N. H. 540.

There has been no case decided in this court, construing the statute we are considering, in this particular. The cases

cited are simply declaratory of the common law as to the effect of the protest of inland bills. The case of the *Kaskaskia Bridge Co.* v. *Shannon* was decided before the act of 1845, which is the same in substance as the present statute on this subject, was in force.

The cases of *Boyd* v. *Bragg*, 17 Ill. 69, and *McAllister* v. *Smith*, id. 328, were in relation to protests of bills of exchange in other States, and the provisions of the statute in this particular were not called in question, nor in any manner involved in the decision. It will be seen, the court did not assume to construe this clause of the statute.

The record of the notary who made the protest was properly certified. By the statute, it was made competent evidence of the facts therein stated, liable, however, to be rebutted by other competent evidence, and there was, therefore, no error in the court in admitting it.

No error appearing in the record, the judgment will be affirmed.

Judgment affirmed.

The Toledo, Wabash and Western Railway Co.

v.

John Jones.

1. Pleading and evidence—*ground of action not stated in declaration.* Where, in an action against a railroad company, to recover for injuries received at a public road crossing by a collision of the train with plaintiff's wagon and team, the declaration alleged that the company neglected to keep the crossing in repair, there being no averment that the condition of the crossing contributed to the injury, but the gravamen of the action was the neglect to give the statutory signal or warning before reaching the crossing, and neglect in not slackening the speed of the train: *Held*, that evidence of the condition of the crossing was not admissible.

2. Negligence—*neglect of railroad company to give signals at road crossings.* In an action to recover damages against a railroad company for injuries received at a road crossing by a collision with plaintiff's team, it

is error to instruct the jury to find the defendant guilty of negligence from the mere fact that a bell was not rung or whistle sounded as required by law, regardless of the consideration whether the failure contributed to the accident or not.

3. The omission to ring a bell or sound a whistle at a road crossing does not render a railroad company liable for injury to animals or to a person, unless it is made to appear the warning might have prevented the injury.

4. In a suit against a railroad company to recover for injuries sustained by a collision with its train, it is error to instruct the jury that, if the train was behind time, a higher degree of care on the part of the company was required in approaching a road crossing. Such companies are bound at all times, in approaching road crossings, to observe due care and caution.

5. Same—*plaintiff's care not lessened at road crossing because train is behind its time.* There is nothing which can relieve a person from the duty of using due care and caution at a railroad crossing of a public highway. Therefore it is erroneous to instruct the jury, in a suit to recover damages for injuries received at such crossing, that if the train inflicting the injury was behind its regular time, this excused the plaintiff from using the same care and caution required of him had the train been on time.

6. Same—*relative duty of railroads and persons traveling highways.* Where a railroad train, and a person traveling the highway with his wagon and team, each approaches a railroad crossing at the same time, it is not the duty of the company to stop its train, but it is the duty of the traveler, in obedience to the known custom of the country, to stop his team, and not attempt to pass in front of the advancing train.

7. Same—*where plaintiff is guilty of negligence.* Where the plaintiff, when nearing a railroad crossing with his wagon and team, saw an advancing train, which was in plain view for some considerable distance, and, supposing he could cross in time, attempted to do so, and when he found he could not, his horses became unmanageable through fright, and a collision occurred, it was *held*, that, owing to his own negligence, he could not recover for the injuries received, and a judgment in his favor was reversed.

Appeal from the Circuit Court of Macon county; the Hon. C. B. Smith, Judge, presiding.

This was an action on the case, by John Jones against the Toledo, Wabash and Western Railway Company. The opinion states the essential facts of the case.

Messrs. Nelson & Roby, and Mr. A. J. Gallagher, for the appellant.

Messrs. Crea & Ewing, and Messrs. Park & Lee, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

This was case, in the circuit court of Macon county, against a railroad company, for negligence. The jury found for the plaintiff, and assessed the damages at five thousand dollars. A motion for a new trial was entered by the defendant, which, on a *remittitur* of one thousand dollars being allowed by plaintiff, was denied, and judgment rendered for four thousand dollars, to reverse which defendant appeals.

The point, that the damages are excessive, though assigned as one of the reasons for a new trial, and also assigned as error, is not argued by appellant, and we will not consider it. The points made and relied on for reversal are, admitting improper evidence for the plaintiff. in this, that one Hall was permitted, against defendant's objection, to testify as to the condition of the culvert at the crossing.

Although it is alleged in the declaration that defendant neglected to keep the crossing in repair, it is not alleged that being out of repair contributed to, or caused the accident. The liability of the company was placed upon the negligent management of the train by not lessening the speed, and not giving the required warning. As to the crossing, the allegation is, that the defendant neglected to maintain and keep it in repair; carelessly and negligently conducted the locomotive and train on its approach to the crossing, by not slackening speed and not giving warning of the approach of the train to plaintiff; while he was driving to and across the railroad with all due care and caution, and while passing along such highway, the wagon, etc., was struck and overturned by said locomotive and train.

It is not perceived there is any allegation that the condition of the crossing contributed to the injury. It is no part of

the gravamen of the action. Suppose a crossing is out of repair, as they will be sometimes, and no injury results to any one from its being in a dilapidated condition, an action of this kind will not lie, nor can its condition be used as a make-weight to sustain an entirely different charge in which the condition of the crossing is not an element.

This point is well taken, and permitting evidence to go in, against the objections of defendant, was error, and the instructions based upon that evidence should not have been given.

Appellee insists there is authority for the introduction of such evidence, and for the instructions thereon, in *Indianapolis and St. Louis R. R. Co.* v. *Staples*, 62 Ill. 313. In looking at that case we find nothing on this point, and are constrained to hold it was error to admit the testimony and give the instructions, as calculated to mislead the jury and draw their attention from the real *gist* of the action.

Appellant also complains that the third instruction should not have been given. It required the jury to find the defendant guilty of negligence, from the mere fact that a bell was not rung or a whistle sounded, regardless of the consideration whether the failure contributed to the accident or not.

This court said, in the case of this same company against *Blackman*, 63 ib. 117, that the provision of the statute requiring this duty of all railroads, is, that such companies shall be liable for any damages sustained by reason of the neglect to perform this duty, and not that it shall be liable for the mere non-performance; and, therefore, an instruction similar to the one now in review was erroneous; and the same was held in *Galena and Chi. Union R. R. Co.* v. *Dill*, 22 ib. 264.

In *Ill. Cent. R. R. Co.* v. *Phelps*, 29 ib. 447, it was held, that the omission to ring a bell or sound a whistle at a road crossing, does not render the company liable for injury to animals, unless it is made to appear the ringing or sounding might have prevented the injury. On the authority of these cases, we must hold the instruction erroneous.

It is also complained by appellant that the ninth instruction was erroneous. That instruction is as follows:

"The court instructs the jury, for the plaintiff, that, if they believe, from the evidence, that the train which it is alleged injured the plaintiff, (if they believe, from the evidence, that he was so injured,) was two or more hours behind its usual time in passing such crossing where it is alleged that the injury occurred, such fact would, in law, relieve the plaintiff from using the same degree of care and caution on approaching said crossing that he would be required to use had said train passed said crossing at its usual time; and if the jury believe, from the evidence, that defendant was, at the time of the alleged injury, running its train of cars two or three hours behind its regular schedule time, then that fact (if shown by the evidence) would impose a higher degree of care on the part of the defendant, in approaching crossings of public highways, than would be required of the defendant when running on its regular time."

This instruction was wrong, for obvious reasons. Those managing a train of cars are bound at all times to approach a road crossing with due care and caution. To instruct the jury, therefore, that, if a train is behind time, they must observe more care and caution, is a proposition not sanctioned in law. Due care and caution is the maximum in either case. It is pertinently asked, in order to increase this care and caution, must the driver stop the train to see if any person is about to pass before his engine?

The other proposition contained in the instruction is equally erroneous.

There is nothing which can relieve a person from the duty of exercising due care and caution at a railroad crossing. It is not always the case that trains are on time, as is well known, hence the pressing necessity of using vigilance, care and caution at all times. The duty in this respect is well expressed in *Chi. and Alton R. R. Co.* v. *Jacobs*, 63 ib. 178.

The doctrine of the instruction is, where trains are not on time, a person crossing their track may be as reckless as he pleases.

It is further complained that appellant's first instruction was modified to their injury.

As asked, it was as follows:

"The court instructs the jury that it was not the duty of the engineer in charge of the locomotive, on nearing the road crossing, to stop his train for the purpose of avoiding a collision with the wagon and team he saw approaching the crossing, though by applying the brakes he could do so in time to avoid the collision; but it was the duty of the person in charge of the team, in obedience to the known custom of the country, to stop his team and not attempt to pass in front of the advancing train."

This instruction states the law, and is in conformity with the rulings of this court in *St. L. Alton and Terre Haute R. R. Co.* v. *Manly*, 58 Ill. 300, and *Chi. and Alton R. R. Co.* v. *Jacobs*, *supra*.

Appellant makes a point on the evidence, and herein, insists the verdict is not sustained by the evidence, and a new trial should have been granted. We are of opinion, after a careful examination of the record, that the great preponderance of the evidence on the question of negligence is in favor of appellant.

It is proved, by more than one disinterested witness, that, at the time of the accident, when appellee was being cared for, he said he heard the bell and saw the train, but could not control his horses. He said, at the time, there was no one to blame but himself.

The whole evidence shows that the most ordinary care and caution on the part of appellee would have prevented the accident, for he could see the train, if he had used his eyes properly, quite a distance before he reached the crossing, but he drove on recklessly and heedlessly. As one witness, not

employed by the railroad company, testified, appellee said he heard him ring the bell, and saw the train, but thought he could get across the track, and whipped up his horses, and when he found he could not get across, he could not hold his horses, and he had no one to blame but himself.

This case is so like in all its essential points to *Jacobs'* case, *supra*, that it can be decided in no other way than that was decided.

One incident in this matter, doubtless, influenced the jury very much in making up their verdict, as it was so well calculated to excite the warmest sympathies — that was, the death of the little boy riding in the wagon. Had not that death occurred, it is not probable a verdict would have been rendered for the plaintiff.

We are satisfied the case is with appellant on the law and on the evidence, and so believing, the judgment is reversed.

Judgment reversed.

The Chicago and Alton Railroad Company

v.

Milam M. Engle.

1. Ordinance—*publication, how proved—evidence.* Where the charter of a town provided that "no ordinance shall be of any force until the same shall have been advertised, by publishing copies in three public places in said town for ten days," but contains no provision as to how proof of publication shall be made, it must be proved as at common law. The certificate of the town clerk of the due publication of an ordinance, as required by law, is not admissible to prove publication.

2. In a suit against a railway company, to recover for the killing of an animal within the limits of an incorporated town, on the ground of an alleged violation of an ordinance of the town by the company, in running its train at a prohibited rate of speed, it is indispensable to a recovery that the plaintiff should prove that the ordinance was in force at the time of the alleged accident.

Appeal from the Circuit Court of Menard county; the Hon. Lyman Lacey, Judge, presiding.

This was an action on the case, by Milam M. Engle against the Chicago and Alton Railroad Company, to recover damages for the killing of plaintiff's horse in the incorporated town of Greenview, by one of defendant's trains of cars. The ground of recovery, alleged in the declaration, was the running of the train at a greater rate of speed than six miles an hour through the town, in violation of an ordinance of said town. The plaintiff recovered judgment for $244.33\frac{1}{3}$, and defendant appealed.

Mr. N. W. Branson, for the appellant.

Messrs. Morrison & Whitlock, for the appellee.

Mr. Justice McAllister delivered the opinion of the Court:

In order to a recovery under his declaration, it was indispensable that appellee should have shown the ordinance of the town of Greenview to have been in force at the time of the alleged killing of his horse by appellant's train. The act incorporating the town provides, that "no ordinance shall be of any force until the same shall have been advertised, by publishing copies in three public places in said town for ten days," but contains no provision as to how proof of publication shall he made. In the absence of any such provision, common law evidence of the fact of posting copies in three public places should have been adduced.

The court below permitted the ordinance to be read in evidence, against the defendant's objection, upon the mere certificate of the town clerk that it had been "published on the 19th day of June, A. D. 1868, by posting up three copies as required by law." There being no statute making such certificate evidence of the fact of publication, it was incompetent, and the ordinance not admissible in evidence, or, if it

was, no force could be attributed to it, until the fact of publication, as required by the charter, was shown by competent evidence.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

CALEB W. SLADE

v.

ROBERT D. MCCLURE *et al.*

1. CONTINUANCE—*for absence of witness.* Where a cause had been once continued on account of the absence of the same witnesses, who were defendant's partners, and had absconded, taking with them the partnership books, and the affidavit for the second continuance for the same cause presented such a state of circumstances as to reasonably shut out all hope of procuring the testimony of the witnesses: *Held*, no error in refusing the second application.

2. NEW TRIAL—*on ground of surprise.* Where a motion for a new trial was based on the ground of surprise, occasioned by the testimony of a witness, it was *held*, that a new trial to enable the party to discredit the witness was properly denied.

APPEAL from the Circuit Court of Mason county; the Hon. LYMAN LACEY, Judge, presiding.

This was an action commenced by Robert D. McClure, Thomas Culter, Jared B. Wing and Charles P. Culter, partners under the name of McClure, Culter & Co., against Caleb W. Slade, Stephen Sexton and George W. Henninger, partners under the name of Henninger, Slade & Sexton, before a justice of the peace, and taken by appeal to the circuit court. Slade alone was served with process, the other defendants not being found. The action was upon a promissory note. Slade asked for and obtained a continuance of the cause at the first term on account of the absence of his two partners, Henninger and Sexton, and, at the second term, moved for a further continuance, on the same ground, which was refused. A

trial was had, resulting in a judgment in favor of the plaintiffs, and Slade appealed.

Messrs. CONWELL, DEARBORN & CAMPBELL, for the appellant.

Messrs. FULLERTON & ROGERS, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from the Mason circuit court, to reverse a judgment rendered on a promissory note signed by appellant.

The points made here are: 1. The court refused to grant a continuance on defendant's motion and affidavit. 2. Refusing a new trial.

It appears from the record that a continuance had been applied for by defendant at a previous term, and allowed by the court, on account of the absence of certain named witnesses, by whom he expected to prove certain facts adjudged material.

At the subsequent term, the same affidavit, substantially, was made the basis of another application for a continuance, on account of the absence of the same witnesses. This motion the court denied, and, we think, properly, in the exercise of a legal discretion, for the affidavit presented such a state of circumstances as to reasonably shut out all hope of procuring the testimony of these witnesses. They were the absconding partners of appellant, who, in their flight, had taken with them the books and papers of the concern.

The ground for a new trial is alleged to be surprise, occasioned by the testimony of one McClure. The purport of the testimony of Gordon, if had, would only tend to discredit the testimony of McClure. This has never been held sufficient ground for a new trial.

We perceive no error in the judgment, and must affirm the same.

Judgment affirmed.

WILLIAM W. DEATHERAGE *et al.*

v.

JOSEPH R. ROACH.

PRACTICE—*withdrawing papers from the files.* A paper in a cause, when filed with the clerk, is a file of the court, and should not be withdrawn without leave of the court. But where a declaration, after being filed, was withdrawn from the files by the plaintiff's counsel, but restored to the file before the time for the defendant to plead had expired, and it not appearing that the defendant had any defense of any kind to the note sued on, or had sustained any injury: *Held*, a judgment in favor of the plaintiff would not be reversed for the refusal of the court to continue the cause for this irregularity.

APPEAL from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

This was an action of assumpsit, by Joseph R. Roach against William W. Deatherage and others, upon a promissory note.

Messrs. MORRISON, WHITLOCK & LIPPINCOTT, for the appellants.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit in the Morgan circuit court, resulting in a judgment for the plaintiff.

The only point made on this appeal is, the refusal of the court to continue the cause on defendant's motion and affidavit, alleging that the declaration was not filed ten days before the first day of the term to which the writ was returnable.

By the bill of exceptions, it appears the declaration bore the file mark of the clerk as of the day the summons issued, which was October 27, 1874, more than ten days before the first day of the term. But it was alleged by the defendants, and admitted by the plaintiff, that on filing the declaration the plaintiff had withdrawn it from the file and taken it to his office for safe-keeping, saying he would produce it whenever it was wanted. His counsel gave as a reason for thus withdrawing the declaration, that papers in a suit between the same parties, one of the defendants being the clerk of the

court had been lost, and he had been put to great trouble and delay in supplying the loss.

It is known to be a common practice, but loose and improper, for the clerks to permit papers to be withdrawn by counsel after they are filed, and we would not desire to encourage such a practice. A paper, when filed with the clerk, is a file of the court, and should not be withdrawn without leave of the court. In many cases much injury might result from such practice.

In this case, the declaration was filed in time, and restored to the files before the time for pleading had expired, and it nowhere appears, nor is it alleged by appellants, they had any defense of any kind to the note. Nothing of the kind was pretended. They do not allege, by this withdrawal they were prevented from pleading, or that any injury of any kind has resulted to them.

Under such circumstances, appellee having an unquestioned claim to the amount of the note and damages, and appellants not having been prevented of making any defense they might have had, by this irregular act of appellee's counsel, we therefore affirm the judgment.

Judgment affirmed.

Mr. JUSTICE SHELDON dissents.

WILLIAM WAHLE

v.

LOUIS REINBACH.

1. CHANCERY—*abating nuisances.* A court of equity will always act with reluctance in abating a nuisance, and seldom until it has been found to be such by a jury. But where the injury resulting from the nuisance is in its nature irreparable, as, when loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to personal property will ensue, from the wrongful act or erection, courts of equity will interfere by injunction.

Statement of the case.

2. SAME—*preventing the creation of nuisance.* A court of equity will not, in general, interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance.

3. SAME—*irreparable injury defined.* By irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other; and because it is so large on the one hand or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law.

4. NUISANCE—*privies.* Privies are regarded as *prima facie* nuisances, and, although necessary and indispensable in connection with the use of property for the ordinary purposes of habitation, yet, if they are built or allowed to remain in such a condition as to annoy others in the proper enjoyment of *their* property, by reason of either the noisome smells that arise therefrom or by the escape of filthy matter therefrom upon the premises of another, or so as to corrupt the water of a well or spring, they are nuisances in fact.

5. SAME—*defined generally.* Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained; and smoke, noise and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it any one not compelled by poverty to remain. The discomfort must be physical, not such as depends upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance.

6. SAME—*facts of this case.* Where a defendant was about erecting a privy on his own lot, about eight feet from the dwelling house and cellar, and within twenty feet of the well of the complainant, it was *held*, that a bill for an injunction to restrain the completion of the same would lie, there being no adequate remedy at law for the injury that would result therefrom to the complainant.

WRIT OF ERROR to the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

This was a bill in equity, filed by the defendant in error against the plaintiff in error, to restrain the erection of a

privy near to the residence and well of the complainant. The court below decreed the relief sought.

Mr. OSCAR A. DELEUW, for the plaintiff in error.

Messrs. DUMMER & BROWN, for the defendant in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This is a bill in equity, to enjoin a threatened nuisance. The substantial allegations of the bill are, that complainant is the owner and occupant of a certain lot, in the town of Jacksonville, on which is the residence now and for some time past occupied by himself and family; that respondent has become the owner of an adjoining lot, on which he is proceeding to construct a privy, within eight feet of complainant's dwelling house and the cellar thereunder, and within twenty feet of the well of water from which complainant and his family are supplied with water for drinking and cooking and other domestic purposes; that the privy is being built by respondent for the use to which such structures are appropriate; that if he is permitted to complete and use it, it will become an intolerable nuisance to complainant and his family, and that, from its proximity to his dwelling house, cellar and well, it will become injurious to the health and comfort of himself and family, and prejudicial to the enjoyment of his property.

It is further alleged, that respondent has no authority to construct the privy at this particular place, for the reason that it is on ground reserved by a prior owner of the property for an alley; that he has an abundance of room on his own premises for its location, so remote from any building that no inconvenience would result from it; that if the privy shall be completed and used, as intended, complainant and his family will suffer therefrom irreparable injury to their comfort and health, and that he has no adequate remedy at law

The answer of the respondent admits the contemplated construction of the privy at the place alleged in the bill, but denies all the other allegations.

The court, on hearing, found the allegations of the bill to be true, and decreed as therein prayed.

Having given the evidence an attentive consideration, we see no cause to disagree with the conclusion of the court as to its effect.

The question, then, to be determined is, do the allegations in the bill authorize the decree?

It is argued by the counsel for complainant, that, before an injunction can issue in such cases, it must be determined by a jury, on a trial at law, that a nuisance in fact exists. It is true, and has been so held by this court in the cases to which he refers, that a court of equity will always act with reluctance in abating a nuisance, and seldom until it has been found to be such by a jury. *Dunning* v. *City of Aurora*, 40 Ill. 481; *Bliss* v. *Kennedy*, 43 id. 67; *Town of Lakeview* v. *Letz*, 44 id. 81. These cases, however, recognize the doctrine, which is supported by all the authorities on this branch of equity jurisdiction, that where the injury resulting from the nuisance is, in its nature, irreparable, as, when loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property will ensue from the wrongful act or erection, courts of equity will interfere by injunction, in furtherance of justice and the violated rights of property. Waterman's Eden on Injunctions, 259, 4 note; Kerr on Injunctions, 339. It is said, in Kerr on Injunctions, *ubi supra*: "The court will not, in general, interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance." See also Wood on the "Law of Nuisance," 812, sec. 769.

It is laid down by the author last referred to, p. 566, sec. 572: "Privies are regarded as *prima facie* nuisances, and although necessary and indispensable in connection with the use of property for the ordinary purposes of habitation, yet if they are built or allowed to remain in such a condition as to annoy others in the proper enjoyment of *their* property, by reason either of the noisome smells that arise therefrom or by the escape of filthy matter therefrom upon the premises of another, or so as to corrupt the water of a well or spring, they are nuisances in fact," etc. And the same author, at p. 817, sec. 770, in discussing what is meant by irreparable injury, which will authorize the interposition of a court of equity by way of injunction, also says: "By irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other; and because it is so large on the one hand or so small on the other, is of such constant and frequent recurrence, that no fair or reasonable redress can be had therefor in a court of law."

This question, as applicable to the facts of the present case, is well discussed also by Zabriskie, Chancellor, in *Cleveland* v. *Citizens' Gas Light Co.*, 5 C. E. Greene, (20 N. J. Eq.) at page 205. The Chancellor said: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance, that should be restrained; and smoke, noise and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it any one not compelled by poverty to remain.

"Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and, when continued or repeated, make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property, as the means of attaining it; and any interference with our

neighbor in the comfortable enjoyment of life, is a wrong which the law will redress. The only question is, what amounts to that discomfort from which the law will protect? "The discomforts must be physical—not such as depend upon taste or imagination. But whatever is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance." See also, to the same effect, *Ross* v. *Butler,* 4 C. E. Greene (19 N. J. Eq.) 294.

Manifestly no remedy in an action at law would be adequate in a case like the present. Upon what basis could the damages be estimated for the sickness or discomfort caused by inhaling the unwholesome vapors, drinking the impure water, and enduring the foul stenches originating from a structure of the description and relative location complained of? And to say that such a nuisance must be suffered to be created and continued until its character shall be formally determined at law, would seem to be but little better than a mockery of justice to him whose residence is affected by it.

We are of opinion that the case is clearly one in which there is no adequate remedy at law, and where the injury is, in its nature, irreparable.

The decree is affirmed.

Decree affirmed.

WILLIAM D. GULLETT *et al.*

v.

CHARLES E. LIPPINCOTT *et al.*

SCHOOL LANDS—*right of settler or occupant to enter.* The act of 1835, in relation to the sale of school lands belonging to certain fractional townships, and which provided that any person or persons living upon any of the lands in Greene county, or having improvements thereon, might enter the same at their appraised value, was not intended to apply only to persons living on or having improvements on the same at the passage of the act, but applies to persons living on and having improved the same when it is appraised for sale.

APPEAL from the Circuit Court of Greene county; the Hon. CHARLES D. HODGES, Judge, presiding.

This was a bill in chancery, filed by William D. Gullett and James J. McClimans against Charles E. Lippincott, Samuel Wells, Massey Cox, Cassius Heskett and William M. Benner. The object of the bill appears in the opinion.

Messrs. WOODSON & WITHERS, for the appellants.

Messrs. HODGES & BURR, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, exhibited in the circuit court of Greene county, by appellants, who were tax-payers, residents and trustees of schools of a certain township in Greene county, to restrain the Auditor from issuing patents to appellees, Wells, Haskett, Cox and Benner, and to set aside a sale of certain school lands in Greene county made by Caleb Worley, superintendent of schools, to each of said parties.

The bill charges that the proceedings for the sale of the lands were under and in conformity to an act of the legislature passed January 17, 1835, but it is alleged that neither of the defendants resided on or made improvements upon the lands prior to the passage of the act, and that they had no right to purchase the lands of the superintendent of schools.

The answer sets up the sale of the lands under the act of 1835, under which it is insisted the defendants had the right to purchase of the superintendent of schools, and are entitled to patents from the Auditor.

The cause was heard upon bill, answer, exhibits and affidavits filed, and upon the hearing the court dissolved the injunction and dismissed the bill, and complainants bring the record here by appeal.

The only question necessary to be considered is, whether the sale of these lands was authorized by the act of 1835.

The land in controversy constituted a quarter section, and belonged to a fractional township. Under the School Law, no disposition could be made of the land, because there was not the requisite number of inhabitants of the fractional township to secure a sale by petition. Under this state of facts the legislature passed the act of 1835. Session Laws of 1835, page 31. The second section of the act provides that, such lands as have been selected in lieu of the sixteenth sections in fractional townships, upon the Mississippi and Illinois rivers in Greene county, may be sold, or any portion thereof belonging to either of said fractional townships, upon the petition of three-fourths of the inhabitants of said townships; or if there be not ten inhabitant voters in said townships, said lands may be sold by the petition of any fifty legal voters of the county in which such lands lie, in the same manner as other lands are sold, under the laws providing for the sales of section sixteen in the different counties in this State; and the money arising from the sale shall be disposed of in the same manner, for the benefit of the inhabitants of the several townships, as other moneys derived from the sale of sections sixteen.

Section three of the act provides that, should there be any person or persons living upon any of the lands selected in lieu of the sixteenth sections in said fractional townships in Greene county, or have any improvements thereon, they may apply, after the same shall have been valued (which valuation shall be the same as if no improvement had been made thereon), to the school commissioners of said county, who shall permit them to enter the same at the valuation of the trustees of the township to which said land belongs; and if there should be no trustees in said township to which the land belongs, then the county commissioners' court of said county shall appoint three disinterested men of said county to make said valuation.

Under this act three disinterested men were duly appointed by the county court to appraise the lands, who subdivided the

quarter into forty-acre tracts, and fixed a valuation on each forty.

The proof is clear that the land was appraised at its full value. The superintendent of schools then advertised the lands for sale. Some time after the land had been advertised for sale, the defendants each presented to the superintendent of schools his affidavit showing that he was the occupant and owner of the improvements upon a designated forty-acre tract of the land, and tendered the valuation placed upon the tract by the appraisers, which was received by the superintendent, and a certificate of entry given.

The appellants contend, under the third section of the act of 1835, the defendants, Wells, Haskett, Cox and Benner, were not entitled to the privilege of entering the land at the appraised value, because they, at the time the act was passed, did not reside upon, neither had they made improvements upon the land.

We do not think a fair or reasonable construction of the act will limit its provisions to those who occupied or had improvements upon the land at the time the act went into effect.

Had such been the object or intent of the legislature, certainly different language would have been used to express that intent.

The language is, "Should there be any person or persons living upon any of the lands selected in lieu of the sixteenth section in said fractional townships in Greene county, or have any improvements thereon, they may apply after the same shall have been valued." The section does not read "occupants at the time of the passage of the act," neither is any time specified when the improvements may have been placed upon the land in order to protect the settler.

The language of the section is general, and not confined to the owner of improvements at any specified time.

The object seems to have been to afford protection to the party occupying the land at the time it should be appraised

for sale, to the extent of the improvements. We perceive no reason why a party, who places improvements on the land after the passage of the act, is not entitled to the same protection as one who improves before.

The provisions for appraisement of the land are so well guarded that the school fund was in no danger of not realizing the full value of the land, and it is scarcely reasonable to suppose that it was the object or intent of the legislature to enrich the school fund by the sale of improvements placed upon school lands belonging to one who, perhaps, was so unfortunate as not to be able to own a tract of land to improve for himself.

No error appearing in the record, the decree of the circuit court will be affirmed.

Decree affirmed.

WILLIAM BRANNAN *et al.*

v.

JOHN G. ADAMS.

1. INTOXICATING LIQUOR—*civil liability of seller to person caring for intoxicated party.* A saloon-keeper or other person who sells liquors and makes another drunk, is liable, under the act of 1872, in the first place to pay a reasonable sum for taking care of such person until he becomes sober, and the penalty of $2 a day for taking care of him after he becomes sober, if his drunkenness cause him to become sick, or he, while drunk, and in consequence thereof, injures himself so as to require others to care for him, on account of his inability to do so for himself.

2. If a party sells another liquor that makes him drunk, and while drunk from the liquor so sold him, and in consequence of his intoxication, falls and breaks his leg, so that it becomes necessary for some one to take care of him until he recovers, the party who does so care for him will be entitled to recover of the seller of the liquor, but such recovery will be limited to the time the injured person is unable to take care of himself.

3. SAME—*whether the liquor sold was the cause of the injury.* If the person intoxicated had recovered from the effects of the liquor sold him

by the defendant, and was sober at the time of breaking his leg, or if he became sober and then got drunk on liquor procured from others before the accident, then the defendant will not be liable.

4. SAME—*evidence on the question.* Where it did not appear that a person receiving an injury while drunk, at five or six o'clock in the afternoon, which made it necessary to care for him, had drunk at the defendant's saloon after ten or eleven o'clock in the forenoon of that day, it was *held* error to refuse proof offered by the defendant to show how long it usually requires an intoxicated person to get sober when he drinks no other liquor. Any evidence tending to show that the person had become sober before the accident, or was made drunk by liquor obtained from some one other than the defendant, is admissible and proper.

5. SAME—*act construed—distinction between sale and gift of the liquor.* The fourth section of the act of January 13, 1872, relating to intoxicating liquors, provides only for the penalty of $2 per day for taking care of one disabled, in cases where the liquor that produced the intoxication is *sold.* It has provided no penalty for causing intoxication by *giving* liquor to be drunk. It is, therefore, error for the court, in a suit to recover the penalty given for taking care of such disabled person, to instruct the jury that they may find for the plaintiff if the defendant sold or *gave* the liquor to such person.

6. SAME—*evidence as to what it was worth to care for disabled party.* A suit to recover for taking care of a person injured while drunk, from the party selling the liquor which produced the intoxication, is a penal action, and no more than the penalty given can be recovered, and, therefore, it seems that evidence of what it was worth per day to care for such person after he became sober, is improper.

APPEAL from the Circuit Court of Menard county; the Hon. LYMAN LACEY, Judge, presiding.

This was an action of debt, by John G. Adams against William Brannan, Dabney Hall, Frank Bryant and Danville F. Bryant. The following is a copy of the declaration, omitting the caption:

"John G. Adams, the plaintiff, by Fullerton and Rogers, his attorneys, comes and complains of William Brannan, Dabney Hall, Frank Bryant and Danville F. Bryant, the defendants, of a plea that they render to the plaintiff the sum of $2000 which they owe to, and unjustly detain from him.

For that, whereas, the defendants, on the 19th day of January, A. D. 1873, in Mason City, in the said county of Mason, by the sale of intoxicating liquors, did cause the intoxication of one Samuel Mitchell, and thereupon, and by reason of said intoxication, the said Samuel Mitchell fell in the street and broke his leg, and thereupon the plaintiff, then and there, took charge of and provided for the said Samuel Mitchell, he being so intoxicated, as aforesaid, and with his leg broken, as aforesaid, in consequence of such intoxication as aforesaid; and kept him, the said Samuel Mitchell, in consequence of such intoxication, and by reason of said leg being broken in consequence of such intoxication, for the space of two hundred days from and including the day aforesaid. By means whereof, and by force of the statute in such case made and provided, an action has accrued to the plaintiff to demand of the defendants a reasonable compensation for so taking charge of and providing for the said Samuel Mitchell, as aforesaid, which said reasonable compensation amounts to the sum of $1600, parcel of the said sum of money above demanded; and also the sum of $2 for each day the said Samuel Mitchell was so kept by the plaintiff as aforesaid, amounting to the further sum of $400, residue of the said sum of money above demanded. Yet the defendants, though requested, have not paid to the plaintiff the said sum of $2000, above demanded, or any part thereof, but refuse so to do, to the damage of the plaintiff of $2000, and therefore he brings this suit," etc.

The defendants filed the plea of *nil debet*, to which the plaintiff added the *similiter*. The cause was tried by a jury, who returned a verdict for the plaintiff for $248, upon which judgment was rendered. The defendants appealed, and assigned for error the giving of improper instructions for the plaintiff, the refusing instructions asked by defendants, the admission of improper evidence for the plaintiff, the rejection of testimony offered by the defendants, and the overruling of a motion for a new trial.

Messrs. DEARBORN & CAMPBELL, for the appellants.

Mr. E. A. WALLACE, and Messrs. FULLERTON & ROGERS, for the appellee.

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

In this suit, appellee claimed to recover of appellants, who were saloon-keepers, and, as he claims, sold liquor to one Mitchell, and made him drunk, whereby he fell and broke his leg, and in consequence of which appellee kept and cared for him until his leg became healed and well. A recovery is claimed under the fourth section of the act of January 13, 1872. It provides that, if any person, with or without a license, shall cause, by the sale of intoxicating liquors, the intoxication of another person, the person thus selling shall be liable to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and $2 per day in addition thereto for every day such person shall be kept in consequence of such intoxication.

Appellants claim that they have incurred no liability under this section, because Mitchell obtained no liquor of them after ten or eleven o'clock in the forenoon, and he was not found with his leg broken until about five or six in the afternoon. They insist that if they did sell him spirits in the forenoon that made him drunk, still that intoxication did not cause him to break his leg. Or even if it did, that the injury was too remote, as they were only liable for damages for taking care of him until he became sober. As to this last proposition, we are clearly of the opinion that a saloon-keeper, or other person who sells liquor and makes another drunk, is liable, in the first place, to pay a reasonable sum for taking care of the person until he becomes sober, and the penalty of $2 a day for taking care of him after he becomes sober, if his drunkenness cause him to become sick, or he, whilst drunk, and in consequence thereof, injures himself so

as to require others to care for him on account of his inability to do so for himself.

This, although the language of the section is not free from doubt, seems to be the true construction. The language evidently contemplates two conditions in which the person cared for may be. The first is manifestly simply to take charge of and provide for him whilst drunk. For that, a reasonable compensation is allowed. Then what is the other condition? It would seem to be for necessarily keeping him in consequence of such drunkenness. If sickness ensue from and as a consequence of such drunkenness, or if, whilst drunk, he should injure himself, or become disabled, as a consequence of his drunkenness, and it thereby became necessary that care should be bestowed upon him, then the person doing so would be entitled to $2 a day during, and only during, the time that such care should be necessary. This, it seems to us, is the fair and reasonable construction of the statute.

The provision is humane in its purposes. It was, as one of its purposes, to provide for a class of persons who have become slaves to their appetites, and who, when they have spent all of their money, and have been cast forth and out of doors into inclement weather, shall still have credit to insure them protection from the winter's blast until they become sober, if humane persons shall be inclined to take charge of them. It is intended as an inducement to other persons to afford assistance, and prevent injury or perhaps death to the person thus paralyzed to such an extent as to render them incapable of taking care of themselves. And it is manifestly the policy of the law to render the person who sold the liquor liable for the expense of rendering such assistance. If the person who sells the liquor wishes to avoid the liability, he should refuse to sell it, or having sold it, he should take charge of, and render the assistance to the person he has made drunk and not leave it to others.

If these appellants sold Mitchell liquor that made him drunk, and whilst drunk from the liquor they sold him, and

as a consequence thereof, he fell and broke his leg, and by reason thereof it became necessary that appellee, or some other person, should take charge of him and to be kept by him until he recovered, and appellee did so care for him, he is entitled to recover; but not for any time after Mitchell became able to take care of himself.

As to the first proposition, if the drunkenness caused by appellants had ceased when the accident occurred, then appellants were not liable. If he had recovered from the effects of the liquor sold by them, and was sober at the time, or if he became sober and then got drunk on liquor procured from others, appellants are not liable. To recover, it must be shown that the intoxication was produced by appellants, which led to the accident; and inasmuch as it is not shown that Mitchell drank at appellants' saloon after ten or eleven o'clock in the forenoon, it became an important question to learn whether he would be sober, or the effects of that liquor had passed off, at five or six o'clock in the afternoon. In view, then, of these facts, it was proper to admit any evidence which would tend to establish the truth on this point; and we think, as there was no evidence showing directly whether he was drunk or sober, it was error in the court below to reject the proof offered to show how long it usually requires for an intoxicated person to get sober when no other liquor is drunk. This evidence might not prove that he was sober or that he was then drunk, but it would tend to prove the fact. It is not a legal conclusion that a drunken person will become sober in six or seven hours, but it is a fact which, if true, must be found by the jury. We can not judicially know whether the proposition is true or untrue; nor can we know that a jury can certainly determine from their own observation and experience. Hence, they should be permitted to hear evidence to aid them in determining the question. This evidence should have been admitted.

This evidence was proper for another purpose. If the jury found for plaintiff, it was important that they should know

when Mitchell recovered from the drunkenness caused by appellants, so as to fix a fair and reasonable amount of compensation for taking charge of him whilst he was drunk. This was a question involved in the trial, and hence the pertinency of the evidence.

This is a penal action, and, to recover, the plaintiff must clearly bring himself within the terms of the statute. Now, the section under which this recovery is sought, provides only for the penalty in cases where the liquor is sold which produces the intoxication. It has provided no penalty for causing intoxication by giving liquor to be drunk. In all penal statutes a recovery can only be had for the cases provided for in the statute. Courts are not warranted in extending them to other cases not named or embraced in the statute. In this, the construction is the same as in criminal statutes. Hence, the court erred in telling the jury that they might find for plaintiff if appellants sold or gave the liquor to Mitchell, etc.

Again, we are not satisfied with the sum found by the jury, on the evidence in the record. Appellee testified that Mitchell was not able to get around for about nine weeks after his leg was broken, and it was almost two weeks after he could walk before he could wholly help himself. From this we infer that witness intended to be understood as saying, Mitchell could walk when he could "get around," at the end of nine weeks. If he "got around" in some other manner, he would, we presume, have explained the manner. If this is so, then in two weeks after, or at the end of eleven weeks, he was able to "wholly help himself," and at that time all necessity ceased for appellee to take care of and support him. If such was the fact, then appellee could only recover $2 a day for that time as penalty; but the jury have allowed for four months at that rate. It is true, that appellee testified that he had kept him four months after his leg was broken, but we fail to find any satisfactory evidence that it was necessary

to keep him such a length of time; but the evidence tends to show that it was not necessary after eleven weeks.

There was other evidence admitted, tending to show that it was worth four or five dollars a day to keep and take care of Mitchell, and it may be that the jury took that evidence into consideration in finding their verdict. This is a penal and statutory action, and no more than the penalty given can be recovered for each day, without reference to whether the service is worth but half or double the sum fixed by the statute. We are strongly inclined to think this evidence may have improperly influenced the jury.

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

Judgment reversed.

JOHN P. BEDDEN

v.

JOHN M. CLARK.

TRESPASS—*herding stock upon uninclosed land.* Where the plaintiff is in possession of land, and exercising control over the same, the driving and herding of stock upon the same, when forbidden, whether it is inclosed or not, is a trespass, and the plaintiff may recover all damages sustained by it.

APPEAL from the Circuit Court of Vermilion county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. MALLORY & LINDSEY, for the appellant

Mr. E. W. GRIGGS, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This action was brought in trespass, before a justice of the peace, to recover damages occasioned by appellant herding his stock on uninclosed lands of appellee without his consent.

At the trial the court permitted appellee to read in evidence, over objection of appellant, what is called the stock ordinance of the township of Butler, passed in 1871. Whether it was properly admitted in evidence, or whether the court gave the correct construction to it, are not, in the view we have taken, material questions in the decision of the case.

There is no controversy as to the fact appellant did herd his stock on appellee's land in 1872. He insists, however, it was done by the license and permission of appellee. This is denied, and the finding of the jury on all questions of fact submitted is in favor of appellee. The evidence shows appellee owned the land, had some improvements on it, and exercised such acts of dominion over it as authorized the jury to find he had possession. This being so, he could lawfully warn all persons to desist from herding stock upon it. The court very properly instructed the jury, as it did in the sixth instruction, that "stock can not be herded on a person's land or premises without his consent, and if they are so herded, that will constitute a trespass, and the owner of said land or premises, who has possession of the same, may recover damages from the trespasser, if any were sustained."

Were it lawful for stock to run at large in Butler township, as appellant insists it was, still that would not authorize him to herd his cattle on the land of appellee, over which he had control, when forbidden to do so. Driving stock upon the land of another, whether inclosed or not, when forbidden by the owner, would constitute a trespass, and such owner may maintain an action for the recovery of all damages sustained.

No material error appearing in the record, the judgment must be affirmed.

Judgment affirmed.

The Indianapolis and St. Louis Railroad Company

v.

Joseph Peyton.

Negligence—*neglect to give warning and running train at prohibited rate of speed.* In an action against a railroad company to recover for the killing of plaintiff's cow by a train of cars in an incorporated town, it appeared that no bell was rung or whistle sounded, and that the train was running at a greater rate of speed than allowed by ordinance of the town. It also appeared that the plaintiff's cow was running at large, contrary to ordinance: *Held*, that a verdict in favor of the plaintiff was authorized, the negligence of the plaintiff in allowing his cow to run at large being slight as compared with that of the company, which was gross, and in violation of a statute law as well as of an ordinance.

Appeal from the Circuit Court of Coles county; the Hon. Oliver L. Davis, Judge, presiding.

Messrs. Wiley & Parker, for the appellant.

Mr. J. R. Cunningham, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

This was originally an action brought before a justice of the peace of Coles county to recover damages of the defendant, a railroad company, for killing a cow, the property of the plaintiff. There was a verdict and judgment for the plaintiff, from which defendant appealed to the circuit court. On trial there before a jury, a verdict was rendered for the plaintiff, and his damages assessed, on which the court entered judgment, having overruled a motion for a new trial.

The accident occurred within the corporate limits of the town of Charleston, where the company were not required by law to erect a fence.

The claim of the plaintiff is based on the fact that no bell was rung or whistle sounded, and that the train was moving at a higher rate of speed than the ordinance of the town allowed.

The defense was, negligence on the part of the plaintiff in permitting the cow to run at large in violation of an ordinance of the town, thus contributing to the accident.

It was proved no bell was rung or whistle sounded, and that omission was *prima facie* negligence. It was not proved that the rate of speed was more than eight miles an hour, the rate allowed by the ordinance, but it was proved, substantially, by proving the train was running "very fast." A speed of eight miles an hour would not be very fast, but as the speed was "very fast," the inference must be it was more than eight miles an hour, so that a violation of law, in both respects, was established against appellant.

But it is insisted, appellee contributed to the injury by a violation, on his part, of the town ordinance, and therefore ought not to recover.

On this point, the instruction of the court was not correct, but that was not assigned as a reason for a new trial, nor is it assigned as error on this record.

Notwithstanding the error in the instruction, we are inclined to affirm the judgment, fully believing the jury were warranted in finding the verdict on the proof submitted. A positive violation of the law of the State is established against the company, and a positive violation of an ordinance of the town is also established. The negligence of appellee was slight as compared with that of the company, which was gross.

We will not reverse and remand a cause where we are satisfied the same verdict would be rendered under a proper instruction.

The judgment is affirmed.

Judgment affirmed.

LEVI CONOVER

v.

MARTHA M. HILL *et al.*

1. JOINT OBLIGATION—*death of joint obligor—effect on rights of obligee.* In case of a joint obligation, if one of the obligors die, his representatives are at law discharged, and the survivor alone can be sued. And it also seems well settled, that if the joint obligor so dying be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity, the survivor only being liable.

2. CHANCERY JURISDICTION—*contribution between sureties.* The general jurisdiction of courts of equity over matters of account, includes cases of contribution between sureties bound for the same principal, and the jurisdiction assumed in courts of law upon this subject in no manner affects that originally and intrinsically belonging to equity.

3. SURETY—*right to contribution from estate of deceased co-surety.* Where one of the sureties upon the bond of a school commissioner, which was joint and several, died, and after his death the surviving surety was compelled to pay for the default of the principal, it was *held*, that the survivor had a right to compel a contribution from the estate of the deceased co-surety.

4. CONTRIBUTION—*sufficiency of bill for, against estate.* Where a bill in equity by a surety, against the administrator and heirs of a deceased co-surety, for contribution, was filed, on the complainant's own behalf and that of all other creditors of the estate, and it failed to show when letters of administration were issued, or that the two years had elapsed from the time they were issued, or any legal ground or reason for taking administration from the probate court, where his remedy was ample, it was *held*, that the bill was properly dismissed on demurrer to the same.

WRIT OF ERROR to the Circuit Court of Macon county; the Hon. C. B. SMITH, Judge, presiding.

This was a bill in chancery, filed by Levi Conover, Martha M. Hill, Maria McGuire, John McGuire, George Hill, Helen Hill, heirs at law of James M. Hill, and James H. Pickerell, administrator of James M. Hill, deceased. The facts of the case necessary to an understanding of the points decided, are stated in the opinion of the court.

Mr. S. G. MALONE, for the plaintiff in error.

Messrs. NELSON & ROBY, for the defendants in error.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

Conover, the plaintiff in error, and one James M. Hill, became, November, 1863, sureties upon the official bond of one Holinger, appointed school commissioner of Cass county. Holinger was a defaulter. Hill died October 5, 1867. The bond being joint and several, suit was afterwards brought upon it against Conover alone, which proceeded to judgment October 6, 1869, for $1947.08, damages, besides costs, which Conover, on the 9th of same month, paid. Letters of administration upon Hill's estate were issued, but at what time does not appear. This bill in equity was brought by Conover, in November, 1872, against the administrator, widow and heirs of Hill, for an account and contribution. The court below sustaining a demurrer, dismissed the bill, and the record is brought to this court on error.

If the bond in question had been, in form and legal effect, joint, merely, the death of Hill, so far, at least, as the obligees were concerned, would have been a discharge of his estate, both at law and in equity. For it is a well settled principle, that, in case of a joint obligation, if one of the obligors die, his representatives are at law discharged, and the survivor alone can be sued. And it seems to be equally well settled, that if the joint obligor so dying be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity—the survivor only being liable. In such case, it is said, where the surety owed no debt outside and irrespective of the joint obligation, the contract is the measure and limit of his obligation. He executes a joint contract, incurs a joint liability, and none other. Dying prior to his co-obligor, the liability all attaches

to the survivor. See *Getty* v. *Binsse et al.* 49 N. Y. 385, and authorities there cited.

The bond in this case was joint and several, and no joint judgment had been recovered against all the obligors. There being a several liability on the part of James M. Hill to the obligees, the doctrine above enunciated would not apply as to the obligees, and much less will it as against Conover, the co-surety, who has discharged the obligation.

The general jurisdiction of courts of equity over matters of account, includes cases of contribution between sureties bound for the same principal; and the jurisdiction assumed in courts of law upon this subject, in no manner affects that originally and intrinsically belonging to equity. 1 Story Eq. Jur. secs. 492, 496.

"The ground of relief does not stand upon any notion of mutual contract, express or implied, between the sureties, to indemnify each other in proportion, (as has sometimes been argued), but it arises upon principles of equity, independent of contract." Ib. sec. 493.

There can be no question but complainant was entitled to contribution from the estate of James M. Hill, for his proportion of the amount paid by him to relieve of the common burden, nor is there any doubt of the general jurisdiction of chancery in cases between sureties for an account and contribution. The objection raised to the bill in this case is, that it seeks to withdraw the administration of Hill's estate from the probate court, without showing any special reasons therefor.

In *Freeland, executor, etc.* v. *Dazy*, 25 Ill. 294, it was held, that, while it could not be questioned that the court of chancery could, in the exercise of its general jurisdiction, take upon itself the administration of estates, yet the court will not exercise this jurisdiction, except in extraordinary cases, where some special reasons are shown to exist why the administration should be withdrawn from the probate court.

Syllabus.

This bill was filed by complainant, on his own behalf and that of all other creditors of the estate, making the administrator a party. It fails to show when letters of administration were issued, or that the two years had elapsed from the time they were issued, or any legal ground or reason for taking administration from the probate court, whose remedy was ample for the case. *Harris* v. *Douglas*, 64 Ill. 466.

The demurrer was properly sustained, and the decree of the court below will be affirmed.

Decree affirmed.

FREDERICK SCHWEIZER

v.

JAMES M. TRACY.

1. FRAUD—*purchase of goods on false representations may be avoided by vendor.* Where a purchaser of goods represented to the vendor that the stock of goods he then had on hand at his place of business, amounted in value to about $4800; that he had a considerable amount of outstanding debts due him; that he did not owe to exceed $500, and this in Louisville, Ky., and that he owed nothing anywhere else, and thereby obtained credit for goods of the value of about $1900, which he had shipped to his father-in-law, in whose name he did business, while the fact was, that at the time he was indebted in about the sum of $5000 to merchants in Chicago, for goods before sold to him, some of which was then due, and did not have the amount of goods he represented: *Held*, that no title to the goods sold him on the faith of these false and fraudulent representations passed, but that the purchase was voidable, at the option of the vendor, on the ground of fraud.

2. SAME—*right of innocent purchaser from fraudulent vendee.* Where a person who has purchased goods upon false and fraudulent representations sells them to an innocent purchaser for value, before they are reclaimed by the vendor, such innocent purchaser will acquire a valid title.

3. SAME—*right of an attaching creditor of the fraudulent vendee.* But an attaching or judgment creditor does not stand in the position of an innocent purchaser, as he parts with nothing in exchange for the property, and does not take it in satisfaction of his debt. He takes no greater

interest, or better title in the property than his debtor has, and if the debtor has purchased by means of false and fraudulent representations, his vendor may reclaim the goods by replevin against the officer seizing them under attachment or execution.

4. SAME—*distinguished from the case of Burnell* v. *Robertson*, 5 Gilm. 282. In *Burnell* v. *Robertson*, 5 Gilm. 282, the debtor had a valid title to the property attached, and the controversy was between an attaching creditor and a prior purchaser from the debtor, who had not obtained possession of the property, and the court there treated the attaching creditor as a subsequent purchaser having first obtained possession. But this case is distinguishable from that in this, that the debtor's title was fraudulently obtained, and liable to be avoided by his vendor.

5. ERROR—*admission of evidence.* Where a deposition taken in another suit was permitted to be read in evidence against a party's objection, and it did not appear that its admission injured the party objecting, it was *held*, no ground of reversal.

APPEAL from the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

This was an action of debt, by James M. Tracy, coroner of Champaign county, for the use, etc., against Frederick Schweizer, impleaded with Mack, Stadler & Co., of Cincinnati, Ohio. The latter were not served. The facts of the case are stated in the opinion of the court.

Messrs. HOADLY, JOHNSON & COLSTON, for the appellant.

Messrs. SWEET & DAY, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit upon a replevin bond, which had been given by appellant as surety, and Mack, Stadler & Co., as principals, in an action of replevin, commenced by the latter in the circuit court of Champaign county, on the 22d day of October, 1872, to recover a lot of merchandise previously sold by them, and then in the possession of the sheriff of said county, taken under a writ of attachment against the vendee of the goods from Mack, Stadler & Co., sued out October 18, 1872. Mack, Stadler & Co. having been nonsuited in their action,

a return of the property replevied awarded, and failure therein, this suit was brought against the principals and surety in the replevin bond. No service, however, was had upon Mack, Stadler & Co., nor did they enter their appearance.

Appellant pleaded, in substance, to the declaration, under the statute in that behalf, that the merits of the suit in replevin were not determined in that suit, and that at the time of the commencement thereof, and now, Mack, Stadler & Co. were, and are, the absolute owners of the goods replevied, and entitled to the possession of the same. Upon replication filed, traversing the fact of such ownership and right of possession, issue was joined, and upon trial by the court without a jury, it was found in favor of the plaintiff below, and judgment rendered for $1198.58 damages, from which defendant appealed.

It is first objected that the court below erred in admitting in evidence, against the objection of the defendant, the deposition of Isaac H. Mack, one of the firm of Mack, Stadler & Co., which had been taken in the replevin suit. Upon perusal of the deposition, we do not discover in it anything of such injurious effect to appellant as should cause a reversal of the judgment, even were the deposition improperly admitted in evidence. We will not, therefore, stop to discuss the question of its admissibility.

It is further assigned for error that the finding of the court below is contrary to the law and evidence.

The record discloses that Mack, Stadler & Co. were wholesale dealers in clothing in the city of Cincinnati; that one C. K. Weil, doing business in the town of Urbana, in this State, in the name of his father-in-law, Moses Block, purchased at the store of Mack, Stadler & Co., on the 6th of September, 1872, the goods which were afterwards replevied, in value about $1900, on credit, stating to them that the stock which he then had on hand at Urbana amounted in value to about $4800; that he had a considerable amount of outstanding debts due him; that he did not owe to exceed $500,

and this in Louisville, and that he owed nothing anywhere else. The fact was, that Weil was, at the time, indebted in about the sum of $5000 to merchants in Chicago for merchandise sold to him prior to the purchase from Mack, Stadler & Co., some of which indebtedness had become due, and the inability to obtain further credit there had induced him to resort to the Cincinnati market, for the purpose of getting goods on credit.

We have no doubt, from the evidence, that the representations as to the value of the Urbana stock, and the amount of the indebtedness thereon, were false and fraudulent, and that the goods were sold upon the faith of these representations, and that no valid title passed to the purchaser, but that the purchase was voidable, at the option of the vendors, on the ground of fraud in the making of it, whilst the property remained in the hands of the vendee.

The point is made, by appellee, that Weil was doing business in the name of Block, and so known by Mack, Stadler & Co., and that they shipped the goods in the name of Block, and that these circumstances should, in some way, disentitle Mack, Stadler & Co. to question the validity of the purchase from them.

Whether Weil was acting either for himself or as agent for Block, is immaterial. In either case, the effect upon the sale, of the fraud and false representations, would be the same; it being manifest that the goods were not parted with because of the credit given to either Weil or Block, but because of the representations of the value of the Urbana stock, and the amount of the indebtedness thereon.

But it is supposed that there was fraud here on the part of Mack, Stadler & Co., in assisting Weil to perpetrate a fraud upon the community, which should debar their right to avoid the sale. The matter of the use of Block's name by Weil in the manner it was, was understood by the Chicago creditors, as well as by Mack, Stadler & Co. It was not shown how any one was defrauded, or likely to be so, by the

conduct of Mack, Stadler & Co. They simply knew that Weil was carrying on business in the name of Block, and bought and requested the goods to be shipped in the name of the latter; that Weil was owing some $500, and perhaps that Block was insolvent.

We discover nothing in this which should deprive Mack, Stadler & Co. of redress for a fraud practiced upon them in the purchase of the goods.

Coming, then, to the conclusion, which we do, that had Mack, Stadler & Co. discovered the fraud practiced upon them whilst the goods remained in the hands of the fraudulent vendee, and replevied them, they could have successfully maintained their action, the question is presented, whether the attaching creditors here, or the sheriff, by virtue of his writ of attachment, acquired any other or greater title than the fraudulent vendee possessed.

Had the vendee, before the reclaiming of the goods by Mack, Stadler & Co., sold them to an innocent purchaser for value, no doubt, under the decisions of this court, the purchaser would have acquired a valid title to the goods. *Jennings* v. *Gage et al.* 13 Ill. 610; *M. C. R. R. Co.* v. *Phillips et al.* 60 id. 190; *Young et al.* v. *Bradley et al.* 68 Ill. 553. The case of *Burnell* v. *Robertson*, 5 Gilm. 282, is cited as sustaining the doctrine that an attaching creditor stands in the light of a purchaser, and is to be protected as such. That was a case where a debtor had title to the property, and the controversy was between a prior purchaser from the debtor, who had not obtained possession of the property, and a subsequent attaching creditor; and in reference to such a state of facts, the court say: "In case of two sales of personal property, both equally valid, his is the better right who first gets possession of the property, and the attaching creditor stands in the light of a purchaser, and is to be protected as such." That is, the attaching creditor stands in the light of a purchaser, not necessarily as against the world, but as against another purchaser, the creditor having, by virtue of

his attachment, first obtained possession of the property; thus acknowledging the common doctrine respecting the sale of personal property, that a sale without the delivery of possession, is void as against subsequent purchasers and creditors. This is the full import of that decision.

But in the case at bar, the only title of the debtor is one acquired by fraud and false representations, and voidable at the option of his vendors. The general expression used in the case cited is to be understood with reference to the facts of that case, and is not authority in support of the view that an attaching creditor, under the circumstances of such a case as the present, *as against the vendor*, stands in the same position as an innocent purchaser for value.

In *Martin* v. *Dryden et al.* 1 Gilm. 188, where there had been a sale and conveyance of real estate, but the deed not recorded, this court held that an attaching creditor, without notice of the prior deed, would hold the land as against the prior purchaser; but that was under our recording act, containing the provision that all deeds and title papers shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and as to them, all such deeds and title papers shall be adjudged void, until the same shall be filed for record in the county where the land may lie. Gale's Stat. 664, sec. 5.

In the cases above cited, the attachments were sustained against prior purchasers in obedience to plain rules of law. In the first case, the rule of the common law made the prior sale of the goods without the delivery of possession, void as against creditors. In the second case, a statutory enactment declared the prior deed void as to creditors until it was recorded.

But in the case before us, the attaching creditor has no such plain rule of law to invoke in his behalf. He can cite the doctrine that where personal property has been obtained

by means of a fraudulent purchase, a *bona fide* purchaser thereof from the fraudulent vendee, for a valuable consideration, without notice, will acquire a good title; but that does not embrace the case of a mere attaching creditor. He can not be regarded as such a purchaser, or be viewed like a mortgagee, who is considered a *quasi* purchaser. The claim of an attaching creditor to protection is not of equal strength with that of a *bona fide* purchaser for a valuable consideration. He parts with nothing in exchange for the property, nor does he take it in satisfaction of any precedent debt. The property is merely seized for the purpose of having it afterward so appropriated. The attaching creditor, by means of his attachment, obtains but a lien. It is a well settled rule, certainly of equity, that the general assignees of a bankrupt take his estate subject to every equitable claim which exists against it by third persons; and so it is with judgment creditors, as respects the lien of their judgments. *Ex parte Howe*, 1 Paige, 125.

As to such assignees, the Supreme Court of the United States say: In cases like this the assignee stands in the place of the bankrupt; his rights are their rights; and theirs, like the lien of judgments at law, are subordinate to all the prior liens, legal and equitable, upon the property in question. *Gibson* v. *Warden*, 14 Wall. 249.

In *Tousley* v. *Tousley*, 5 Ohio St. 78, it was held that a judgment creditor is not a purchaser, nor entitled to the privileges of that position. It is there said: So far as the statute goes, in giving him (a judgment creditor) a preference over mortgages not perfected by delivery to the recorder, his rights are absolute, but for everything else, he is remitted to general principles; and upon general principles, it is very clear that he acquires a lien only upon the interest of his debtor, and is bound to yield to every claim that could be successfully asserted against him. See also, Drake on Attachment, sec. 220; *Nathan* v. *Giles*, 5 Taunt. 558.

The only difference, as affects the present question, between the lien of a judgment, and one acquired by attachment, is, that one is general and the other specific. We are unable to see that this distinction should change the rule in its application to a case like the present. Nothing was here attached but the interest of the debtor and fraudulent vendee in the property seized. He had not an absolute title, but only a voidable one, subject to be avoided by the defrauded vendors. The same right of avoidance of the fraudulent purchase which they had against the fraudulent vendee himself, we are of opinion, existed against his attaching creditors. Had he made an assignment of the property for the benefit of these attaching creditors, the assignee would have taken only such interest as the assignor had in the property—his voidable interest. We can not see upon what principle the creditors could acquire any greater interest by the levy of an attachment to secure the payment of their claims, than they would have done by a voluntary conveyance made by the debtor himself for the same purpose. It is the general rule, that a better title is not obtainable from any one than he possesses. There are exceptions, but the levying of an attachment comes within none of the recognized exceptional instances, where one can acquire from another a greater interest in property than such other himself possesses.

We perceive no laches on the part of the vendors in the exercise of their right of avoiding the sale.

It follows, then, that the right of possession and property in the goods was in Mack, Stadler & Co., that their suit of replevin was rightly brought, and that there is no liability upon the replevin bond for the non-return of the property replevied.

The finding and judgment of the court below being manifestly against the evidence, the judgment is reversed.

Judgment reversed.

THE CITY OF CHAMPAIGN

v.

ROBERT MCMURRAY, Trustee, etc.

1. CASE—*evidence under general issue.* Under the plea of not guilty, in an action on the case, the defendant may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may also give in evidence any justification or excuse.

2. In an action on the case for an injury to premises, the declaration alleged in the first count that the premises, at the time of the injury, were in the possession of tenants, and that the plaintiff, as trustee, had the reversion thereof, and in the other counts alleged that the plaintiff, as trustee, was in the possession thereof. The defendant filed the general issue: *Held*, that it was incumbent on the plaintiff to prove either a legal title or an actual possession of the property.

3. POSSESSION—*kind of, necessary to maintain suit for injury.* Where possession of land is relied on for any legal purpose, in the absence of paper title, it must be an actual, and not a constructive, possession.

APPEAL from the Circuit Court of Champaign county; the Hon. LYMAN LACEY, Judge, presiding.

This was an action on the case, brought by Robert McMurray, as trustee of Eliza B. and Charles M. McLaurie, against the city of Champaign, for an injury caused to a certain building by a change in the grade of a street so as to throw a quantity of water upon the premises. A verdict was returned and judgment rendered in favor of the plaintiff for $768 and costs. Defendant appealed.

Mr. J. S. WOLF, and Messrs. SWEET & DAY, for the appellant.

Messrs. BLACK & GERE, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

In the first count of the declaration it is alleged that the premises claimed to have been injured were, at the time the

injury was committed, in the possession of tenants, and that the plaintiff, as trustee for Eliza D. and Charles McLaurie, had the reversion thereof.

In the remaining counts, the allegation is, that the plaintiff, as trustee, was in possession of the premises.

The defendant pleaded not guilty. No evidence was offered of title or of actual possession in the plaintiff, as alleged in the declaration.

The court, at the instance of the plaintiff, among other things, instructed the jury "that the question of ownership of the property is not in issue in this case—that the same is admitted by the pleadings."

We are of opinion that the giving of this instruction was error.

The rule at common law is, that, under the plea of not guilty, in an action on the case, the defendant may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may also give in evidence any justification or excuse. 1 Chitty's Pleadings (7th Am. from the 6th London Ed.) 527.

The English rule, that, "in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement," etc., was adopted by the judges at Hilary term, 4th William IV, pursuant to the statute of 3d and 4th William IV, 1 Chitty's Pleadings, 737, and has never been adopted by statute in this State.

It was incumbent on the plaintiff to make proof, under his declaration, either of a legal title to, or the actual possession of, the property claimed to have been injured. *Gardner* v. *Heartt*, 1 Comstock, 528; 2 Greenleaf's Evidence, sec. 230, b; *Gardner* v. *Heartt*, 2 Barb. 165; *Schenck* v. *Cuttrell*, 1 Dutcher (New Jersey), 5.

Where possession, alone, of land is relied upon for any legal purpose, in the absence of paper title, it must be an actual,

and not a constructive, possession. *Webb* v. *Sturtevant*, 1 Scam. 182; *Ill M. F. Ins. Co.* v. *Marseilles Manufacturing Co.* 1 Gilman, 266.

The proof in this respect was clearly insufficient.

The judgment is reversed and the cause remanded.

Judgment reversed.

OLIVER P. CANTERBERRY

v.

CHARLES MILLER.

1. CONTRACT—*construction.* Where two instruments in writing are made at the same time, relating to the same subject matter, they may be regarded as a single instrument and construed together.

2. Where the language of a written contract is unequivocal, although the parties may have failed to express their real intentions, there is no room for construction, and the instrument will be enforced according to its legal effect.

3. SAME—*must be between two or more parties.* In a suit by the plaintiff to recover the price of hogs sold, where the defendant refused to accept and pay for the same, the written contract showed that the plaintiff bought the hogs of himself, and that the defendant sold the same number of hogs to himself; in other words, it appeared that each party signed the writing the other should have executed: *Held*, that the plaintiff could not recover, and that the contract was properly excluded by the court.

APPEAL from the Circuit Court of Sangamon county; the Hon. CHARLES S. ZANE, Judge, presiding.

Messrs. CULLOM, SCHOLES & MATHER, for the appellant.

Messrs. MATHENY & MCGUIRE, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by appellant, in the circuit court of Sangamon county, against appellee, to recover for a breach of a contract, in and by which it is

claimed by appellant he sold appellee 100 head of hogs for a certain price, and to be delivered at a certain time and place, which appellee failed and refused to accept and pay for according to the terms of the contract.

In support of the contract sued upon, appellant testified that, on the 30th day of April, 1873, he and appellee made a contract in writing in regard to the sale of the hogs, and that he signed and delivered to appellee the following writing:

"I have this day bought of *O. P. Canterberry* 100 head of hogs, to average 225 lbs. and over, to be delivered at Sherman between the 1st and 20th of July, at *my* option. The hogs to be weighed on *his* scales, and delivered at *his* expense. All the above hogs to be well fatted, no sows to show pigs, no stags or boars. For which *I* agree to pay $4.50 per hundred lbs. on delivery.

This 30th day of April, 1873.

O. P. CANTERBERRY."

And that, at the same time, appellee signed and delivered to him a writing, as follows:

"*I* have this day *sold to Charles Miller* 100 head of hogs, to average 225 lbs. and over. The hogs to be weighed at *my* scales, and delivered at Sherman at *my* expense, between the 1st and 20th of July, at *his* option. All the above hogs to be well fatted, no sows to show pigs, no stags or boars. For which *he* agrees to pay $4.50 per hundred lbs. on delivery.

This 30th day of April, 1873.

CHARLES MILLER."

These writings were offered in evidence by appellant, but were excluded by the court, and no other evidence having been introduced by appellant in support of the contract declared upon in the declaration, the jury returned a verdict in favor of appellee, upon which the court rendered judgment.

The only question presented by the record is, whether these writings constitute a valid contract between the parties. The two instruments having been made at the same time, and

relating to the same subject matter, may be regarded as a single instrument, and construed together.

But when viewed in this manner, do they constitute a contract that can be enforced in a court of law?

A contract is defined to be an agreement of two or more persons upon a sufficient consideration to do or not to do a particular thing. 2 Kent, 450.

But these papers, offered in evidence as a contract, do not appear to be an agreement between two or more parties. The one signed by appellant, Canterberry, reads that he has bought of *himself* 100 head of hogs, for which he agrees to pay *himself* $4.50 per hundred. The one executed by appellee, Miller, reads that he has sold to *himself* 100 head of hogs, for which *he* agrees to pay $4.50 per hundred.

The language used in these instruments is clear and pointed, no ambiguity exists, and it is as clearly expressed as words can do it, that appellant buys of himself, and that appellee sells to himself a certain number of hogs, and we are aware of no rule of construction by which we can hold this to be a contract wherein appellant sells and appellee buys a certain quantity of hogs.

It is no part of the duty of courts to make contracts for parties, and we are aware of no manner in which these instruments can be held to be a contract between appellant and appellee, unless the court should make a radical alteration in the terms of the two instruments.

In *Benjamin* v. *McConnell*, 4 Gilm. 436, it was held that, in the construction of a contract, where the language used was ambiguous, courts uniformly endeavor to ascertain the intention of the parties, and to give effect to that intention. But where the language is unequivocal, although the parties may have failed to express their real intentions, there is no room for construction, and the legal effect of the agreement must be enforced.

It is, no doubt, true, that these parties failed to express in the instruments executed what they actually intended, but

that is their misfortune. The wording is such that no action can be maintained upon them in their present form. They are void for uncertainty, and the circuit court did not err in excluding them from the consideration of the jury.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

HEMAN ALLEN *et al.*

v.

JOSEPH HARTFIELD.

1. SALE—*right to possession.* Where a bill of sale of horses acknowledged the receipt of $20, and provided for the payment of $255, the balance, in three days after its date, but fixed no time for the delivery of the horses, which were left with the seller: *Held*, that it did not show a sale on credit, and that the seller was not bound to deliver possession until payment was made or tendered.

2. SAME—*rescission, where possession obtained in fraud of seller's rights.* Where a sale of horses was made for cash on delivery, and, when taken to the purchaser, he directed the seller to put them in the stable and come to the purchaser's house for his pay, and at the house he offered the seller his own notes in payment, which the latter declined to accept, but demanded the money or the horses, it was *held*, that if the purchaser obtained possession without intending to pay in money, it was in violation of the contract, and in fraud of the seller's rights, and the latter had a right to rescind the contract and sue for and recover his horses or their value.

3. AGENT—*liability of, for aiding in the fraud of his principal.* Where a purchaser fraudulently obtains possession of horses bought by him, which he refuses to deliver up, and A sends the horses to his brother with a letter not to give them up without A's order, and the latter concealed the horses and refused to give them up: *Held*, that A and his brother, if not liable as principals, were certainly liable in trover as agents of the fraudulent purchaser in carrying out a common purpose.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was an action of trover, brought by Joseph Hartfield against Heman Allen, J. B. Mann and William H. Mann.

The proof showed that the plaintiff sold the defendant Allen two horses, evidenced by the following bill of sale:

"This is to certify that I, Joseph Hartfield, have this day sold to Heman Allen two gray horses, named Billy and Mack, and have received $20 on the same, and the balance to be paid the 21st of November, 1873. Balance due J. H. Hartfield, $255. Cropsy, Nov. 18, 1873.

JOSEPH his + mark HARTFIELD."

The horses were left with the plaintiff. In December he took the horses to Allen's premises, and, by direction of Allen, put them in his stable and went to his house for the pay. Allen then tendered him three notes on the plaintiff, which he got of James B. Mann. The plaintiff refused to take them in payment, and demanded the money or the return of his horses. The other facts are stated in the opinion. On the trial the court gave the following, among other instructions, for the plaintiff:

"The court instructs the jury that, by the written contract in evidence. Hartfield was to deliver the horses on the 21st day of November, to Allen, and that Allen was to pay Hartfield $255 in money on delivery. It was not a sale on credit, and Allen had no right to the possession of the horses without the payment of the $255 in money; and if Allen obtained the possession of the horses without the intention of paying the money, then such possession was obtained by fraud, and the property in the horses did not pass to Allen by such delivery."

The jury found the defendants guilty, and assessed the plaintiff's damages at $269. The court overruled motions for a new trial and in arrest of judgment, and rendered judgment on the verdict, and the defendants appealed to this court.

Messrs. STEVENSON & EWING, for the appellants.

Messrs. WILLIAMS, BURR & CAPEN, for the appellee.

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

It appears that Allen, on the 18th day of November, 1873, purchased of appellee two horses for $275, and paid him $20 on the purchase. He took from appellee a written bill of sale, which states that the balance was to be paid on the 21st of that month. In December appellee placed the horses in Allen's hands, who directed him and his son to put the horses in the stable and go to the house and get his pay. They did as directed, but when appellee went to the house for his pay, Allen offered him three notes on appellee, which he refused to receive, and which he claimed he did not owe. Appellee demanded the horses or the money, but Allen informed him he could have neither.

It seems that a messenger was sent with the horses to James B. Mann, of whom Allen had obtained the notes, for instructions. He wrote a letter to his brother, Wm. H. Mann, and gave the messenger $5. When the horses were demanded of Wm. H. he said that a young man had brought them there with a letter from his brother not to let any one have them without a letter from him. James B. Mann testified that he wrote the letter to his brother, and gave the messenger $5 for expenses; but, when inquired of by young Hartfield, he denied knowing where the horses were.

Hartfield brought an action of trover against Allen and the two Manns.

On a trial in the court below, the jury found for the plaintiff, and, after overruling a motion for a new trial, the court rendered a judgment in his favor, from which this appeal is prosecuted.

There is no ground for holding that this was a sale on credit. The bill of sale will bear no such construction. By it the balance of the money was to be paid on the 21st day of November, three days after the sale. No time was fixed for a delivery of the horses. Hence the law implies that they

were not to be delivered until the money was paid; that they were to be simultaneous acts, and that the vendor could not be compelled to deliver them until payment was made, or the price tendered at or after the time fixed for payment.

It may be that the title vested in Allen, subject to be defeated by a non-compliance with his part of the agreement. But even if that be true, he had no right to possession until he paid the money. Appellee had not agreed to take notes, even his own, in payment for the horses. Allen had not even alluded to the notes. Hence it was money for which appellee sold the horses, and Allen had no right to possession until he paid or tendered the money. If Allen obtained possession of the horses without intending to pay for them in money, it was in violation of the contract, and in fraud of appellee's rights, and he then had a right to rescind the contract and sue for and recover the horses or their value. In this view of the contract, the instruction given for appellee, and which appellants question, was correct and properly given.

It is next urged that the evidence is not sufficient to sustain the verdict against the two Manns. We fail to see why. They acted in the matter as though they were principals, but if not, they certainly were agents of Allen. One of them directed the other to hold and not give them up unless upon a letter from him, and he furnished money to pay the expenses in taking the horses to a place of concealment. And his brother, to whom he sent the horses, refused, on demand, to give them up to the owner. If James had no interest in them, or was not aiding Allen to thus obtain the horses, why did Allen send the messenger to James for money and instructions as to what he should do with the horses?

We regard the evidence as abundant to connect the Manns with the fraud, either as principals or active agents in carrying out the common purpose, and the judgment is manifestly just, and it must be affirmed.

Judgment affirmed.

GEORGE MILMINE *et al.*

v.

A. C. BURNHAM *et al.*

1. MISTAKE—*correction as against subsequent purchaser.* Where a mistake was made in the description of land in a conveyance and in a mortgage given to secure the payment of money, and possession was taken of the land intended to have been conveyed, and upon discovery of the mistake the grantor executed a conveyance for the land actually sold, it was *held*, that the mortgagee, on bill to have his mortgage corrected, had a superior equity to a judgment creditor who had notice of the mistake before the making of the second deed, and who, after such notice, caused his execution to be levied upon the land, and also against his assignee, who procured a sheriff's deed.

2. JUDGMENT CREDITOR. A judgment creditor has no equities superior to a *bona fide* purchaser, and whatever notice will affect the latter, must in like manner affect the former.

APPEAL from the Circuit Court of Champaign county; the Hon. LYMAN LACEY, Judge, presiding.

This was a bill in equity, by George Milmine and Edward C. Bodman, against A. C. Burnham, Robert F. Davidson, James Surplis, Catharine Surplis, his wife, Harmond Stevens and Daniel Buskirk, for the correction of a mistake in, and a foreclosure of a mortgage given by Surplis and wife to the complainants. The opinion of the court states the material facts.

Mr. A. J. GALLAGHER, and Mr. J. S. JONES, for the appellants.

Messrs. SWEET & DAY, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

On the hearing of this cause, the court found certain facts, and by stipulation of parties it is agreed the evidence introduced sustains the finding. The facts out of which the controversy arose being uncontroverted, a brief statement may

be made: In 1867, one William A. Conkey sold a tract of land to James Surplis, but in making the deed an error occurred in the description; the description given in the deed located it in a quarter section in which Conkey owned no land. No other error occurred in the description. Surplis, however, with the consent of the grantor, took possession, and in fact occupied the land actually sold to him.

While in possession of this land, Surplis, to secure his indebtedness to complainants, executed to them a mortgage on the land he had purchased of Conkey, but by the same erroneous description contained in the deed. Default having been made, complainants filed a bill to foreclose this mortgage, and obtained a decree. Soon after this decree was rendered, the mistake in the description of the land as given in the deed and mortgage was discovered, and on the 19th of December, 1869, Conkey made another deed to Surplis to correct the erroneous description.

At the October term, 1869, of the circuit court of Champaign county, in which the land is situated, and where the parties reside, defendants Burnham and Davidson obtained a judgment against Surplis and others. That term of the court closed on the 17th day of November, but at that time the judgment creditors had no notice of the mistake in the description of the land, either in the deed or mortgage.

The court found, and the stipulation concedes it, they had "full notice" of the mistake in the mortgage prior to the 19th day of December, 1869, the day on which Conkey made Surplis a new deed correcting the erroneous description in the first deed.

On the 5th day of January, 1870, the execution, which had previously been issued on the judgment in favor of Burnham and Davidson against Surplis and others, was levied upon the land in controversy; was afterwards sold, and purchased by plaintiffs in the execution. The certificate of purchase was afterwards assigned to Swearingen, and the land not having been redeemed, he obtained a sheriff's deed.

The single question that arises on this record is, who has the superior equities—the mortgagees or the judgment creditors, or their assignee, who stands in their shoes?

The judgment creditors maintain they had no notice of the interest of the mortgagees on the 17th day of November, when their judgment became a lien on the property of Surplis; and the lien having once attached, it must prevail over any rights of complainants acquired under the previous mortgage conveying the land to them by an erroneous description. We can not concur in this view of the case. At that date, the legal title to the land was not in Surplis. He had been the owner of the equitable title, but had parted with it by his grant to complainants. However, he was still the owner of an equity of redemption, and was in possession. All the judgment could become a lien upon, was his equity of redemption. Whatever interest he had could only be known by inquiry of him upon the premises, and such inquiry would have disclosed the fact he had previously conveyed his equitable title to complainants by mortgage deed. Before the legal title became vested in Surplis under Conkey's second deed, the judgment creditors had "full notice" of the interest of complainants—that Surplis had mortgaged the land to them, but by an erroneous description. It was after notice they caused the levy and sale to be made.

Under our statute, a purchaser and a judgment creditor having a lien, stand upon the same equity. *Massey* v. *Westcott*, 40 Ill. 160. This is the most favorable view of the law defendants can insist upon. It can not be justly claimed a judgment creditor has any equities superior to a *bona fide* purchaser. Whatever notice would affect the latter, must in like manner affect the former. Surplis had no title of record, and the extent of his interest could only be known by inquiry of him on the premises. As we have before said, inquiry would have disclosed the fact he owned nothing but an equity of redemption, having previously conveyed whatever title he had to complainants by mortgage deed. With

what show of justice can it be said a purchaser with such notice would obtain superior equities to previous mortgagees? Yet, this is the precise attitude defendants occupy. Had the legal title been in Surplis before the judgment creditors had notice of the prior mortgage, and before the judgment became a lien, a very different question might have been presented. The case, then, perhaps would have been within the rule in *Massey* v. *Westcott, supra.* But such was not the case. It is conceded by stipulation the judgment creditors had "full notice" of the equities of the mortgagees before the legal title became vested in the judgment debtor. Hence, it can not be insisted they were innocent purchasers.

This is a contest between creditors, and, in view of the facts found by the court, we are clearly of opinion complainants had superior equities, and should prevail.

The decree will be reversed and the cause remanded, with directions to the circuit court to decree the relief sought by the bill.

Decree reversed.

JACOB MANN

v.

LEWIS SMYSER *et al.*

1. FAILURE OF CONSIDERATION—*sufficiency of plea of.* To a declaration upon a promissory note, the defendant pleaded that he was induced to enter into and make the said agreement and promises by means of fraud, covin and misrepresentations of the plaintiffs, and others in collusion with them, in this: that, on, etc., plaintiffs sold defendant their warehouse, situate, etc., for $1500, including one corn-sheller, etc.; that he was induced to enter into said contract by the representations of plaintiffs that they could and would procure for him an assignment of the lease from the railroad company for the ground upon which the warehouse and appurtenances were situated, which representations the plaintiffs knew to be false at the time; that defendant, relying on said representations, entered into said contract, and in payment thereof, executed his notes as follows: for the sum of $500 each, payable in four, eight and twelve months,

respectively, the last one of which is the one declared on, the others having been paid; that plaintiffs did not and could not procure an assignment of the grounds on which the warehouse and appurtenances were situated, but that the railroad company, after such sale, before they would assign said lease of the plaintiffs to defendant, took possession of a portion of the grounds and compelled the defendant to remove a portion of said warehouse, and deprived him of the use of a portion of said grounds, to his great damage, to wit: the sum of $500, of all which the plaintiffs had notice, etc.: *Held*, that the plea was substantially good as a plea of partial failure of consideration.

2. EVIDENCE—*parol to vary a written contract.* As a general rule, and at the common law, it is not allowable to vary the terms of a written contract by parol testimony.

3. SAME—*parol evidence when failure of consideration is pleaded.* Under the statute which allows a total or partial failure of consideration to be pleaded in defense of a suit upon a note or bond, the defendant may show, by parol testimony, what the consideration was, as well as its failure.

4. Thus, where a party took an agreement in writing for the sale of a warehouse on ground leased of a railroad company, and the vendor also agreed, verbally, to procure an assignment of the lease of the ground, which constituted the consideration of notes given by him, it was *held*, in a suit upon the last of the series of the notes, that the maker might show by parol that, besides the articles named in the bill of sale, the lease was included, and was a part of the consideration of the note.

APPEAL from the Circuit Court of Edgar county; the Hon. OLIVER L. DAVIS, Judge, presiding.

This was an action of assumpsit, brought by Lewis Smyser and John Milton, against Jacob H. Mann, upon a promissory note for $500. The facts of the case are stated in the opinion of the court.

Messrs. BISHOP & MCKINLAY, for the appellant.

Mr. JAMES A. EADS, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the Edgar circuit court, on a promissory note, to which several pleas were pleaded, to some of which issues of fact were made up, and to others issues of law,

which were determined in favor of the demurrants, and on which the questions made on this appeal arise.

Appellant contends that the third, fifth and seventh pleas by him pleaded, were proper pleas, averring a partial failure of the consideration of the note.

As the seventh plea is more precise than the others in the statement of facts, it is here copied from the record:

"And for a further plea in this behalf, defendant says *actio non*, because he says that the plaintiffs caused and procured the defendant to enter into the said agreement, and to promise as to the said first count of said declaration alleged, and the defendant was induced to enter into and make the said agreement and promises aforesaid through and by means of fraud, covin and misrepresentation of the plaintiffs and others in collusion with them, in this: that, on the 29th day of July, A. D. 1872, plaintiffs sold to defendant their warehouse, situated on the south side of the I. and St. L. R. R., in the city of Paris, Illinois, for the sum of $1500, including one corn-sheller, etc.; that said defendant was induced to and did enter into said contract by the representations of said plaintiffs that they could and would procure for him an assignment of the lease from said railroad company of the ground upon which said warehouse and appurtenances were situated, which said representations plaintiffs knew to be false and fraudulent at the time and place last aforesaid.

"Defendant further avers, that plaintiffs made said representations to defendant as aforesaid, knowing them to be false, and that defendant, relying upon such representations, entered into said contract, and in payment thereof executed his notes, as follows: for the sum of $500, each, payable in four, eight and twelve months, respectively, the last of which is the one declared on in said declaration, the other two having been fully paid and discharged by said defendant.

"And the defendant says that plaintiffs did not and could not, by the terms of their lease with said railroad company,

procure an assignment of the grounds on which the said warehouse and appurtenances were situated, but that the said railroad company, after the said sale to defendant, before they would assign said lease of plaintiffs to defendant, took possession of a portion of the grounds upon which said warehouse and appurtenances were situated, and compelled the defendant to remove a portion of said warehouse, and deprived him of the use of a portion of said ground to his great damage, to wit: the sum of $500, of all which the plaintiffs then and there had notice, and this he is ready to verify," etc.

The note produced in evidence by the plaintiffs was conceded to be the whole cause of action.

Defendant, in his fifth plea, set out the bill of sale of the property for which this note, with others, was executed, and proposed to show, by parol, that the writing so set out in his plea was not the contract of the parties, but that it was understood and agreed by the parties that the lease of the ground on which the warehouse stood, belonging to the railroad company, was also to be transferred to the defendant, as set forth in his plea, as a part consideration of the note. This would be, in effect, varying a written contract by parol, which, as a general rule, and at the common law, could not be allowed.

It is contended by appellant, that this rule of the common law has been changed or greatly modified by our statute which permits a party to plead a failure of consideration. This necessarily raises an inquiry into the consideration, for if the consideration can not be shown by parol, the statute would be inoperative and inefficient. A note may, on its face, be an absolute contract to pay a sum of money at a certain day for property sold and delivered. It may be shown, under a plea of failure of consideration, that, at the time the note was executed, there was a horse to be delivered by the payee to the maker by a certain day, and that the same has not been delivered. This is the doctrine of *Hill et al.* v. *Enders et al.* 19 Ill. 163. This was followed by *Morgan et al.* v. *Fallenstien et al.* 27 ib. 31, where it is said, if the common law rule

should prevail that a part of the agreement rest in parol, it would be impossible, in any case, to show a total or partial failure of consideration of a note by parol, for the consideration of a note must necessarily form a part of the agreement in pursuance of which the note is given, and when the note is given, that part of the agreement which constitutes the consideration is never reduced to writing, and must be shown by parol if it is ever shown.

Our statute has expressly provided for this defense, and, necessarily, to give effect to the statute, parol evidence must be admitted to show what the consideration was, as well as to show that it has failed. The statute has made no exception.

A note or bond to pay money, is, necessarily, but a part of the agreement between parties, leaving out, as it does, all that portion of the agreement which induced the undertaking to pay the money, and if this part could not be shown by parol, there would ever be a liability to a failure of justice.

This doctrine was discussed in *Great Western Insurance Co.* v. *Rees*, 29 ib. 272, and the court said, the door is necessarily thrown wide open to disclose the whole truth about the consideration; that this is the only mode by which effect can be given to the statute.

The last case decided by this court on this point, is *Gage* v. *Lewis*, 68 Ill. 604, and is in harmony with these cases.

In our judgment the seventh plea is, substantially, a good plea of partial failure of consideration; that it was competent for the defendant to plead, and prove, besides the articles named in the bill of sale, and called "exhibit A," the lease, was included, as set forth in the plea, and was a part of the consideration. The demurrer should have been overruled.

It is not necessary to consider other points, as the judgment will be reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

SIMEON CADWALLADER

v.

FRANKLIN HARRIS.

1. FORMER RECOVERY—*against vendee of land, in ejectment, does not conclude vendor.* A recovery in ejectment by default against the vendee of land who is in possession under an unexecuted contract of purchase, is not conclusive upon the rights of the vendor, even though he had notice of the pendency of the suit, and can not be set up to defeat an action of ejectment subsequently brought by him for the same land.

2. A recovery in such a case will conclude only the defendant in the action, as shown by the record, and all persons claiming from or through him by title accruing after the commencement of the action, and the landlord when the defendant is his tenant. The relation of landlord and tenant does not exist between vendor and vendee.

3. STATUTES—*extent of their effect on common law.* It is a general rule, that statutes are not to be presumed to alter the common law farther than they expressly declare.

APPEAL from the Circuit Court of Adams county; the Hon. JOSEPH SIBLEY, Judge, presiding

Messrs. SKINNER & MARSH, for the appellant.

Messrs. WHEAT & MARCY, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was an action of ejectment, brought in the Adams circuit court, by appellee, Harris, against appellant, Cadwallader, to recover the lands in question. The plaintiff had judgment, to reverse which this appeal is prosecuted.

It is not contended that plaintiff's evidence failed to make out a *prima facie* case; but the question is raised in this court that he was concluded by the judgment of the United States Circuit Court for the Southern District of Illinois, rendered at the June term thereof, 1867, in favor of one Kibbie, against Sturtevant, the latter being in possession as vendee of Harris

under an executory contract of sale of the lands in question, but only a portion of the purchase money having been paid.

There is nothing in the record tending to show that the strict relation of landlord and tenant existed between Harris and Sturtevant at the time the suit against the latter was brought in the Federal Court by Kibbie, or during its pendency. Counsel rely upon a virtual relation of that nature arising by implication of law, and, in argument for appellant, they assume that notice of the pendency of the suit against Sturtevant was given to Harris, wherefore they say he is concluded by the judgment. It is not pretended that Harris was brought or came in to defend the suit against Sturtevant, so as to become a party to the record.

His title was so connected to and consistent with the possession of Sturtevant, the occupant, that he might properly have been let in to defend in that action. *Williams* v. *Brunton*, 3 Gilm. 600. But he was not, and the question is, whether, the relation of vendor and vendee existing under an unperformed contract of sale and purchase, the vendor, under the circumstances of this case, is concluded by the judgment against the vendee. It is insisted, on behalf of appellant, that he is; but this result is predicated upon the fact of notice or knowledge of the pendency of the suit against the vendee.

Upon that question there was a contrariety of testimony, and it was for the court below, sitting in the place of a jury, to determine with which party was the weight of the evidence. The court having found for the plaintiff, then, if the fact of notice was material, the presumption would be indulged that the finding was against the alleged notice. But was it material, or, in other words, would Harris be concluded by the judgment against his vendee, to which he was not a party, even if notice had been shown by positive, uncontroverted evidence? By the common law, a judgment in ejectment was not conclusive upon the title of either of the parties to the record; but an innovation has been made, by statute, upon this rule of the common law.

By the 29th section of our original Ejectment act, it is provided: "Every judgment in the action of ejectment rendered upon a verdict, shall be conclusive as to the title established in such action upon the *party* against whom the same is rendered, and against all persons claiming from, through or under such party, by title accruing after the commencement of such action."

The only other provision as to the effect of the judgment, contained in the statute, is in the 31st section, which gives the same identical effect, after two years, to a judgment by default.

No proposition could be plainer than that Harris, the vendor, did not claim from, through or under Sturtevant, his vendee, by any title accruing either before or after the commencement of Kibbie's action against Sturtevant. If, therefore, the judgment against the latter can be held conclusive upon Harris, it must be upon the ground that he was in some way, theoretically or constructively, a party against whom the same was rendered.

It is a general rule, that statutes are not to be presumed to alter the common law farther than they expressly declare. But whether the court apply that rule, or the statute in question be construed liberally according to its fair intent, the word "party," when applied to a defendant, can only mean the person or persons named as defendant or defendants in the judgment.

Our statute, in this respect, is but a copy of that of New York. The latter received a construction by the Supreme Court of that State, in 1841, Nelson, Ch. J., delivering the opinion of the court. After quoting the language of the act, which is identical with ours, the court said: "It is plain the act applies only to the *party* or *parties* to the record and *privies*. The mere retainer of an attorney, or other acts by the *party in interest* to defend the suit, does not bring the case within the act, nor should the application of the provision turn upon any such extraneous matters. The record of the suit should

be the test, and must be, as it respects the person against whom the verdict is rendered." *Byerss* v. *Rippey*, 25 Wend. 431.

The judgment against Sturtevant was by default. Section 31, of the Ejectment act, declares: "Every judgment in ejectment, rendered by default, shall, from and after two years from the time of entering the same, be conclusive upon the *defendant* and upon all persons claiming from or through him, by title accruing after the commencement of the action." The word "*defendant*," here employed, is even more explicit than that of *party*, in the other section; for the law recognizes a *party in interest* as well as a party to the record, but a judgment by default can not be rendered against one not named as a party to the record.

From these provisions and their context it seems very clear that the fair intention of the legislature was, to make the record in these as in other cases the test. For, as respects the person against whom the verdict is rendered in the one case, and the judgment by default in the other, the record must constitute the sole test. Upon those persons and privies the statute makes the judgment conclusive. Can the court extend the effect beyond that given by the statute, and not falling within recognized principles? As between the vendor and vendee themselves, if ejectment be brought against the latter, and he notify his vendor to defend, the judgment might, for some purposes, be held conclusive. But that is not the view in which it is claimed to be conclusive. It is that it is conclusive between the vendor and the party who brought ejectment against the vendee, and it is upon the ground of the relation of landlord and tenant by legal implication. It is true, the court, in *Oetgen* v. *Ross*, 47 Ill. 142, so held, where the strict relation of landlord and tenant subsisted. The basis of the doctrine was section 5, of the Landlord and Tenant act, requiring the tenant, under a penalty, to notify his landlord when sued in ejectment.

The section just referred to, prescribes no form or manner of giving such notice to the landlord. If it had been intended that such notice should have the effect which the court. in that case, has ascribed to it, the legislature would, at least, have required that it be given in writing, or some formal manner. The tendency of the doctrine is subversive of the principle which underlies the entire policy of our system, in regard to acquiring jurisdiction of the person. Why is so formal a notice by service of process indispensable to a valid judgment upon contract or in actions sounding in damages, when the most casual means of knowledge of a party's claim of title and suit brought may give jurisdiction to divest a man of the most valuable tracts of land?

Nothing being required to appear of record, the door is opened for the grossest frauds and perjuries. It is a doctrine which ought not to be extended to any case where the strict relation of landlord and tenant does not exist. Such relation does not exist between vendor and vendee.

The judgment of the court below should be affirmed.

Judgment affirmed.

ELLIS L. SWEET *et al.*

v.

WILLIAM REDHEAD.

1. MARSHALING ASSETS. The rule in equity of compelling a first resort to a particular one of two funds for a creditor's benefit who can reach but one of them, will not be enforced when it trenches upon the rights or operates to the prejudice of the party entitled to the double fund, or works injustice.

2. Where A and B executed a deed of trust on 80 acres of land to secure a note given by them, and afterwards, for the purpose of releasing 10 acres of the same, in use for a cemetery, B and his wife gave their trust deed on 17 acres owned by B to secure the payment of the same note, and it appeared that, at the time of the execution of the last named

deed of trust, A and B had given two other mortgages on the 80-acre tract, one to C for $1500, and the other to D, the then holder of the note secured by the first deed of trust, for $2500; that the mortgage to C had been foreclosed and sold to E; and after the execution of the several deeds of trust and mortgages, the complainant purchased the 17-acre tract, and who then filed his bill to compel D and the trustee to sell the 80-acre tract before the 17-acre tract: *Held*, that the complainant, having purchased after the giving of the two mortgages, had no higher equity than the holders under the mortgages, and that, as the sale of the 80-acre tract first might destroy the mortgage securities, it would be unjust and inequitable to so decree.

APPEAL from the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

Messrs. SWEET & DAY, for the appellants.

Messrs. A. M. & H. W. AYERS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The case presented by the bill is this: On January 27, 1871, Samuel B. and Charles C. Troyford executed a trust deed to Albert C. Burnham on 80 acres of land in Champaign county, to secure the payment of a certain promissory note to Oswin Wells. The bill alleges that 10 acres of the tract were used for a cemetery, and for the purpose of so using the 10 acres, and for a further and collateral security of the same note given to Wells by Samuel B. and Charles C. Troyford, Charles Troyford and Mary Troyford, his wife, on the 27th day of April, 1872, executed their trust deed to Burnham on a tract of land of 17 acres in the same county; that Sandford Richards had become the owner of the note, and that Ellis L. Sweet had become successor in trust to Burnham, pursuant to a provision in the trust deeds, and there having been default in payment of the note, Sweet, upon the application of Richards, had advertised the two tracts of land for sale, for the purpose of payment of the note—the 17-acre tract, as to be sold on the 23d day of March, 1874, and the 80-acre tract, as to be sold on the 30th day of March, 1874.

The bill alleges that, subsequent to the execution of both the trust deeds, the complainant became the purchaser of the 17 acres, and it prays for an injunction of the sale as advertised, and that Sweet and Richards be compelled, first, to exhaust the 80-acre tract, before having recourse to the 17 acres, for the satisfaction of the note.

A preliminary injunction having been awarded, the court below overruled a motion to dissolve it, and, upon hearing on pleadings and proofs, made it perpetual. Sweet and Richards appealed.

The equity of the complainant is plain enough upon the face of the bill, under the application of the familiar rule, that, where there are two creditors of one debtor, the first having two funds to which he may resort for the satisfaction of his debt, and the second only being able to reach one of the funds, the first shall resort for satisfaction of his debt to that fund which he alone can reach. But it appeared in defense that, at the time of the execution of the trust deed of Charles and Mary Troyford for the 17 acres, there were two other mortgages given by Charles C. and Samuel Troyford on the 80 acres subsequent to the one first above named as given to Burnham, to-wit: one to R. A. Bower, to secure the payment of $1500, executed March 20, 1871, and recorded May 25, 1871, and one to Sandford Richards, to secure the payment of $2500, executed August 1, 1871, of the first one of which there had been a decree of foreclosure for $2072; and under the second one, in default of payment, there had been, in pursuance of a power of sale contained in the mortgage, a sale by Richards of the 80 acres to one Bailey, on the 19th of August, 1874, for the sum of $2878; that Redhead, the complainant, had knowledge of these mortgages at the time of his purchase of the 17 acres; that the deed of trust by Charles and Mary Troyford of the 17 acres was not as collateral to the one of Samuel B. and Charles C. Troyford, but that the former was given upon the release by Burnham and Richards of the 10 acres in the latter, and upon an express

arrangement with Samuel B. and Charles Troyford that the deed of trust of the 17 acres should be in lieu of, and take the place of the 10 acres released. There was no proof whatever of any of the allegations of the bill, except that the answers admitted the substantial allegations, except that the mortgage of Charles and Mary Troyford was collateral to that of Samuel B. and Charles C. Troyford.

Should the 80-acre tract, as required by the decree, be first resorted to and exhausted, and should the whole of it be absorbed in the satisfaction of the first mortgage debt, the effect would be an entire destruction of all rights under the second and third mortgages of the 80 acres, as the first mortgage is the first lien, and the sale thereunder would carry the whole title. This would be a plain injury to the subsequent mortgagees.

Now, this rule of compelling a first resort to a particular one of two funds for a creditor's benefit who can reach but one of them, will not be enforced whenever it will trench upon the rights, or operate to the prejudice of the party entitled to the double fund. 1 Story Eq. Ju. sec. 633.

As it was said by Mr. Justice Sergeant, in the case of *Zeigler* v. *Long*, 2 Watts, 206, in reference to this doctrine: "This principle must be employed, like all other rules of equity, to the attainment of justice. It is not to overthrow the equity of another person, and thus work injustice." And see *Barnum's Appeal*, 7 Watts & Serg. 269; 2 Lead. Cas. in Equity, 278, 281.

Should the 17-acre tract be first resorted to and exhausted, as Richards was proceeding to have done, according to the advertisement which was made of the sale, and should that tract be sufficient for the satisfaction of the first mortgage debt, that would be for the benefit of the second and third mortgages on the 80-acre tract; it would operate to make the second mortgage a first mortgage, and render it a security upon the whole interest in the land. The subsequent mortgagees of the 80 acres have the same equity to have the 17

acres first resorted to and exhausted in satisfaction of the first mortgage debt, in relief of their mortgages, that complainant, the purchaser of the 17 acres, has to have resort first made to the 80 acres, for the benefit of his purchase.

Complainant bought with knowledge of the subsequent mortgages, which had, before his purchase, been made on the 80 acres. The equities of the subsequent mortgagees and complainant would seem to be equal, except that those of the subsequent mortgagees are prior in time, and therefore better.

Nor do we see that complainant can be aided through his grantor's equity, that of Charles Troyford, to have the first mortgage debt of himself and Samuel B. Troyford first satisfied out of their joint land, the 80 acres, embraced in the first mortgage made by them jointly, before resorting to his (Charles Troyford's) separate land, the 17 acres, embraced in the mortgage made by himself and wife alone.

We may remark that there is nothing in the record to show whether Charles C. Troyford and Charles Troyford are different persons, or one and the same person; we assume them to be the same person.

As between Charles Troyford, or his grantee, the complainant, and Samuel B. Troyford, there would be an equity that, for the satisfaction of the joint mortgage debt of Samuel B. and Charles Troyford, their joint land mortgaged by them should first be resorted to and exhausted, before having recourse to the separate land of Charles Troyford by him separately mortgaged. But another equity here intervenes. After their first deed of trust of the 80 acres to Burnham, (the debt secured by which has come to be owned by Richards,) Samuel B. and Charles C. Troyford make a second mortgage of the same land to Richards, to secure another mortgage debt of theirs, and then, afterward, Charles Troyford makes his separate mortgage on 17 acres of land to secure the payment of the first mortgage debt of himself and Samuel B. Richards is, then, the holder of the three mortgages, and, in proceeding to enforce collection of his first mortgage debt, it is his

interest to have first applied the 17 acres separately mortgaged by Charles Troyford, as whatever is realized from that source makes the better the security of his second mortgage on the 80 acres.

If Charles Troyford, or his grantee, who stands in his place, be allowed to compel the exhaustion first of the 80 acres, it will be to the lessening of, and may be to the entire destruction of the security of the second mortgage given by Charles and Samuel B. Troyford. It would be in defeat, or to the injury of rights which Charles Troyford had himself granted.

Richards has the three securities, which have been freely given by Charles Troyford. If, by enforcing first the separate mortgage on the 17 acres, Richards will thereby strengthen the security of his second mortgage on the 80 acres, we think he well may do so. It is for himself to choose, and not for Charles Troyford or his grantee to dictate, which security he shall first foreclose. Such is Richards' right by virtue of his ownership of the mortgages.

Troyford's equity to have joint land applied to pay a joint debt, before resort to his separate estate, is here countervailed by Richards' conflicting equity to foreclose his securities in such order of time as may best secure the collection of the claims secured thereby.

Bailey, the purchaser of the 80 acres under foreclosure of the second mortgage, is, of course, substituted in the place of Richards, the mortgagee, and entitled to insist on all rights that Richards might have done had such mortgage remained unforeclosed; or Richards may do so for Bailey.

Additional support to the decision, if needed, might be derived from the special fact which appears in evidence, that, at the time of the giving of the mortgage on the 17 acres, 10 acres of land were released from the mortgage of the 80 acres, and that it was the distinct understanding between both the Troyfords, Burnham and Richards, that the mortgage of the 17 acres should be in lieu of, and take the place

of the ten acres. But we feel it unnecessary to dwell upon that.

We are of opinion the court erred in overruling the motion to dissolve the injunction, and making the same perpetual, and the decree is reversed and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

JACOB DAY

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

VERDICT—*in criminal case—must specify counts on which defendant is found guilty.* Where a defendant in a criminal case is found guilty of less than the whole number of the counts in the indictment, without specifying which counts, it will be error to render judgment on the verdict. The verdict in such case should specify the counts upon which the defendant is found guilty.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

This was an indictment against Jacob Day, for selling intoxicating liquor to a person in the habit of getting intoxicated.

Messrs. SWEET & DAY, and Mr. J. S. WOLFE, for the plaintiff in error.

Per CURIAM: This was an indictment containing twenty counts. The verdict was: "We, the jury, find the defendant guilty on ten counts," on which the court rendered consecutive judgments. This was error. The verdict should have specified the counts on which they found the defendant guilty. *The People ex rel.* v. *Whitson,* 74 Ill. ——. It was

impossible to know, from the verdict, on which counts the jury found defendant guilty, and on which he was acquitted.

Judgment reversed and cause remanded.

Judgment reversed.

E. W. MILLS *et al.*

v.

EXECUTORS OF ELIZABETH BLAND.

1. CONTINUANCE—*on amendment of declaration—affidavit.* An affidavit for a continuance by a defendant on the ground of an amendment of the declaration, should show that the party has a meritorious defense to the action, and that he was taken by surprise, and should also state facts from which the court can see that by reason of the amendment the defendant is unprepared for trial, and that at another term a good defense can be interposed.

2. ABATEMENT—*suit brought in the name of a deceased person.* After the death of the plaintiff had been suggested, and her personal representatives substituted and the declaration amended accordingly, and the defendant had filed the general issue, the defendant asked for time to prepare an affidavit showing that the original plaintiff was dead before the suit was brought, which the court refused: *Held*, no error, as the objection could be taken advantage of only by plea in abatement, and that could not be done after pleading to the merits.

APPEAL from the Circuit Court of Moultrie county; the Hon. C. B. SMITH, Judge, presiding.

Mr. A. B. LEE, and Mr. J. MEEKER, for the appellants.

Mr. A. C. MOUSER, for the appellees.

Mr JUSTICE CRAIG delivered the opinion of the Court:

This was an action commenced in the circuit court of Moultrie county, in the name of Elizabeth Bland, for the use of Eugene Bland, against appellants, upon a promissory note. Upon the first day of the term of court to which the

summons was returnable, the attorney for the plaintiff suggested the death of Elizabeth Bland, and the executors of her estate were substituted as parties plaintiff, and an amended declaration was filed, to which the defendants interposed a plea of the general issue.

The defendants then entered a motion for a continuance of the cause, based upon an affidavit as follows: "Erastus W. Mills, being duly sworn, upon his oath says he is one of the defendants in the above entitled cause, and that he is not prepared to proceed to trial, on account of the amendments, at this term, and believes he will be ready at the next term."

The court overruled the motion for a continuance, and this decision is assigned for error. The 26th section of the Practice Act, Rev. Stat. 1874, p. 778, declares: "No amendment shall be cause for a continuance unless the party affected thereby, or his agent or attorney, shall make affidavit, that in consequence thereof, he is unprepared to proceed to or with the trial of the cause at that term, and that he verily believes that if the cause is continued he will be able to make such preparation."

Upon a fair and reasonable construction of the statute we do not regard the affidavit sufficient.

The object of the statute allowing amendments was to enable the parties to obtain a speedy trial upon the merits, untrammeled by technical questions arising upon the pleadings.

The affidavit fails to show that the defendants had any defense whatever, upon the merits, to the action, or that they were taken by surprise by the amendment made to the declaration.

The affidavit, in order to authorize a continuance of the cause, should have contained facts from which the court could have seen that, by reason of the amendment made, the defendants were not then ready for trial, and that at another term of court a meritorious defense could have been interposed to the plaintiff's cause of action.

A different rule from this would defeat entirely the object contemplated by the enactment of the statute.

Another ground of error relied upon is, the decision of the court in refusing defendants time, after the motion for the continuance was overruled, to show by affidavit that Elizabeth Bland died before the suit was commenced.

We do not perceive any error in the action of the court in denying the application; at most it was addressed to the discretion of the court, and, had the fact been shown, defendants were in no position to take advantage of it, as the fact, if it existed, could only be pleaded in abatement, and this plea defendants could not then interpose, for the reason that they had already filed a plea in bar.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

WILLIAM H. COONS *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. COLLECTOR'S BOND—*additional bond may be required.* Where, after the filing of a county collector's bond for the collection of the ordinary revenue, such officer was required to collect an additional tax, the board of supervisors may lawfully require the giving of an additional bond in a penalty double the tax to be collected by him.

2. SAME—*estoppel.* Where an officer gives a bond, under which he is allowed to receive moneys, make sale of land for taxes, and receive commissions, he and his securities will be estopped from denying the validity of such bond when sued for a breach of its condition. It will be obligatory as a common law undertaking, unless prohibited by statute or opposed to public policy.

3. SAME—*misdescription of the tax in respect to the year.* Where a special bond given by a collector in respect to a special bounty tax required the collector to perform the duty of collector of such tax for the

year 1864, when, in truth, there was no such tax levied for that year, but for the year 1865, and for that year only: *Held*, that the year 1864 might be properly rejected as surplusage, as such tax was levied for one year only.

4. Describing the collector as "collector of the bounty tax" in a special bond given to secure the performance of his duty in respect to such tax, will not vitiate the bond, as the law makes him the collector of all the taxes.

5. SAME—*whether necessary to prove the levy of the tax.* In a suit upon a collector's special bond given to secure the collection, etc., of a bounty tax, there was no proof of any order levying such tax, but the bond admitted that there was such a tax to be collected, and during the trial no question was made that there was such a levy, but it was conceded by the line of defense: *Held*, that the order levying such tax under such circumstances was not necessary to a recovery, upon the bond, of the taxes shown to have been collected by him.

6. SAME—*proof of conversion of moneys not necessary.* Where an officer who has collected revenue, refuses to pay over the same on a proper demand, or neglects to make settlement with the county board when required by law, he must, when sued for the same, show what he has done with it, and in such a case no other proof of a conversion is necessary to authorize a recovery upon his bond.

7. SAME—*whether liable on first or second bond in case of re-election.* Where taxes were collected by a collector, and orders taken up during his first term of office, and he failed to make a report of his acts and to make settlement with the board of supervisors when required by law before the expiration of his term, and he was re-elected, and in a suit upon his bond given during the first term, it was contended that the sureties on the last bond given by him were liable, as it would be presumed he paid over the funds to himself as his own successor: *Held*, that the sureties in the first bond were liable, for the reason that the collector failed to make a report and surrender up the orders taken by him, and to settle with the county board when required by law.

APPEAL from the Circuit Court of Clark county; the Hon. O. L. DAVIS, Judge, presiding.

This was an action of debt, by the People of the State of Illinois, for the use of the board of supervisors of Clark county, against William H. Coons, and others, the sureties of said Coons, upon his bond as collector. The material facts of the case are stated in the opinion of the court.

Messrs. DULANEY & GOLDEN, and Messrs. WILKIN & FICKLIN, for the appellants.

Mr. S. S. WHITEHEAD, for the People.

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

It appears that appellant Coons, on the 10th day of April, 1865, entered into bond, with the other appellants, as collector of a bounty tax levied in Clark county. The bond, as executed, has this condition:

"The condition of the foregoing bond is such, that if the above bound William H. Coons shall perform all the duties required to be performed by him as collector of the bounty taxes for the year 1864, in the time and manner prescribed by law; and when he shall be succeeded in office, shall surrender and deliver over to his successor in office all books, papers and moneys belonging to said county, or to the State, and appertaining to his said office, then the foregoing bond to be void; otherwise to remain in full force."

The declaration contained various breaches, and issues to the country were joined on several which averred that he had in his hands a large sum of money collected as a bounty tax, also a large number of bounty orders issued by the county, and a large sum of poll tax, all of which he had failed to turn over or account for to the board of supervisors or to his successor in office, and had converted them to his own use. There were pleas filed, among which was a plea of performance and a plea of want of consideration.

A trial was had on the issues, by the court, by consent, without a jury. The court, after hearing the evidence, found the issues for the plaintiff, and rendered judgment for $6737.71, from which defendants prosecute this appeal and assign various errors.

The first question urged in argument by appellants is the want of consideration to support the bond; that the law did

not require a bond. The whole proceeding was conducted under a special act adopted at the session of 1865, 1 Vol. Priv. Laws, p. 110, sec. 5. It provides, "All taxes which may be levied in pursuance of the provisions of this act, shall be collected by the same officers and in the same manner as other county taxes, but the commission for collecting the same shall be only one-half now allowed by law for collecting county taxes."

Does this provision require the collector to give a bond for the faithful discharge of his duties in collecting and disbursing this fund?

What is the manner of collecting taxes in counties under township organization? After the assessment is made, the warrant is issued to the township collector, who makes return of the money collected and his books to the county treasurer, who receives such as may be paid, and sells real estate for taxes delinquent on lands, and thus collects all of the various taxes so far as that may be done. But the township collector is not qualified to collect until he has given a proper bond as required by the statute. The county treasurer is declared to be collector, and he is not qualified to act as collector until he has taken the oath of office and has given a further bond to the people in double the amount of the taxes to be collected for that year; and a failure to give such a bond vacates his office.

The execution of this bond is a part of the manner of collecting the taxes. Without it there would be no power to collect them legally. And the law requires that it should be in a sum double the amount of taxes to be collected. Here was a very large increase of the taxes levied after the collector's bond had been executed. Suppose, from inadvertence or otherwise, the collector's bond had been greatly too small when approved, does any one doubt that the board of supervisors would have had complete power to require a new or an additional bond? To hold it could not be done, would be to hamper that body in requiring the officers having charge of

the collection of taxes to render the public secure in their revenues, and might lead to disastrous results in numerous instances. The law has required the bond to be executed in a particular manner, and imposed the duty on the board of supervisors to require a compliance with its terms, and they must be held to be invested with ample power to enforce a compliance with the law in this particular.

If such a requirement may be made in the case supposed, why may not the same be made and enforced where the law has authorized the levy of a tax after the collector has given his bond, whereby it may be the bond may lack many thousand dollars of being double the amount of all taxes to be collected? The reason is as cogent in the latter as in the former of these cases. And we are of the opinion that the board of supervisors were authorized to require it, and hence there was a valid and legal consideration for its execution. We do not regard it as a mere voluntary bond, given where it was not authorized by the law.

The cases referred to in other States are not in point, and are perhaps under different statutes. The case of *People* v. *Johr*, 22 Mich. 461, holds that, where money is obtained under and by virtue of such a bond, the parties are estopped from denying its validity. It was held that, where the county treasurer was allowed to receive money and to make tax sales, the obligors could not be allowed to avail of the advantages derived from an attempt to perfect a statutory bond, and then to urge that such defective bond was not obligatory. And in the case of *Prichett* v. *The People*, 1 Gilm. 525, this court, in the case of an administrator's bond, announced the same doctrine. It was held that, by the execution of the bond, the principal, under color of legal authority, obtained the control of the personal estate of deceased, and disposed of it as the law authorized. They thus became entitled to commissions for their services; that the right to receive compensation in the shape of commissions was a valuable consideration for the promise of the principal and to sustain that of the sureties;

that such a bond was good at the common law, unless prohibited by statute or is opposed to public policy. So, in this case, the collector obtained control of this tax fund, received commissions under this bond, and, inasmuch as it is not prohibited by statute, nor is it opposed to sound public policy, it must be held obligatory.

It is urged that the bond is void, because it requires Coons to collect and to account for the bounty tax for the year 1864, when there was levied no such tax for that year, but it was levied in March, 1865. Also that there is no such office as collector of bounty taxes, and the bond imposes upon him all the duties required of him as collector of the bounty tax.

We perceive no force in the latter of these two objections. He was, in effect and for all practical purposes, the collector of that tax. He was the collector of the State, the county, school and other taxes, and we fail to see that it was of any material consequence whether he was described as county collector or as collector of the bounty tax, as his duties under the law were the same in either case. When he discharged the duty imposed by this special law, he and his sureties were fully discharged to that extent. Whether he regarded himself as county collector or collector of the bounty tax, when he was receiving and paying out this tax, could not matter, as all such acts would be referred to this bond.

The question of whether he and his sureties can be held liable under this bond for bounty taxes levied in 1865, is not free from difficulty. It seems to be conceded that there was but one bounty tax ever levied in that county, and that was in March, 1865, and it may be inferred that it was to secure the faithful performance of Coons' duty in collecting and disbursing this tax that induced the county authorities to require him to execute this bond; and it is apparent that if the wrong date was written by mistake, a court of equity would reform and correct the instrument. If, however, we may, in the light of all the surrounding circumstances, strike out the

figures "1864" as surplusage, the condition of the bond would be free from all doubt and uncertainty.

When it is seen that there was but one such tax levied, and it was ready to be collected, and this bond was manifestly entered into to enable Coons to collect that tax, we do not perceive that we should do any violence to the rules of interpretation by rejecting the figures as surplusage. By doing so we feel well assured that we are but carrying into effect the clear intention of the parties. The obligors manifestly intended to bind themselves for the faithful discharge of all the duties of Coons in reference to the collection of this tax, and they delivered it, and the county authorities received it as a valid and effectual instrument. The makers, we may well suppose, intended to deliver a valid instrument. Nor did the county authorities intend to receive an invalid bond. Had there been a tax levied for 1864, then the bond would only apply to that tax. But there being none for that year, the recital is untrue, as there was nothing that language could embrace. But when stricken out, the bond then embraces what was intended by all parties, and carries out their purposes when the instrument was executed. We feel ourselves fully warranted in rejecting the repugnancy and holding that the bond applies to and embraces the bounty tax thus collected, and that there is no necessity to turn the parties over to a court of equity.

It is insisted that appellees failed to make a case against appellants; that the order levying the tax should have been read in evidence.

The evidence shows there was a bounty tax levied, and that Coons collected a large portion of it. They, in their bond, admit there was a bounty tax to be collected, and it does not seem, during the whole trial, to have been questioned, but to have been conceded. The town collector's books show it, Coons' receipts show it, and the whole line of defense concedes it. Under these facts, we think the court had ample

evidence that the tax was levied, and, moreover, several of the pleas admit the tax was levied.

Where an officer collects money under an execution, he would not be heard to say that there was no judgment on which it could issue, and he would therefore appropriate the money to his own use. Having acted under it, he admits and is bound by it as being a valid process. So in this instance, Coons received the warrants from the various town collectors without question, and proceeded to collect and did collect large sums of money under these warrants, and why should the order levying the tax be produced? We are satisfied that the evidence was sufficient to show the tax was levied, and that is all the rules of practice require.

It is urged that appellees failed to prove a conversion of this fund; that the mere proof that Coons had received the money was not enough to require him to show what he did with it.

We entertain no doubt that, where an officer has received money and refuses to pay on a proper demand, he must then show what he has done with it, or be liable for it. Or where he is required to dispose of it in a specified mode, by a particular time, and he fails to do so, he is then, to avoid liability, required to account for its proper and legal disposition.

The 13th section of chapter 28, R. S. 1845, requires the county commissioners, at the June and December terms of each year, to settle with their county treasurer and count the funds in the treasury, and the clerk to enter of record the amount and kind of funds in the treasury. Although this, in terms, applies to county commissioners, as has been repeatedly held, it embraces boards of supervisors, as the law applicable to the first is declared to embrace the latter. The settlement being required, it is the duty of the treasurer, who is *ex officio* collector, to become an actor in such settlement. He necessarily should present a full and detailed statement of the moneys received from all sources and the moneys paid out, with dates, etc., as the basis of a settlement. He has the

books and the treasurer's and collector's accounts, and he should furnish the information to the board, and then it is their duty to examine it, by committee or otherwise, and see that it is correct; and a treasurer failing to do so when acting as collector, is in default of duty to the same extent that he is when acting as treasurer, and when he fails or refuses to report at the regular session of the board of supervisors, he has omitted a duty imposed by law that places him in a position that he must, when thereafter legally required, show what disposition he has made of public funds that have come to his hands. Thenceforward the burthen of proof is upon him to discharge himself from the liability to account for and pay over funds shown to have come into his hands.

In this case it appears that Coons did not offer to report until in 1868, and, from some unknown cause, and strange as it may seem, the board of supervisors would not receive it or permit it to be read. Why they should refuse to receive the report and settle with the collector, in violation of a requirement of the statute, is incomprehensible to us. We can imagine no well founded reason for such action, when we see it accompanied with positive refusals of the board to settle with Coons. It has much the appearance of an effort to permit Coons to use and appropriate this fund to his own use, or to shield him in defaults he had already committed. Nor does it imply that they were zealous in protecting the people in their pecuniary rights. But that did not release Coons from the effect of his neglect to report during the year 1865, for the tax collected before the annual session of the board of supervisors, or at the first session in 1866, for moneys thus collected and bounty orders received after the time he should have reported. But failing to report in 1865, he should have made a full report in 1866. But failing in this duty, it devolved on him to show what he had done with the money and orders which he is shown to have received. If he did his duty, he collected the taxes within the time required by law, either by voluntary payment or by sale of delinquent lands.

And inasmuch as we have no evidence of a sale having been made, we may presume collections were made during the year 1865, prior to his entering upon his second term. In this case he was shown to have received during his first term, of this tax, a sum very much larger than the judgment recovered. The receipts were in money and bounty orders uncanceled and liable to be again put into circulation. Appellants have failed to show that such orders were ever canceled, and failing to do so, the court below was fully warranted in the inference that they had been again put in circulation by Coons, and, for the same reason, that he had used the money for his own individual purposes, and the county would be thus compelled to again take up the orders, and also to levy and collect a sum of money to replace the amount thus used.

It is urged that it is not shown that Coons did not pay over the money and orders thus collected to his successor, and hence appellants are not liable; that, as he became his own successor about the first day of December, 1865, we must presume he complied with that part of the condition of his bond. This might be true if there were no other condition in the bond. But it is conditioned that he will perform all of the duties required of him as collector of the bounty tax, etc., in the time and manner prescribed by law. It was manifestly a breach of duty for him to convert the money and orders which he had collected to his own use; and in the fourth breach of the declaration it is averred that he so converted them. And as he had received a large sum more than the judgment, failed to report and to surrender up the orders at the September session of the board in 1865, and has failed to show what disposition has been made of them, the court below was warranted in finding that he had converted them to his own use; or, under other breaches, that, having converted them, he did not pay and deliver them to himself as his successor. If previously converted, he could not, in any sense, deliver them to his successor.

The entire record considered, we fail to find that there is any error for which the judgment of the court below should be reversed. In fact, the evidence would have justified a much larger judgment.

Judgment affirmed.

Mr. Justice Scholfield took no part in the decision of this case.

The Toledo, Wabash and Western Railway Co.

v.

Ephraim S. Hamilton *et al.*

1. Carrier—*liability for stock while being transported.* Where a railroad company accepts stock for transportation, it is bound to take reasonable care of it, and if, from the want of such care, loss ensues, the company will be liable to the owner.

2. Same—*duty to provide water for stock.* It is as much the duty of the servants of a railway company to provide water, at suitable points on the line of its road, for the use of stock, as it is their duty to carry such stock; and where hogs, while being transported, died for the want of water, it was held that the company was liable.

3. Same—*burden of proof to show exemption from liability is on the carrier.* Where a carrier receives live stock for transportation, and a loss is sustained by the owner in consequence of their not being supplied with water, the burden of proof to show an exemption from liability rests upon the carrier.

Appeal from the Circuit Court of Ford county; the Hon. O. L. Davis, Judge, presiding.

This was an action on the case, by Ephraim S. Hamilton and William Cessna against the Toledo, Wabash and Western Railway Company, to recover for loss sustained on a lot of hogs from the want of watering and properly caring for them while being transported. The material facts of the case appear in the opinion.

Mr. Owen T. Reeves, for the appellant.

Messrs. Wood & Loomis, for the appellees.

Mr. Justice Scott delivered the opinion of the Court:

This action was brought to recover for the loss sustained on a lot of hogs, resulting, as alleged, from the negligence of the railroad company in failing to water and care for them while in its charge, being shipped from Rankin, Illinois, to Toledo, Ohio. The evidence preserved in the record makes a clear case against the company within the rule declared in the *Illinois Central Railroad* v. *Adams*, 42 Ill. 474, and we refer to that case as stating the principles of law which must control this decision.

Upon the questions of fact involved, the evidence is abundant to sustain the finding of the jury. It is not contested the hogs died for the want of water while in the custody of the carrier. The excuse insisted upon is, the company had no water that could be used for that purpose on the line of its road between the shipping point and Toledo, where the hogs were to be delivered to another carrier. The burden of proof to show exemption from liability as a carrier rested upon defendant. This it has not done. The proof shows there was water at Hoopeston. The conductor of the train was apprised of the suffering condition of the hogs at that station, and requested to give them water. According to plaintiff's testimony, he declined to comply with this request, not because there was no water, but if he ran slow enough by the tank to water the hogs he would not be able to get his train up the grade beyond.

It is also insisted, all the water at that point was wanted for the use of the engines running on the road. Whether there was enough water for the use of the engines and hogs does not appear from anything in the evidence, nor do we regard it as material. There was certainly water there in addition to what was required for present use, and the servants of the

company in charge ought to have used it on the hogs. It was as much the duty of the company to provide water at suitable points on the line of its road for the use of stock, as to carry it. Before they received the stock they should have known whether they had water, and if suddenly the supply had become exhausted, they should have notified the owner. But having accepted his stock for transportation, they were bound to take reasonable care of it, and if, from the want of such care, loss ensued, the company is liable. Had the hogs been watered at Hoopeston, and been unloaded within a reasonable time at Toledo, it very clearly appears the loss would have been avoided. In both respects the company was guilty of gross negligence.

No error appearing in the record, the judgment will be affirmed.

Judgment affirmed.

The Toledo, Wabash and Western Railway Co.

v.

Mary Durkin, Admx. etc.

1. Master and servant—*respondeat superior—negligence of fellow-servant.* It has been uniformly held by this court, as by the English courts, that the doctrine of *respondeat superior* does not extend to the case of an injury received by one servant through the carelessness or negligence of another, while both are engaged in the business of the principal, if the latter has taken proper care to engage competent servants to perform the duties assigned them.

2. Negligence—*servant of railroad corporation assumes the risks incident to his employment.* When a person enters into the service of a railroad company, he thereby undertakes to run all the ordinary risks incident to the employment, including his own negligence or unskillfulness and that of his fellow-servants engaged in the same line of duty, or incident thereto, provided such other servants are competent to discharge the duties assigned them.

3. Same—*ringing bell, etc.* Where the omission to ring a bell or sound a whistle at a road crossing appears not to have contributed in the slightest

degree to an injury or accident on a train of cars, the railroad company operating the same will not be subjected to liability in a civil suit for damages in consequence of such omission.

4. Practice in Supreme Court—*remanding.* Where a judgment was reversed, and it appeared, from the agreed statement of facts, that no recovery could be had, the cause was not remanded, but the costs, both in this and the court below, were ordered to be taxed against the appellee, who was also the plaintiff below.

Appeal from the Circuit Court of Madison county; the Hon. William H. Snyder, Judge, presiding.

This was an action on the case, by Mary Durkin, administratrix of the estate of Lawrence Durkin, deceased, against the Toledo, Wabash and Western Railway Company, to recover compensation for wrongfully and negligently causing the death of said Lawrence Durkin. The deceased was engaged as an employee of the defendant at the time he was killed. He was returning to his home at the time on a platform car, with other hands, and the train, while backing, struck some cattle on the track near a road crossing, whereby the car on which the deceased was sitting was thrown from the track and he was killed. The cause was tried by the court below, without a jury, on an agreed statement of facts. The court found for the plaintiff, and rendered judgment for $3000 in favor of the plaintiff, and the defendant appealed.

Mr. G. B. Burnett, for the appellant.

Mr. Charles Conlon, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

This is an appeal from a judgment of the circuit court of Madison county, rendered on an agreed state of facts, presenting the single question, so often and so uniformly adjudicated by this court, and by other courts in England and in this country, arising out of the doctrine of *respondeat superior.*

So far back as the case of *Honner* v. *The Illinois Central Railroad Co.* 15 Ill. 550, decided in 1854, this court said this doctrine

did not extend to the case of an injury received by one servant through the carelessness of another, when both are engaged in the business of the principal.

This case was followed by *Illinois Central Railroad Company* v. *Cox*, 21 ib. 20, with a slight qualification, the court holding that a railroad company or other corporation are not responsible for injuries to their servants or agents occasioned by the carelessness or negligence or unskilfulness of fellow-servants while acting in the same service, without their knowledge or sanction, provided such company or corporation have taken proper care to engage competent servants to perform the duty assigned them. It was further held, when a person enters into the service of a railroad company he thereby undertakes to run all the ordinary risks incident to the employment, including his own negligence or unskilfulness, and this includes the risk of occasional negligence or unskilfulness of his fellow-servants engaged in the same line of duty, or incident thereto, provided such fellow-servants are competent and skilful to discharge the duty assigned them.

Reference was made to *Honner* v. *Ill. Cent. R. R. Co. supra*, and numerous English and American cases, all holding the same doctrine, among which were *Hutchinson, Admx.* v. *The York, New Castle and Berwick Railway Co.* 5 Exch. 341; *Wymore, Admx.* v. *Jay*, ib. 353; *Skip* v. *Eastern Counties Railway Co.* 24 Eng. L. and E. 396; *Wiggott* v. *Fox*, 36 ib. 486; *Farwell* v. *Boston and Worcester R. R. Co.* 4 Metc. 49; *Murray* v. *S. Carolina R. R. Co.* 1 McMullen, 385; *Brown* v. *Maxwell*, 6 Hill (N. Y.) 592; *Ryan* v. *Cumberland Valley R. R. Co.* 23 Penn. 384; *Shields* v. *George*, 15 Geo. 349; *Madison and Indianapolis R. R. Co.* v. *Bacon*, 6 Ind. 205.

The doctrine of the case in 15 Ill. and 21 ib. *supra*, was followed and adhered to with no shadow of change by *Moss* v. *Johnson*, 22 Ill. 633; *Ch. and N. W. R. R. Co.* v. *Swett, Adm.* 45 ib. 201; *Ill. Cent. R. R. Co.* v. *Jewell*, 46 ib. 99; *Chicago and Alton R. R. Co.* v. *Keefe*, 47 ib. 108; and *Same* v. *Murphy*, 53

ib. 336; *C. B. and Q. R. R. Co.* v. *Gregory,* 58 ib. 272; *C. and A. R. R. Co.* v. *Sullivan,* 63 ib. 293.

In Keefe's case, *supra,* this court said, commenting upon the cases in 15 Ill. 20, and 22 Ill. *supra,* that the decisions therein were in conformity with the great current of authorities, and that the question, whether one servant could recover against the common master for injuries resulting from the carelessness of a fellow-servant, if the master had used due diligence in their selection, was no longer an open question in this court.

In this case the facts agreed concede the competency of the fellow-servants of the injured party, and in opposition to these decisions of this court of last resort, pronounced with great unanimity, establishing the doctrine, the circuit court, by its judgment, totally ignored them, and held them for naught. Either the learned judge had forgotten these cases, or perceived something in the facts of this case taking it out of the rule established in them. But we fail to perceive anything which can or should take this case out of the operation of the rule we have so frequently announced.

Many other later cases are referred to by appellant, which are directly in point with this. Among them *Fitzharmon* v. *R. R. Co.* 10 Cushing, 228; *Russell* v. *R. R. Co.* 17 N. Y. 134; *O. and M. R. R. Co.* v. *Tindall,* 13 Ind. 366, and numerous other cases, all recognizing the same doctrine.

Appellee's counsel, with commendable candor, admits the law to be as these cases declare it to be, but complains of its harshness, expressing a hope that it may be relaxed.

We do not well perceive how such corporations could perform the duties they owe the public if amenable to an action for an injury to one servant caused by the negligence of a fellow-servant, the corporation having provided competent servants.

As was said in Cox's case, *supra,* a party entering into such service undertakes to run all the ordinary risks incident to the service, and this includes the risk of occasional negligence

or unskilfulness on the part of his fellow-servants engaged in the same line of duty, or incident thereto.

It is complained as negligence that the gravel cars had no seats—no side protection, and were dangerous. This is all true, and deceased knew that when he entered into the service, and graduated his wages accordingly.

It would hardly be expected these cars should be fitted up with side railings, cushioned seats, or reclining or other chairs. All the hands knew there were no such conveniences, and their only chance for rest, in a run of four miles, would be the platform of the cars.

What good would it do to ring a bell or sound a whistle at a crossing under such circumstances, taking into consideration the men upon the platform? It would be of no service to them, and the omission could not have contributed in the slightest to the accident. Nor was this a point mooted in the case.

The judgment of the circuit court, being against all the authorities on the question, and against the rule as announced by this court, is reversed, and as no cause of action is shown, the cause will not be remanded. The costs will be taxed against appellee, both in this court and the court below, to be paid in due course of administration.

Judgment reversed.

MARIA HEWITT

v.

JESSE LONG.

1. CUSTODY OF CHILDREN—*good of child the primary object.* In disposing of the custody of children, the primary object should be the good of the children, and where the child has arrived at an age to choose for itself, the court will not take it from one parent and give it to another against its wishes.

2. SAME—*ground of father's superior right at common law.* The father's paramount right to the custody of his child by the common law, springs from his obligation to provide for its maintenance. Where he is fully discharged from that obligation by decree of court granting his wife a divorce, his common law right to the custody of his child must necessarily yield to the discretionary power over the subject vested by the statute in the court.

3. SAME—*effect of decree of divorce on question.* Where a divorce is granted to a wife for the misconduct of the husband, on a subsequent application to modify the decree giving the mother the custody of their child, the father will be conclusively estopped from alleging any facts inconsistent with those found in the decree of divorce.

4. Where the father wilfully deserted his wife before the birth of their daughter, without cause, went to another State, and when the child was fourteen years of age, sought to have the decree giving the child to her mother on divorce modified, and her custody given to him, so that he might take her out of the State among total strangers, and thus deprive the mother, the unoffending party, of her society, and it appeared that the child did not want to be taken from her mother, who was devotedly attached to her, and was shown to be an amiable and respectable person, and to have done her duty by the child, and was able to give her a good education and properly care for her, it was *held*, that a decree giving the child to the father thus situated, although wealthy, could not be sustained, and the same was reversed, and the petition of the father dismissed.

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

The facts of the case are fully stated in the opinion of the court, and in the dissenting opinion of Mr. JUSTICE BREESE.

Messrs. DUMMER & BROWN, for the appellant.

Messrs. KETCHAM & GRIDLEY, for the appellee.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This is a controversy between parents, about the custody of a female child, named Alice Long, born October 5, 1858. The parties to the suit were married in Cass county, this State, March 15, 1857, and from thence lived together as husband and wife in that county until the wife, appellant

here, became advanced in pregnancy with said child, when, and before her birth, Jesse Long, the husband, appellee here, wilfully and without any reasonable cause deserted and absented himself from appellant, and so continued to do for the space of more than two years, whereupon she filed her bill in the circuit court of Cass county, where she had, meanwhile, resided, for a dissolution of the marriage, on the ground of such desertion. Jurisdiction was obtained of the person of appellee by publication, and by his afterwards causing his appearance to be entered by an attorney in fact, and such proceedings were thereupon had in said cause that afterwards, at the September term, 1860, of said court a decree was duly entered therein in appellant's favor and against appellee, dissolving said marriage for the cause aforesaid, and awarding the care and custody of said child to appellant, the mother, also requiring appellee to pay appellant as alimony the sum of $1000, and to the guardian of said child the sum of $2000 for her support and maintenance. These sums, as appears by the decree, were respectively paid at the time of entering it.

At the January term, 1873, of said court, Long presented his application, by petition and notice, for a modification of said decree so as to take the custody of said child from the mother, and bestow it upon him. At the April term next following, the application was granted, and the mother appeals to this court.

We shall not undertake to set out in detail the evidence upon which this modification was made, but only the results of it, as gathered from a careful examination.

It appears that from Long's first desertion of his wife, he has continually absented himself from this State, with the exception of two visits, at which he barely saw Alice, and a third, when he came with two other men with a view to take her with him to Iowa, without the leave of the court, but could not find her. On this last occasion he did not see her at all. By his thus absenting himself from the State, he was

almost a total stranger to the child. It appears that at the time of the hearing, Alice was upwards of fourteen years of age, and she testified in court to her desire to stay with her mother, and her aversion to being taken away by her father, who was a stranger to her. As showing reasons for the modification, Long introduced the testimony of various business men and some public officers residing in Jasper county, in the State of Iowa, to the effect that Long was the owner of, and resided upon, a farm situate about six miles from the village of Newton, in that county, the farm comprising some 2000 acres of land, mostly under cultivation, with a good house and other improvements upon it; that he was a cattle raiser, drover, and active business man; that he had a large amount of personal property, and his whole property was variously estimated at a value ranging from $50,000 to $150,000; that he was president of a national bank in Newton, had established a church and a school on his farm. It was shown that in 1867 he married the wife with whom he then lived, but had no children by her; that his house was well furnished, having both a piano and organ in it, upon which his wife played, and that she was a teacher in a Sabbath school. There is no evidence as to the age or experience of this wife, and none in respect to her, coming from any one having more than a general, casual acquaintance with her—none as to who she was, where she was brought up, what was her character before her marriage, or as to any of her personal characteristics. All that can be determined about her from the evidence, is barely that she is a woman who attends church, teaches in a Sabbath school, and plays upon a piano and organ. It is virtually into the society, keeping and control of this unknown woman, a total stranger to this young girl, that the latter is to be forcibly cast by the order appealed from. It is unnecessary to say, that a woman may attend church, may teach in a Sabbath school, and play both piano and organ, and yet be wholly unfit to be the mistress over a girl reared in tenderness and affection, as Alice

has been. The father can have no particular affection for this child. The theory of natural affection which tenderly clings to a child whom a parent has never scarcely seen, and upon whom he has bestowed no care, may do for works of the imagination, but will not, in the absence of proof, be presumed in a judicial investigation. There being much to repel, and nothing to warrant, the inference of affection on his part, when we consider his heartless treatment of the mother, his voluntary desertion of the child itself until nearly fourteen years of age, are we not justified in suspecting his motives? May they not be, after all, to annoy the mother, whom he must feel conscious of having injured, or may they not be to place the child in the position of mere drudge to this second wife, of whose personal characteristics we know so little? Is Long shown to be such a man as to whom no such motives should be imputed? If he possesses any degree of natural affection, why has he not exhibited it towards this child in earlier years? Without reasonable cause he deliberately deserted the child's mother when she was about to become such, and that mother never received from him one word of explanation, either by letter or message, has never even seen his face from the time of that act until she met him in court, more than fourteen years afterwards, to resist his efforts to tear this child from her very bosom, to forcibly bear away the girl to a foreign State, among strangers, where she may be immured in that country castle, a virtual prisoner, under the dominion of such a father, beyond the ear of the court of which she is ward, beyond the reach of its protecting hand, and beyond a mother's watchful eye, while we have no assurance of a counteracting influence from the second wife. Can a chancellor, under these circumstances, say, upon his conscience, it is just, it is in accordance with humane, equitable principles, to place this child's welfare, physical and moral, in such jeopardy?

But his counsel say he may have had reasonable cause for leaving this child's mother as he did, but he is too manly to

disclose it. No speculations of this nature can be indulged. Appellee can not make an issue upon that question. The statute makes wilful desertion, without reasonable cause, for the space of two years, a ground for divorce. Upon that ground the bill in the original cause was filed. The decree finds all the necessary facts, and dissolves the marriage. By this decree he is conclusively estopped from alleging in this proceeding that he had reasonable cause for the desertion.

Again, the witnesses from Jasper county seem none of them to have known him there more than five or six years. Prunty, who was his attorney in fact in the divorce case, says he has known him twenty-five years. There is no witness, not even Long himself, who pretends to testify as to what means he had at the time he deserted appellant, or where, for the eight years preceding his being known in Jasper county, he had been, what he had been doing, or how he acquired his vast property, which he says amounted to from $150,000 to $200,000. There was a presumption against him for his past acts, which it was for him to overcome by proof. In short, it was for him to satisfy the conscience of the court that he was a different man from what he was when he committed the breach of his marital obligations. How has he done this? By showing that somehow, during the late civil war, he acquired a large property; that he was president of a national bank? His wealth would give him that position. By showing he had established a church and school on his farm? His property alone would do that, and the motive might be the gratification of personal vanity. That he kept his contracts with his fellow-men? Self-interest would dictate that. We have given us, to repel the presumption against him that he could not be relied on in the relation of guardian having the custody of this child, literally nothing but the general evidence of business men and public officers of Jasper county, touching his mere outward circumstances and appearances, with the simple fact superadded that in his business transactions he was generally correct. This is but the exhibit which

any man may make, no matter how faithless in his domestic relations, who had in early life married a virtuous and respectable girl; lived with her long enough to fully gratify his animal passions, and until she was about to become a mother, then, without reasonable cause, basely desert her; go west; acquire, no matter how, large wealth; marry a lady capable of making a display, by being a leader in the church and Sabbath school, of playing piano and organ; establish a church, a bank and a school, and gain that sort of influential position which wealth, especially in new communities, so readily leads to. If the question were, whether the circuit court of Cass county should permit the property of a ward of that court to be taken out of its jurisdiction and intrusted to the hands of Jesse Long, it would be different; yet, would there not be great hesitation, even then? But the question here is, whether that court shall abdicate its functions in respect to its ward, Alice Long, a girl of fourteen years, tenderly reared, and devotedly attached to her mother, and subject her to be forcibly, and against her will, wrested from the circle of her home and her love, carried beyond the jurisdiction of the court into a foreign State, there to be subjected to the dominion and control of a father who is a total stranger to her, and of whom all the court knows is, that he basely deserted that child's mother, but has since, and during the late civil war, become wealthy, and acquired the ostentatious position which mere wealth itself may bestow.

Usually, the question of custody of children arises between parents who have mutually contributed their aid and parental offices to rearing them, and where, from the circumstances, the degree of their affections is nearly the same; but here, the care and watchfulness are all from the mother; she has all the affection for this child which a kind mother can have, and it is next to impossible, from the circumstances, that Long should have any; and yet, she being the unoffending party, the only parent who can be supposed to have strong, tender affections for this child, is to be thus forcibly deprived

of her society, and not only that, but subjected to the severe and immitigable punishment of having the object of her love carried, against her will, into a foreign State, thus cutting her off from even the poor privilege of visiting her and learning of her welfare. What has she done to merit all this? Who is she, that her rights, the claims of a mother's affections, should be so disregarded—so despised?

It is quite impossible to read the evidence in this record without rising from its perusal with a thorough conviction of both reason and conscience that this mother is a most estimable woman. Her character and all the antecedents leading to its development, together with her precise relations to this child, are before us. When she gave birth to Alice, there was also born a twin brother. The terrible perils of this birth she encountered alone, without the aid, presence or sympathy of Jesse Long, her then husband and the father of those children. She not only encountered them alone, but with the stigma and mortification of his inexplicable desertion superadded; and thus alone, basely deserted by him who only a little over one year before had taken upon himself all the solemn obligations of marriage, she had to nurture and care for these helpless offspring of a faithless husband, when, after about a year, she consigned the little boy to the grave. Alice survived; and for five years, during all the worst dangers of infancy, this mother, taking refuge under her father's roof, gave that child her care and watchfulness, under circumstances well calculated to bind it closely to her heart. It needs not the words of witnesses to tell us that no object is likely to become more dear than a child nurtured in sorrow by a deserted mother. Through all these trials, and in every new relation, she has borne herself in such a manner as to secure the respect of her acquaintances and neighbors. If one stain upon her character could be found, Long, who had ignored his relationship to this child for fourteen years, and now comes, in the pride and panoply of his wealth, and the arrogance of the common law right of fatherhood,

to snatch it away, would have found and fixed that stain upon her. By what guide to the discretion and conscience of a chancellor can this thing be done? It is not pretended, by the evidence, or even in the argument of counsel, that this appellant is not a fit and proper person to have the continued custody of this girl, at an age when the moral and physical welfare of the latter, above all other times, needs the confidential advice of a mother. The evidence shows that after Alice was five years old, and appellant married Somers Hewitt, she was, at the earnest request of appellant's parents, then advanced in life, with no children at home, but in good circumstances, and between whom and Alice there was a mutual attachment, permitted by appellant to stay temporarily with her grandparents.

There was an ante-nuptial agreement between appellant and Somers Hewitt that Alice should have a home in her family, and be treated as a child. This agreement Hewitt has always been willing cheerfully to fulfil; but as the grandparents found so much comfort in the society of this child, she was permitted to remain with them until they died—the grandfather dying in November and the grandmother in December, 1872. During all this time, the relations between Alice and her mother were most intimate, and the latter had the actual superintendence of her course of life. She had received all the education which it was meet and proper for a child of her age to receive. She is dutiful, bright and vigorous, and her mother, having taken her home at the death of her grandparents, declares, as a witness, her purpose to bring her up with virtuous, industrious habits, and give her a good education; and to this end she needs none of appellee's money. Alice is worth $5000 in her own right. Appellant derives from her father's estate some $5000 or $6000 in her own right; and Somers Hewitt is a respectable, well-to-do farmer, owning some 200 acres of land, with a large, commodious house upon it, free of debt, with plenty of personal property, and is worth from $12,000 to $15,000. He is willing to give

the girl a home with her mother, and make up whatever is lacking to give her a suitable education.

Under all these circumstances, we are at a loss to understand what reason could have dictated the making the modification of the decree, unless it was the supposed paramount common law right of the father, as such. In disposing of the custody of children, the primary object should be the good of the children. Now, waiving all other questions, can it be successfully maintained that the good, the substantial welfare of Alice Long, will be promoted by thus forcing her away from her mother and all the associations of her childhood, and taking her into a foreign State, among total strangers, to pine, and, perhaps, die of a broken heart? Are her feelings and choice entitled to no consideration? Would not the impression that a great wrong had been committed upon her remain with her as long as life lasted?

"The proposition," says Bishop, "is generally regarded as true, that one who has conducted either well or ill in a particular domestic relation, will conduct the same in another; and so, as a general practice, the court gives the custody to the innocent party, because with such party the children will be more likely to be cared for properly." 2 Bish. on Mar. and Div. sec. 532. This rule, from the language employed, is subject to certain exceptions, which are not material to this case.

But counsel for appellee say, that "courts of equity will not only investigate the facts, but will also recognize the legal principle that the right of the father to the custody of a minor child is paramount to that of the mother."

Courts will recognize the principle whenever it is applicable. This right of the father springs from the obligation of the father, by the common law, to provide for the maintenance of his children. Kent says: "In consequence of the obligation of the father to provide for the maintenance, and, in some qualified degree, for the education of his infant children, he is entitled to the custody of their persons and

to the value of their labor and services." 2 Com. 193. No such obligation rested upon Jesse Long. He was fully discharged from it by the original decree; and, besides, how could any such paramount right co-exist with the exercise of the power conferred by the provisions of the sixth section of the divorce act upon the court of chancery? "When a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the *care, custody and support* of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just." Whenever a father becomes subject to the jurisdiction of the court, in a proceeding for a divorce, his common law right to the custody of infant children must necessarily yield to the discretionary power over the subject, vested by the statute in the court. This point is expressly decided in the case of *Miner* v. *Miner*, 11 Ill. 43. It was there held that, under our statute, the paramount right of the father to the children will not be recognized where a divorce has been granted for his fault or misconduct. See, also, *Cowls* v. *Cowls*, 3 Gilm. 435.

In the former of these cases, the court said: "It is apparent from the record that there is some intention on the part of the mother, if allowed to retain the custody of the child, to remove her beyond the limits of the State. This can not be tolerated, and must be guarded against. While the child is given to the mother, the father must not be wholly deprived of its society, but must be allowed access to it upon all reasonable occasions."

The principle or reason upon which this observation is based does not appear any further than that, by such removal, the father would practically be wholly deprived of the society of the child. By the decree, Alice Long became the ward of the court. The incidents of that wardship, by our law, are: The ward must be protected from ill treatment; must be educated under the court's superintendence, and her estate

must be managed and applied under the like superintendence. The mother here, by the delegation of the court's authority, was made the guardian of her person, though not of her estate. For that purpose another person was appointed. The fact of her having an estate derived through the decree, would enable the court to exercise its power of superintendence over her education. The guardian of the person of an infant, appointed under the inherent or statutory authority of the court, is, for that purpose, an officer of the court. Now, while we do not deny the power of the court to permit the ward, under special circumstances, to be taken temporarily out of its jurisdiction, still it seems to us that to remove a guardian who resides in the county of the court, and appoint one who does not, and is to continue to reside beyond the limits of the State, to whose domicil the ward is to be taken, and there permanently to remain, is for the court to divest itself of all practical power over the incidents of the wardship, and to virtually abdicate its functions in respect to those incidents. For what control can the court have over one, theoretically an officer of the court, but who resides permanently beyond the limits of the State? What protection can the court give to its ward thus permanently residing; what superintendence over her education; how manage and apply her estate?

But the question has still another aspect. Concede, for the sake of argument, that under certain special circumstances, the court may thus virtually abdicate its functions, the real question in this case is, whether, in doing so, the court may *compel* this ward, against her express opposition, to quit this State and submit to be taken, against her will, into another, to there permanently reside. She had arrived at years of discretion when the order appealed from was made. She was upwards of fourteen years of age. She was capable of judging for herself, and had the natural right of determining where she would go. Courts "will consult the inclination of the infant, if it be of a sufficiently mature age to judge for itself,

and even control the right of the father to the possession and education of the child, where the nature of the case appears to warrant it." 2 Kent's Com. 195. In *King* v. *Greenhill*, 4 Adolp. & Ellis, 624, LITTLEDALE, J., said: "Upon general principles of law, the father is entitled to the custody of the children. If they be of an age to judge for themselves, *they have a right to determine where they will go;* but if they be not, it is the bounden duty of the court to put them in that custody which the law points out." This was where the common law paramount right of the father was in force in all its severity.

Here, the question arises under a statutory authority which abrogates that right and requires the court to make such an order as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just. Alice Long was born in this State, owes natural allegiance, and has certain independent personal rights. The laws and customs of this State are her birth-right. It is by those laws and the circumstances of her parents that she became a ward of the court, and, as such, entitled to its protection and superintendence over her welfare. By those laws, she will attain her majority and be entitled to the possession of her estate in the hands of her guardian, and to call him to account when she becomes eighteen years of age. Whereas, the common law is presumed to prevail in the State to which she is to be taken, and by it she will not be emancipated until she attains the age of twenty-one. It is the English rule, and one founded upon substantial grounds, that, although the court may, under special circumstances, allow an infant ward to go out of the jurisdiction, yet it will never *compel* his removal. *Dawson* v. *Jay*, 3 DeG. Mac. & G. 764.

In that case, the ward was eleven years of age, but was strongly opposed to being taken away. In the course of his opinion, the Lord Chancellor said: "I know of no instance in which this court, when exercising its jurisdiction in taking care of the subjects of this country, has ever so far abdicated

its functions as to send a ward away to some other jurisdiction. * * * I know of no instance in which it has been done; nay, more, I very much doubt whether any functionary in this country has authority to compel a subject of this country thus to expatriate himself, for that is the truth of what is proposed. * * * I am to deal with the child as the parent would, but subject to the qualification, that I have no right permanently to divest myself of the control over the child, which I should be doing if, in this instance, I were to send her out of the country."

The modification of the decree is clearly unjust toward the mother. As these parties stand before the court, the father is the guilty, the mother the unoffending, party. He has become a stranger to the child, deprived himself of her society by his own voluntary and very deliberate act. He, judging him by his conduct, must be quite destitute of affection for the child, while the mother is bound to her by the strongest ties. Now, if either of these parties must, in the future, be deprived of the society of the child, which, under these circumstances, ought it to be, the unoffending or the guilty party? The law has such regard for the affections of parents, where they are shown to possess any, that when a divorce is decreed, even the guilty party will not be wholly deprived of the society of the children, but provision will be made for such party to visit them at all reasonable times. It was to avoid the deprivation of this right, that this court, in *Miner* v. *Miner*, above cited, so emphatically forbade even the unoffending party taking the ward out of the State. But by the modification of the decree, the innocent parent is to be subject to this deprivation in favor of the guilty one. This would be manifestly unjust, and can not be tolerated. There is no ground shown for this extraordinary concession to a faithless husband, but that of a supposed blind idolatry for wealth, of which he has taken far greater pains to make an exhibition, than of any personal virtues. But how can his wealth affect the question? What has he proposed in that

behalf? He introduces Prunty as a witness, who gave it as his opinion that Alice, if permitted to be taken home by her father, will become heir to $80,000 or an $100,000. But does the father, who has the disposal of all this wealth, come into court and propose to make any irrevocable provision for her? Does he offer any solid consideration? No. He presents the mere coarse outlines of a picture of wealth, just sufficient to enable his counsel to suggest *expectancies*, and nothing more. But what are these expectancies but a mere *ignis fatuus* to delude the mind of the court? They are necessarily subject, not only to the caprices of this father's nature, but to those vicissitudes usually attendant upon suddenly acquired fortunes. Is a court of conscience to sacrifice the higher welfare of this child upon such considerations, and especially will it make the strain of absolutely abdicating its functions in order to do so? Justice forbids it, and the law fully accords with that decision.

The order appealed from will be reversed and the petition dismissed.

Petition dismissed.

Mr. CHIEF JUSTICE BREESE, dissenting :*

The decree in this proceeding for a divorce, instituted by the appellant against appellee, committed the custody of the child, the subject of this controversy, to appellant, until the further order of the court.

This decree was very proper and just, as the child was then a mere infant, incapable of taking care of herself. The rule of the common law, that the father has the paramount right to the custody of his children, was properly modified by the circumstances. Courts of chancery in this country and in England have often so ruled. The order was not final, but temporary only, and subject to future modification.

*This case properly belongs to the January Term, 1874, at which time Mr. Justice BREESE was Chief Justice.

As I do not concur in the opinion expressed by a majority of the court, I avail of the scant opportunity afforded me to present, briefly, my views of the case. It need not be said that this is, by no means, an unusual proceeding, very much resting in the discretion of the court, under the circumstances, the dominant question being, what is for the good of the child.

In the section from 2 Bishop on Marriage and Divorce, quoted in part in the opinion, it is said the courts have not laid down exact rules to guide their discretion concerning which of the parties, on a divorce, shall be intrusted with the custody of the children; probably the subject admits not of such rules. The leading doctrine is, to consult the good of the children rather than the gratification of the parents. Therefore, an agreement on this subject between the parents before the decree of divorce is rendered, can have no controlling influence, for they are not the persons whose interests are primarily to be consulted. Sec. 532. Then follows the quotation in the opinion.

There is nothing in this record to show what the conduct of either party was while the marriage relation existed. The only charge is, appellee abandoned his wife without reasonable cause. There is nothing going to show it was a flagrant desertion, but to the world it may have had the appearance of having been causeless. When the divorce suit was decided, the question for the court was, under the statute, which parent should have the custody of the child, and was properly lodged in the discretion of the court trying the cause. It was discreet and proper the care of the child, being then about two years of age, should be temporarily committed to the mother.

Years roll round, and the father petitions the same court to recognize his rights, and to act upon the power reserved in the decree to modify the order, and grant the custody of the child to him. In this application, as in the divorce suit, the question is the same, and in disposing of it much is left to

the discretion of the circuit judge. He had the parties before him; he was, so to speak, more of the vicinage than this court, and had a better opportunity of knowing the parties and observing their demeanor and appearance to aid his judgment. It may be, the appearance of appellant and her present husband was not prepossessing or calculated to inspire confidence in the judge, that, though she might be a worthy woman, she was not a fit person to take charge of a girl fourteen years of age and impart to her a good education, fitting her for the active duties of life. I fail to find anything in the record showing she is such a person, though she may be a good mother and wife. There is no proof the girl had received three months' schooling, and she has reached an age when the foundation should be securely laid. I can not see the circuit judge has abused his discretion, and this court has not, heretofore, reversed a decree in such cases unless it was apparent there had been an abuse of discretion.

That it is a matter of sound legal discretion with the court trying the cause, is affirmed in many cases. Among them are, *Commonwealth* v. *Addicks and wife*, 5 Binney (Penn.) 520; *State* v. *Smith*, 6 Greenlf. (Maine) 462—the welfare of the child being the leading consideration.

The only question, in my judgment, presented to the circuit judge was, what, under the evidence in the cause, is best for the child—to remain in her step-father's family with a large number of children, not one member of the family bearing her name, of different lineage, of moderate resources, her education neglected, and whose outlook bounded by a very narrow circle, or permit her father to take her to his home in the neighboring State of Iowa, where, in his house, she would have no rival, a kind and educated woman to care for her, and a father to watch over her, he, himself, possessed of abundant means and of the highest personal character, and with no other child to divide his affections. These were the questions for the judge, and I think he decided them correctly.

It seems appellee, when he left appellant, made Iowa his home, and some years after, when he was free so to do, married a very reputable and educated woman, of whom it is no shame to say she can master the keys of the piano and the stops of the organ—accomplishments, so considered, which many an indulgent father has impoverished himself to bestow upon a favorite daughter.

It should not be urged, as it seems to be, as an objection to this lady, that she can inspire "a concord of sweet sounds," provided she keeps her house in good order and everything about it clean and neat, as it is proved she does. These should not detract from her merits. All the witnesses speak very favorably of her, and there is not the shadow of a doubt that she would take good care of her husband's child, having none of her own. She seems to possess all the attributes of a good wife, and no blemish should rest upon her by reason of her capacity to master musical instruments found in almost every household.

As to the father, thirteen witnesses who have known him, the most of them more than ten years, give him the very highest character as a man and as a citizen, and his good qualities are beyond all question. There is nothing in the record to show that he amassed his wealth in "the civil war," for that event is not even alluded to in the record, but the inference is irresistible he made it by his industry and sagacity as a farmer, owning the best farm in the county of his residence, raising fine cattle, and dealing successfully in such stock. That he builds churches and school houses, pays his debts and stands up to his contracts, might, without violence, be attributed to the possession by him of many of the good qualities that go to make up a good man and a good citizen. That he will be a kind father, is inferrible from the whole record. The small pittance Alice has, is the gift of her father when the divorce was decreed. He paid her guardian, so soon as it was pronounced, two thousand dollars, out of which her grandfather has received one hundred dollars per annum for

her support for near nine years, when it is said by appellant that, on her marriage with Hewitt, he agreed to take Alice and support her as one of the family. He has not done so; at least up to the death of her grandparents, by whom she was reared, he has not. The presumption is a fair one, that what little she has will all be dissipated before she reaches her majority; and when she becomes a burden, her step-father may compel her to seek another home, for he is under no legal obligation to provide for her. *Bond* v. *Lockwood*, 33 Ill. 215.

All the witnesses concur that appellee is a good man, and his wife a proper person to take charge of his child. He has a large real and personal estate, possesses great energy and integrity of character, has the confidence of his fellow-citizens in an eminent degree, is exemplary in all the walks of life, and with resources at command, in a judicious application of which lies much of human happiness. There is a church which he contributed largely to build on the farm, and a school house also, and near by another seat of learning, and the society in which her father and his wife move is of the most unexceptionable character. He desires the society of his only child, and to bestow upon her an education which shall fit her for that society into which he will introduce her.

It is said, Alice has no affection for her father. Under the pupilage of her grandfather and her mother she has been taught to consider her father as a stranger, and to shun him as a bad man. They have striven to alienate the affections of the child from the father. The grandfather was insane upon this subject, and the whole course of the mother compels the inference that she is actuated by other motives than pure maternal affection. She did not rear Alice. At a critical period of her life she was under the care of doting old grandparents, by whom she was taught to detest her father, and to believe he would, some day, seize her and carry her off to Iowa. This, I understand, is the excuse for failing to send her to a neighboring school. Whilst with her grandparents

she saw nothing of the world save as it was exhibited to her within the circumscribed limits of her grandfather's and step-father's humble homes, where her education has been neglected and nine hundred dollars of her small pittance appropriated to her support, nothwithstanding the alleged promise of her step-father to take her as one of his own family. Alice is now fast approaching her majority. She is at an age demanding, most imperiously, a father's care. The question is fairly presented, what is best for the interests of this child, present and prospective, a residence with her father, to be educated by him, and under his control, and be made the heiress of his large estate, or, nominally under the control of her mother, but really under the control of her step-father, destitute of natural affection for her, and whatever element of that nature may be in his composition, divided between the children of his first wife, and those, four in number, by appellant, with a scanty income?

Experience and observation alike teach us there is not and can not be, in the very nature of the relation, entire harmony in a family thus composed.

Who shall have the rearing and education of this child now approaching womanhood? Who, in view of the present and the future—for it is to these we must look—should have the care, custody and control? A misstep now may blast bright hopes forever.

It is, I think, absurd to say, an uneducated child of immature years should decide this question. It can not safely be assumed she has sufficient judgment and discretion to decide for herself. The court must look from a higher stand-point and take a comprehensive view of the whole ground, and in doing so, I am at a loss to understand how the claim of the father can be so summarily disposed of as it has been.

It is said, it would be cruel to separate this child from her mother. How inevitable is the separation, in some form, of parent and child! The mother's desires in this respect can not control. What is best for the child, under the proofs, is the

dominant question, and I do not think a chancellor should hesitate a moment in decreeing as was decreed by the circuit court.

It is made a prominent point in the opinion, that the father intends to take the child to his home in Iowa, and that is deemed an insuperable objection to his petition. Some English cases are referred to in support of this ground, which have no application to this case.

The case of *Dawson* v. *Jay*, 3 DeGex, McNaughton & Gordon, 764, was, where an American maternal aunt, who had been appointed guardian by an American court, sought to take the child, a British subject, from England, out of the control of her paternal aunt, and remove her to the United States, and place her under the control of her maternal aunt there residing. The court would not allow this, as it was against the policy of that country to give any aid to the expatriation of its subjects.

Lord COTTENHAM, in *Campbell* v. *Mackay*, 2 Mylne & Craig, 31, expressed himself strongly on the injurious effects of a permanent residence of English minors abroad, and would not allow an infant ward of the court to be removed out of the jurisdiction of the court, except in a case of imperative necessity.

Chancellor KENT says, a court of chancery will not remit an infant, too young to choose for itself, and being a natural-born citizen, to be taken from a mother without her consent, to be delivered to an alien father to be carried abroad out of the country. 2 Com. 5 Ed. 210, note d.

It was held by the Supreme Court of New York, in *Mercein* v. *The People*, 25 Wend. 64, as the father had a better title to the custody of his minor children, in the absence of any positive disqualification on his part for the discharge of his parental duties, his alienism would not be a disqualification, and his right would be recognized.

It has been held, a court of chancery may make an order to restrain any of its wards from being taken out of its

jurisdiction, if the court shall think it would not be safe to trust the ward beyond its jurisdiction. The court will always act for the benefit of the infant. This is the paramount consideration.

As was said by Lord MANSFIELD, in *Rex* v. *Delaval*, 3 Burrow, 1434, the court must judge upon the circumstances of the particular case, and give their directions accordingly. There is no rule of the British chancery, or of the law courts, which prohibits a guardian by nature from taking his infant children when he pleases, nor does such a rule prevail in any country.

Miner v. *Miner*, 11 Ill. 43, is cited and relied on to sustain the proposition that, in no case, will a court of chancery permit a parent to take his child, who may be a ward in chancery, out of the jurisdiction of the court. The reason given for the ground assumed by the court, does not exist in this case. The court say, while the custody of the child is given to the mother, the father must not be wholly deprived of its society, but must be allowed access to it on all reasonable occasions. In that case, decided in 1849, it was the intention of the mother to take the child to her father, in the State of New York, distant a thousand miles from the court, and no facilities for intercourse, there not being any railroad communication with the West. The father was virtually denied access to his child should the intention be carried out. This was a right of which he should not be deprived. It was on this ground, the court said, a removal from the State could not be permitted. Nothing is said or intimated that, by so doing, the court would "abdicate its functions," but it is placed on the ground the father would be deprived of free access to his child.

I do not see why Iowa should be called "a foreign State," in the sense of the English cases. It technically may be so, but it is contiguous to this State and of hourly access by railroads, affording to the mother such opportunities of seeing

her child as her new and enlarged and paramount duties to her husband and his children will permit.

In *Cummins* v. *Cummins*, 29 Ill. 452, it appeared the father, residing in this State, by his last will and testament, appointed his brother, permanently residing in Indiana, the guardian of his infant child. This court allowed such guardian his expenses incurred in taking his ward to Indiana, there to be reared. Here was a tacit admission of the right of the guardian. If a testamentary guardian can do this, I can not see why the guardian by nature and for nurture should be prohibited from so doing.

To render appellee still responsible to the court, he has executed a bond with security, in a heavy penalty, to produce the child whenever demanded by the court, and to obey all orders of the court in regard to her—which bond, if not sufficient, can be increased by the order of this court. Should there be misconduct by the father towards the child, should he neglect her education or condemn her to servile employment, or permit his wife to tyrannize over her or misuse her, he is amenable, through this bond, to the court, and can not escape its judgment. It is said the laws and institutions of this State are the child's birthright, and that her allegiance is due to this State. This idea has proved fatal to the prosperity of our southern sister States, and has deluged the land with blood, and piled up hecatombs of victims. It was supposed the blood poured out, and the thousand millions expended on this idea, had expunged it, for the present at least, from all our legal and political codes, as having no foundation. There is nothing in the institutions or laws of Iowa especially differing from our own, and in both States a female is of age at eighteen. We ought not to be considered foreign States, in the sense in which that term is used by the English judges and text writers. We are sister States, in close and friendly communion. The doctrine of the English chancery springs, in no small degree, from motives of public policy. It is well known the young heirs to large possessions

and princely incomes were accustomed to be taken by their guardians to the continent, to France especially, there to indulge in all the extravagances of that country, expending yearly large sums of money, and imbibing ideas and forming habits unfitting them for their home duties. The courts were unwilling to lend their aid to such an object, but even then, in a case of necessity, they would grant the order. *Campbell* v. *Mackay*, *supra*. The rulings of the English chancery on this point have but little application to this case, our State being in close connection with Iowa, whose policies, institutions and pursuits are homogeneous with our own.

Alice owes no allegiance to this State, nor would she owe any to the State of Iowa. Allegiance is incompatible with the right of expatriation, a right of which no citizen can be deprived. Whilst residing in a State, all are bound to obey the behests of its constitution, and conform to the requirements of its laws, and this is the extent of the political obligation.

It is said, the child has an aversion to her father. Who has inspired and encouraged this sentiment in her bosom? She is young, credulous and ignorant—the spoiled child of a foolish old grandfather. It is apparent no act of the father toward her has inspired it. Before he ever saw her he settled two thousand dollars upon her, for it is manifest the decree of the court was, in this respect, a matter of arrangement, and he desires now to lavish upon her, in the most profuse prodigality, all a father's love, to pour out upon her not only that treasure, but make her the heir to his vast possessions. Were she not under the influence of her mother, aggravated by the teachings of her grandfather, and had a competent judgment, can it be doubted how she would decide? No argument should be urged against appellee, drawn from the fact, whilst she was unborn, he, without any explained cause, separated himself forever from her mother, and thus became a stranger to his child. It may have been the most meritorious act he could have performed. It is not shown or

pretended, he, at any time, treated the mother with the slightest unkindness, that he ever spoke to her an angry word, that he has violated any of the commandments or strayed from the path of sobriety and decency, or that he has wanted in due respect to her, other than his voluntary separation; and who will tell the cause for that separation? He has lisped no word of blame or censure upon the mother of his child, proclaimed to none his suspicions, pointing not to her as the one "who wing'd the shaft that quiver'd in his heart," but, confining his secret to his own bosom, having no tongue to express his own feelings, he has proceeded calmly and resolutely on his way, built up a high and enviable reputation, gained the confidence and esteem of all who know him, amassed large wealth, and now comes, with no charges against any one, with no recriminations, and prays the court he may be permitted to lavish his parental love and his wealth upon this his only child, and become, in act and deed, her father and her friend. If he has wronged the mother—and who shall say?—he earnestly desires to make full reparation through the offspring, and brings with him a precious offering.

The majority of the court are of opinion, the best interests of the child demand she should remain where she is, and this is the mother's wish. Is there no selfishness in this? Can the mother really love the child whom she forbids the acceptance of such an offering? Should she not deem herself fortunate in being the instrument in such a cause to bring father and child together, loving and to love each other? Would not the act be in full accord with christian precepts, and greatly redound to the future happiness of all? Appellant has, at no time, accused appellee of any other wrong than abandonment—a fine theme for rhetoric—but he did not abandon her to want; and if it was wrong—and who shall say?—he now desires to right the wrong, by taking to his heart and home a child for whom he has the strongest parental affection.

That appellant has capacity to teach this child to cook, to wash, to scrub the floor, and nurse her younger half-brothers and sisters, not one bearing her name, may be true; but are these the height of woman's aspiration? She may manage her children and step-children, and bring them up as Alice has been: ignorant and uneducated; but does that prove her family is the best place for this child? The very fact that different sets of children compose the family, is a strong fact against her being compelled to be a member of it, even if it be her choice. She has not sense or discretion enough to know any better. In view of all the circumstances, may it not be asked if some unworthy sentiment does not prompt this unreasonable opposition of appellant? Is she unwilling her daughter shall move upon a plane more elevated than she herself occupies, or hold a higher social position?

But it is not pecuniary considerations alone which influence my judgment. There are others, more weighty. Placed under her father's care and protection, at her age, there will be bestowed upon her a finished education, in which "playing the piano and organ" will doubtless be included, and be surrounded by all the good influences which aid so much in the formation of the female character, fitting her for the sphere in which she will move, and of which, under his auspices, she may become a distinguished ornament.

No one has breathed a breath against appellee or against his present wife. They are both shown to be eminently qualified to discharge the duty the father beseeches the court to impose upon them, and as security, if such were necessary beyond the love of a father, that he will not abuse the trust, a bond in a heavy penalty has been executed, which, if not deemed sufficient, can be increased by this court.

In looking over the record, I do not think any prejudice should be excited against appellee, because of the efforts he made in the company of her guardian, and with the consent of the mother, to see the child, when she was with her grandparents. He only desired to see her and talk with her, (she

having before that time said to him, she would go to him when she became of age,) to convince her that the time had come when she should be educated. He protests in his examination that he never thought of using force to take her away, but to take her only with her free consent to go. Force was not dreamed of, and none was applied. The insane grandfather was much excited, and prevented appellee from exercising a right fully guaranteed to him, the divorce notwithstanding. *Miner* v. *Miner, supra.*

The doting old grandfather was apprehensive he was to be robbed of his child, and opposed every effort made by the father to see his child. During the years she was most impressible, she had been under the unfortunate influence of this old man, and when asked in court, her mother, her step-father and appellee present, whom she had been taught to dread, what other reply is it to be supposed she would make than the one she did make: that she did not wish to go to her father—that he was a stranger to her. She had just heard her mother testify she had not seen or heard from him since the separation. Well might she say he was a stranger, though undeniably he was her father, and sought to be her protector and friend, lavishing upon her one of the dearest of all gifts: a father's love.

The facts do not show he is a rude and an unfeeling man. The only charge against him is, that he separated from appellant without assigning any cause, and was therefore subject to the provisions of our law of divorce, of which appellant availed so soon as the two years elapsed. Who can tell how much anguish he may have suffered when impelled to leave the mother? Who knows the cause? Who will ever know? He does not recriminate, if he has reason. Do we not all remember the history of one of the greatest and best men this country has ever produced, who, when Governor of a great and flourishing State of this Union, just united in marriage to one of her fairest daughters, left his home, his honors, his office and his friends, and sought refuge in the wilderness of

the South-west, leaving the world to wonder? He never disclosed the cause—the secret died with him. Is his reputation less dear, less highly appreciated on this account? Was the cause known, his abandonment might be regarded as the noblest act of his life.

Appellee has shown he has a feeling heart, for when the divorce suit was pending, he consented to a decree which gave appellant one thousand dollars in cash, and to the child two thousand dollars, and he not then rich, which, with the interest thereon, is all the means she has, as I understand the case. Out of this, or the interest on it, her grandfather received for her maintenance one hundred dollars a year, notwithstanding the alleged promise of the step-father to take her into his family as one of them.

The chief matter to be regarded by the court, all the authorities say, is the good of the child. 2 Bish. on Mar. and Div. 633. The books are full of this doctrine. How is it possible for a girl of the age of Alice, reared as she has been, to know what is most for her good? She decides without judgment, and has no capacity to consider the effect of her decision. It is a question in which her present and future welfare is deeply involved, and to say that an ignorant girl of fourteen ought to decide it for herself, is saying too much.

Here is presented a case, where the father, whose right at common law overrides that of the mother, a man of most unquestionable morals and conduct, of high standing in society, of great wealth, achieved, not in "the civil war" by thievery and fat contracts, but by his own talents and industry, with no child but this, entreating the court to be permitted to have her in his custody and control, to educate her, to introduce her into that society he will fit her to adorn, with the certain prospect, if she is filial and dutiful, of making her the sole heiress of his large possessions. In opposition, we find the mother again married, to a widower with three children by a former marriage, with four more by appellant, and the prospect of an increase, possessed altogether of a bare

competence, and the step-father under no legal obligation to give her house room, to educate or to provide for her, whose education has been sadly neglected, and whose mother's sole ambition seems to be to make this child a convenient household drudge. Looking upon this picture, then upon that, should a court hesitate to say that it will be for the good of this child she should be placed with her father? If the mother has a natural right to the custody, it has been held by respectable courts that it is lost and disappears when she has, by a second marriage, surrendered that legal discretion which is necessary to render the parental control of any benefit to the child. *The State* v. *Scott*, 10 Foster (N. H.) 274; *Worcester* v. *Marchant*, 14 Pick. 510.

In the case of this child, parental control is lost in the superior authority of appellant's husband, who is the head of the family, and who may subject her to all the indignities a rude step-father is so potent to inflict.

In the exercise of a sound legal discretion, the circuit judge, knowing the parties, having them and witnesses before him, modified the original order, and committed the child to the care of her natural guardian, one in every way well qualified for the trust, and I agree with him, believing, from all that is shown in this record, that appellee is fully competent and willing to develop the virtues and promote the happiness of his restored child, relying for those purposes more upon the efficiency of parental love than upon the power of parental authority.

It seems to be objected, that the father did not come into court and make an irrevocable provision for the child. Should this be required? Her present guardian, Mr. Prunty, testifies she will inherit from her father eighty or one hundred thousand dollars. This is to be understood, if she survives him and is filial and dutiful. Is this expectancy unworthy the consideration of a chancellor? All courts regard this as of value, and so should we. This expectancy might soon become reality, as the father is advanced in years.

Stress is laid on the relation in which this child is supposed to stand as a ward in chancery, and it is said to permit her to be carried beyond the jurisdiction of the court would be an abdication of the functions of the court. I have read of such a relation, but in all my experience I have never known it to be practically enforced in this country. Nothing of this kind was intimated in *Miner* v. *Miner, supra.*

But the case is closed. By the edict of this court, the doom of this child is forever sealed. The mother and the child may live to regret this blighting of a prospect so replete with all the elements conducive to human happiness, and which dawns upon very few. Both may weep bitter tears of regret, the more bitter and the more agonizing because they will be unheeded and unavailing.

My judgment is, the decree of the circuit court committing this child to the care of her father was correct, and should be affirmed.

Mr. JUSTICE SHELDON: I concur with Mr. CHIEF JUSTICE BREESE.

ALFRED M. WATERMAN
v.
A. JUDSON CLARK *et al.*

1. RECOUPMENT—*must proceed out of the same subject matter.* Recoupment and set-off are governed by different principles. In recoupment, a claim originating in contract may be set up against one founded in tort, and *vice versa;* the cross demand must proceed from the same subject matter as the plaintiff's right of action, and the defendant can not, as in the case of a set-off, recover any excess in his favor. It can only be used to mitigate or extinguish damages.

2. SAME—*need not arise as between all the parties.* In an action on a promissory note given by principal and surety on a contract of the principal, it is competent to recoup the damages of the principal growing out of the contract, to the same extent as if the note had been given by the principal, and he alone were sued.

3. SAME—*pleading.* A claim for recoupment is properly set up under the statute by special plea.

4. SAME—*principal and surety.* Whatever defense, by way of recoupment, will avail the principal, is also available to the surety.

5. SAME—*giving of a note with knowledge of the facts.* The right to recoup is not barred by the fact that the damages to be recouped were known to the party executing the note. While the note is an admission of the amount due, and evidence, it is not conclusive of a settlement or waiver of any claim for damages, especially when given under protest.

APPEAL from the Circuit Court of Hancock county; the Hon. JOSEPH SIBLEY, Judge, presiding.

Messrs. MARSH & MARSH, for the appellant.

Mr. W. C. HOOKER, and Mr. G. EDMUNDS, Jr., for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action upon a promissory note, of which the following is a copy, to wit:

$124.49 WARSAW, ILL., Feb. 16, 1870.

Three months after date, we, or either of us, promise to pay to the order of A. M. Waterman, $124.49, for value received, and with interest at the rate of ten per cent per annum from date.

A. J. CLARK,
WM. N. MCCALL.

The error assigned is, the overruling of a demurrer to defendants' fourth plea.

The plea, in substance, was, that Waterman, the plaintiff, on the first day of December, 1869, owned and was running a distillery, and took certain cattle and hogs of defendant Clark to take care of, feed and fatten, at plaintiff's distillery, at a certain price per head per month; that after plaintiff so having the stock for three months, Clark, finding that they were not being fattened, but had been and were being greatly injured and damaged for want of proper care and food at the distillery, demanded a return of the stock, which the plaintiff

refused to deliver to Clark, unless he would execute the note in suit; and thereupon the defendants, protesting that there was no consideration for the note, and to prevent further injury and damage to the stock by plaintiff's detention thereof, executed the note, Clark as principal and McCall as surety; that the stock, while in the possession of plaintiff, were not taken good care of, nor were they fattened, but were injured and damaged by the negligence of plaintiff, and by reason of his feeding of the same with improper and unwholesome food, in the sum of $300, which defendants claimed they were entitled to recoup to the amount of the note.

The objections taken to the plea are—

First. That the matter, in respect to which the damages are sought to be recouped, does not arise between the parties to the record, it arising between the plaintiff and one of the defendants, not both—that the same rule should apply to recoupment as to set-off. The objection would be valid if set-off and recoupment were governed by the same rules. But such is not the case; they depend on quite different principles. In the case of recoupment, a claim originating in contract may be set up against one founded in tort, and *vice versa*. *Streeter* v. *Streeter*, 43 Ill 197. The cross demand must proceed from the same subject matter as the plaintiff's right of action, and the defendant can not, as in the case of a set-off, recover any excess in his favor. He uses his claim in mitigation of damages, by way of reducing the amount of the recovery. It is a defense here against the note, to be availed of as any other defense against the note itself. We conceive it to be no more necessary here, that both the defendants should have sustained the damages to be recouped, than, in case there had been pleas of the want or failure of consideration for the note, it would have been essential that the principal and surety in the note should both have experienced the loss arising from the want or failure of consideration. In such case, the principal alone would be the one injured by the want or failure of consideration, yet the right of defense

in favor of both would be undoubted. The surety is not further bound than the principal, and is entitled to the same defense.

It is sufficient for recoupment, that the counter claims arise out of the same subject matter, and that they are susceptible of adjustment in one action. *Stow* v. *Yarwood*, 14 Ill. 424. We perceive no reason why, in an action on a promissory note given by principal and surety on a contract of the principal, it is not competent to recoup the damages of the principal growing out of the contract to the same extent as if the note had been given by the principal, and he alone were sued. In the case of *McHardy* v. *Wadsworth*, 8 Mich. 350, the precise question here raised was adjudged in favor of the right of recoupment, and that decision meets our full concurrence.

Second. The second objection is, that the plea sets up, by way of bar to a recovery on the note, matters of which the party had full knowledge when the note was executed.

We do not consider that the mere giving of the note for the feed of the stock, should be held a bar to Clark's claim for damages caused to the stock by reason of the manner in which they had been fed, although he was aware of the damage at the time. We can assign to it no higher effect than as an admission of the amount due, and evidence, but not conclusive, of a settlement or waiver of any claim for damages.

Third. The third and last objection is, that recoupment is a defense under the general issue. This was not assigned as cause of demurrer. Our statute requires the defense of the want or failure of consideration of a promissory note to be specially pleaded; in view whereof we regard the claim of recoupment as being properly set up by plea, thereby apprising the plaintiff in advance of trial of the matter of defense to the note.

We perceive no error in overruling the demurrer, and the judgment is affirmed.

Judgment affirmed.

Syllabus.

RUFUS N. RAMSEY

v.

CHARLES HŒGER.

1. CONSTITUTIONAL LAW—*State prohibited from pledging its credit to those holding corporate indebtedness.* The act of April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," does not constitute a contract between the State and the creditors of the counties, townships, cities and towns intended to be aided, for the reason that the constitution of 1848 prohibited the credit of the State from being given to or in aid of any individual, association or corporation.

2. SAME—*repeal of act of* 1869 *giving State taxes to municipalities owing railroad indebtedness.* Under the provisions of the constitution of 1870, and the revenue law in force July 1, 1873, so much of the act of 1869 to fund and provide for paying railroad debts of counties, townships, cities and towns, as requires the State revenue to be collected on the valuations of the taxable property in the State remaining, after deducting in counties, townships, etc., which have outstanding indebtedness incurred in aid of the construction of railroads, the increased valuation of the taxable property over that of the year 1868, is abrogated, and can not be enforced.

3. SAME—*exemption from State taxes without a consideration may be recalled at pleasure.* The tax-payers in counties, townships, etc., which had incurred debts in aid of railways, being liable for their just share of taxes for State purposes, and, in addition thereto, liable to be taxed for the payment of the debts of their county, township, etc., the act of 1869, by which they were exempted from the payment of State taxes on the valuation of property in excess of that for the year 1868, is to be regarded as a mere gratuity, without any consideration to the State; and the rule is that exemptions from taxation are always subject to be recalled when granted as a mere privilege and not for a sufficient consideration.

4. INJUNCTION—*of taxes levied in excess of that authorized by law.* Where the law provided for the levy and collection of a given sum upon the taxable property of the whole State, and required the Governor and Auditor to compute the separate rates per cent required to raise such sum; and it appeared that, in order to make up deficiencies caused by setting apart a portion of the State taxes to certain counties, townships, cities and towns, to be applied on their railroad indebtedness under the act of 1869, a greater rate per cent was levied in certain other counties than otherwise would have been required, it was *held*, that such excess was levied without authority of law, and that the collection of all taxes levied in excess of the proper and uniform rate should be enjoined.

Statement of the case.

This is an agreed case from the Circuit Court of Clinton county.

The only question arising in the case is fully presented by the following agreed state of facts, upon which the case was heard in the court below:

"1. That the counties, townships, cities and towns in the State of Illinois, named in the Railroad and Warehouse Commissioners' Report for 1873, have outstanding railroad bonds under the act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities and towns,' in force April 16, 1869, registered with the Auditor of State, amounting to upwards of $16,000,000.

"2. That $10,000,000 of said bonds were registered in the Auditor's office since the 8th day of August, 1870. (The date the new constitution went into force.)

"3. That the act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities and towns,' in force April 16, 1869, was never submitted to a vote of the people of the State.

"4. That the State tax levied by the Auditor for 1873, upon all the taxable property in the State of Illinois, exclusive of school taxes, etc., is 27 cents on the $100 valuation.

"5. That the equalized assessment for 1868, for State purposes, in the State of Illinois, amounted to $474,480,877, and in 1873 to $1,341,000,000—an increase over the assessment of 1868, in counties having registered railroad bonds under said act of 1869, of $320,000,000, and an increase in counties, etc., having no railroad bonds, of $546,519,123.

"6. That counties, etc., having registered railroad bonds under the act aforesaid, receive the benefit and credit of all State taxes, except school taxes, etc., paid by them (or by the citizens and property-holders of the same), over the assessment of 1868, for the sole and only purpose of paying off their registered railroad bonds.

"7. That under the act of April 16, 1869, aforesaid, the State tax for 1873, exclusive of school taxes, etc., to be placed to the credit of counties, townships, cities and towns having registered railroad bonds upon the increased assessment over that of 1868 of taxable property in the State of Illinois, amounts to $780,000.

"8. That counties, etc., having registered railroad bonds under the act aforesaid, will pay 27 cents less on the $100 valuation, for State purposes, on the increased assessment over that of 1868, except school taxes, towards the support of the State government and towards the liquidation of the State indebtedness, than counties, etc., having no registered railroad bonds.

"9. That the equalized assessment of 1873, in counties having no outstanding registered railroad bonds, has increased over that of 1868 $546,519,123, upon which the tax-payers of said counties will pay 27 cents more on the $100 valuation towards the liquidation of the legal State indebtedness and support of the State government, than counties, etc., having registered railroad bonds under the act of 1869, aforesaid.

"10. That the equalized assessment in Clinton county, Illinois, in 1868, for State purposes, amounted to $1,798,849, and in 1873 to $6,999,089—an increase of $5,200,240.

"11. That upon the increased equalized assessment of 1873 over that of 1868, the tax-payers of Clinton county, Illinois, have to pay the levy of 27 cents on the $100 valuation, for State purposes, exclusive of school taxes, etc., amounting in all to $14,040.64, more than counties, etc., having outstanding registered railroad bonds, upon the same amount of valuation.

"12. That, by reason of such increased assessment, the tax-payers of Clinton county, Illinois, for the year 1873, will pay, exclusive of school taxes, etc., $14,040.64 more for the liquidation of the legal State indebtedness and the support of the State government than counties of like property

valuation having outstanding registered railroad bonds under said act of 1869.

"13. That Clinton county, Illinois, nor any of her townships, cities or towns, have registered railroad bonds under said act of 1869 whatever.

"14. That Rufus N. Ramsey is a citizen and tax-payer of Clinton county, Illinois; that his State taxes for 1873, upon his taxable property, exclusive of school taxes, in said county, by reason of the operation of the act of April 16, 1869, aforesaid, have been increased, and he thereby has to pay $25 more than a citizen and tax-payer of counties, etc., having registered railroad bonds under said act of 1869, upon like valuation, towards the liquidation of the legal State indebtedness and the support of the State government.

"15. That said Ramsey has made a legal tender of all his taxes due, except the $25 aforesaid, which he refuses to pay; that Charles Hœger, the collector of Clinton county, Illinois, has refused to accept the same in full satisfaction; that he threatens to levy upon the personal property of said Ramsey, to satisfy the same, and that said Ramsey has enjoined the collection thereof."

Mr. G. VAN HOOREBEKE, for the plaintiff.

Mr. F. A. LIETZE, for the defendant.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The question is presented by this record whether, under the constitution and laws in force when the tax sought to be enjoined was levied, a higher rate of taxation can be imposed for State purposes, on taxable property in counties which have no outstanding indebtedness incurred in aid of the construction of railroads, than is imposed on taxable property in counties which have such indebtedness.

That the tax levied by the act in force July 1, 1873, has been so apportioned, is admitted by both parties; and it is

claimed by the appellee to be justified by the provisions of an act in force April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns."

The only sections of this act bearing on the question are the first, fourth, fifth and ninth, which are as follows:

"SEC. 1. Whenever any county, township, incorporated city or town, shall have created a debt which still remains unpaid, or shall create a debt under the provisions of any law of this State, to aid in the construction of any railway or railways, that shall be completed within ten years after the passage of this act, whose line shall run near to, or into or through said county, township, city or town, it shall be lawful for the State Treasurer, and he is hereby required, immediately upon receiving the revenue of each year, to place to the credit of such county, township, city or town so having incurred such indebtedness, in the State treasury, annually, for and during the term of ten years, all the State taxes collected and paid into the State treasury on the increased valuation of the taxable property of said county, township, city or town, as shown by the annual assessment rolls, over and above the amount of the assessment roll of the year 1868, excepting the State school tax and the two-mill tax provided for by the constitution of this State for the payment of the State debt; and whenever any county, township, city or town shall have created a debt as aforesaid, it shall also be lawful for the collector of taxes, and he is hereby required, annually, for and during the term of ten years, to pay into the State treasury all the taxes collected, for any purpose whatever, on the assessment of the railroad or railroads for whose aid the said debt was incurred, including the road bed and superstructure, and all fixtures and appurtenances thereof, the locomotives, cars, machinery and machine shops, depots, and all other property, real and personal, of said railway company, within such county, township, city or town; and immediately upon receiving the same, the State Treasurer

shall place to the credit of such county, township, city or town, in the State treasury, the whole amount so received, except the State school tax and the two-mill tax provided by the constitution of this State for the payment of the State debt; and it shall be the duty of said collector of taxes to furnish the State Auditor a separate and detailed account of the amount of taxes collected from said railway or railways, at the time of his annual settlement with the State Auditor; and the State Treasurer shall give to said collector separate receipts for the respective amounts paid into the State treasury to the credit of said county, and said receipts shall be taken and received by the county court, or other legal authorities, as vouchers for the amount collected on account of the county and local assessments on said railroad property, in the annual settlement with such collector; and the several amounts of money in this section provided and ordered to be placed to the credit of such county, township, city or town, shall be applied by the State Treasurer to the payment of the bonded railroad debt of such county, township, city or town, as hereinafter provided."

"SEC. 4. When the bonds of any county, township, city or town shall be so registered, the State Auditor shall annually ascertain the amount of interest for the current year due and accrued and to accrue upon such bonds, and from the amount so ascertained, he shall deduct the amount in the State treasury placed to the credit of such county, township, city or town, as herein provided and directed; and from the basis of the certificate of valuation of property heretofore provided to be transmitted to him, or in case no such certificate shall be filed in his office, then upon the basis of the total assessment of such county, township, city or town, for the year next preceding, he shall estimate and determine the rate per centum on the valuation of property within such county, township, city or town requisite to meet and satisfy the amount of interest unprovided for, together

with the ordinary cost to the State of collection and disbursement of the same, to be estimated by the Auditor and Treasurer, and shall make and transmit to the county clerk of such county, or to the officer or authority whose duty it is or shall be to prepare the estimates and books for the collection of State taxes in such county, township, city or town, a certificate, stating such estimated requisite per centum for such purpose, to be filed in his office; and the same per centum shall thereupon be deemed added to, and a part of the per centum which is or may be levied or provided by law for purposes of State revenue, and shall be so treated by such clerk, officer or authority, in making such estimates and books for the collection of taxes; and the said tax shall be collected with the State revenue, and all laws relating to the State revenue shall apply thereto, except as herein otherwise provided.

"SEC. 5. The State shall be deemed the custodian only of the several taxes so collected and credited to such county, township, city or town, and shall not be deemed in any manner liable on account of any such bonds, but the tax and funds so collected shall be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for, until fully satisfied. The State shall annually collect and apply all the said taxes and funds placed to the credit of such county, township, city or town for and during the term of eight years, to the payment of the annual interest on such registered bonds of such county, township, city or town, in the same manner as interest on the bonds of the State is or may be collected and paid, but in like moneys as shall be receivable in payment of State taxes; and for and during the remainder of the term of years during which said registered bonds shall remain unpaid, the funds provided in Sec. 1 of this act, accruing from taxes collected from the property of said railroad or railroads, and the surplus, if any, of the other funds in this act provided, remaining after the payment of the interest on the bonds, shall be applied to the

payment of the principal of said registered bonds on presentation at the State treasury; or the Treasurer shall purchase the same in open market, at not more than par; and upon such payment or purchase of the said bonds, the amount paid upon the principal of said bonds shall be indorsed thereon, and receipts therefor shall be taken and filed in the office of the State Treasurer, and the interest coupons or bonds, when fully paid, shall be returned to the office of the State Treasurer, and shall be canceled and destroyed in the same manner as those appertaining to the State debt; and the fund derived from the taxes collected on the increased assessment over the year 1868, and the tax levied to meet the interest on said registered bonds, shall continue to be annually applied to the interest of said bonds; and the said taxes and funds required in this act to be placed to the credit of counties, townships, cities and towns, shall be applied by the State Treasurer to the payment of the registered railroad bonds of such county, townships, cities or towns, equally and without discrimination."

"SEC. 9. And the State Auditor, from the total value of all the property in the State, after the same shall have been equalized, in accordance with the provisions of 'An act to amend the revenue laws, and to establish a State Board of Equalization of Assessments,' approved March 8, 1867, shall deduct the amount of said increased valuation of the taxable property, above the valuation of the year 1868, in such counties, townships, incorporated cities and towns as may be entitled to the benefits of this act, and the taxes upon which are herein directed to be credited to counties, townships, cities and towns, and upon the amount remaining he shall cause to be collected such a per cent as shall be sufficient to pay the appropriations and other demands upon the treasury due to the end of each fiscal year; and the same per cent shall also be collected on the said increased valuation above the valuation of 1868, and applied as herein provided."

It can not be held, as insisted by the counsel for appellee, that this statute constitutes a contract between the State and the creditors of the counties, townships, cities and towns intended to be aided, for the plain reason that the legislature was prohibited from making such a contract by section 38 of article 3 of the constitution of 1848, which declares, "the credit of the State shall not in any manner be given to or in aid of any individual, association or corporation." It is impossible to say that such creditors can have a claim upon the State, unless its credit was in some manner given to or in aid of them; nor can we conceive how there can be a vested right in that which can not be granted.

The necessary effect of the act was to exempt tax-payers in the counties, townships, cities and towns availing of its provisions, from the payment of so much of the State tax as is appropriated to the particular counties, townships, cities or towns. The debts in aid of which the appropriation is made are local only. *Dunnovan et al.* v. *Green*, 57 Ill. 63. They are created by municipal authority for what are, at least theoretically, municipal purposes, and, therefore, for a sufficient consideration received by the municipality. It is upon this hypothesis alone that such corporations have been held to possess power to subscribe for shares of capital stock in railroad companies, and incur indebtedness to pay the subscription. *Prettyman* v. *Supervisors of Tazewell County*, 19 Ill. 406; *Roberts* v. *City of Rockford*, 21 id. 457; *Johnson* v. *County of Stark*, 24 id. 85.

It can not be denied that at the date of this enactment the State possessed power to require that full and equal taxation should be levied, for State purposes, upon all the taxable property in the State, without regard to the indebtedness of the particular counties, townships, cities and towns favored by the act; and since the tax-payer is, aside from the act, liable to be taxed for the payment of the debts of the county, township, city or town in which his property is subject to taxation, it can not be said that the State has received any

consideration for the exemption granted by the act. We can not, then, otherwise regard the exemption from State taxation, as contemplated by the act, than as a mere gratuity, the continuance of which rested in the pleasure of the legislature and the sovereign power of the State.

No doubt many persons have been, through a misapprehension of its proper construction and effect, induced to vote to incur indebtedness by particular counties, townships, cities and towns, to a greater extent than they otherwise would; but we can perceive no difference between their condition and that of the individual who, relying on the continuance of the bounty of a friend or relative, contracts debts which the subsequent withdrawal of that bounty leaves him to pay from his own limited resources.

The rule is, that exemptions from taxation are always subject to be recalled when they have been granted as a mere privilege and not for a sufficient consideration. Cooley's Const. Limitations, 383.

It is manifest, therefore, that a system of taxation, enforced either by a new constitution or by an act of the General Assembly, inconsistent with the provisions of this act, would necessarily, to that extent, render it inoperative, although there might be no professed design to repeal it. *Hills* v. *Chicago*, 60 Ill. 86.

It is argued, that it was not intended by those who framed the present constitution to repeal any of the provisions of the act of 1869; that it was only intended to ordain a revenue system which should apply to the future. This may be so, yet, if the language of that instrument is clear and free from ambiguity or doubt, it must control, whatever may have been the design of those by whom it was framed. Cooley's Const. Limitations, 69.

If it shall be conceded that the revenue system which it contains was not self-executing, but that it required legislation to put it in force, still it can not be denied that when the General Assembly did, subsequent to its adoption, enact a

revenue system, such system was required to conform to its provisions. It surely can not be claimed that, under the guise of enacting laws to give effect to the provisions of a constitution, principles can be perpetuated in diametrical opposition to those provisions. *Hills* v. *Chicago*, *supra*.

The present constitution contains the following:

"SEC. 6, ART. 9. The General Assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatsoever."

And section 1 of the same article requires the General Assembly "to provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

The language of these sections is so clear and unambiguous that there can be no necessity of resorting to the debates of the constitutional convention to ascertain their plain, obvious and natural meaning.

The tax involved in the present suit is levied by virtue of an act in force July 1st, 1873, which is as follows:

"There shall be raised, by levying a tax by valuation upon the taxable property in this State, the following sums for the purposes hereinafter set forth—

"For general State purposes, to be designated 'Revenue fund,' $2,500,000, upon the assessed value of 1873, and $1,500,000 annually thereafter; for State school purposes, to be designated 'State school fund,' (in lieu of the two-mill tax therefor,) $1,000,000 annually.

"SEC. 2. The Governor and Auditor shall, annually, compute the separate rates per cent required to produce not less than the above amounts, any thing in any other act providing a different manner of ascertaining the amount of revenue

required to be levied for State purposes, to the contrary notwithstanding; and when so ascertained, the Auditor shall certify to the county clerks the proper separate rates per cent therefor, and also such definite rates for other purposes as are now or may hereafter be provided by law, to be levied and collected as State taxes."

This tax is levied on all the taxable property in the State, and it is not admissible, either under the language of the act or of the constitution, that of the proportional amount of each tax-payer, as determined with reference to such valuation, in some counties, townships, cities and towns he shall only be required to pay one-half, or one-third, while in other counties, townships, cities and towns he shall be required to pay that much more.

The duties of the Governor and Auditor, in respect to this levy, were purely ministerial. They had no authority to do more than compute the separate rates per cent required to produce the amount of the levy, and when this was done, and the result certified by the Auditor to the county clerks, there was no authority in the law, or under the constitution, to extend it otherwise than equally, upon all taxable property, in proportion to its value, as ascertained and determined by those upon whom the law imposed the duty of assessing it.

The fourth section of the act of 1869, it will have been observed, requires the Auditor and Treasurer, after ascertaining the deficiency in the amount necessary to pay the interest upon the indebtedness of any county, township, city or town, incurred in aid of the construction of railroads, for the current year, after deducting the sum which may have been received for that purpose under section 1, to estimate and determine the rate per centum on the valuation of property within such county, township, city or town, required to meet and satisfy the amount of interest unprovided for, together with the ordinary cost to the State of collection and disbursement of the same, to be estimated by the Auditor and Treasurer, and shall make and transmit to the county clerk of such

county, * * a certificate stating such estimated requisite per centum for such purpose, to be filed in his office; and the same per centum shall thereupon be deemed added to and a part of the per centum which is or may be levied or provided by law for purposes of State revenue, and shall be so treated by such clerk, etc. This clearly authorizes the levy and collection of the amount necessary to supply the deficiency in the payment of the interest due upon the indebtedness of such counties, townships, cities and towns, incurred in aid of the construction of railroads, as State revenue, but it is expressly limited to the county, township, city or town by which the particular indebtedness is incurred. And, so far as the last clause of section 2 of the act in force July 1st, 1873, can have any reference to the act of 1869, it must relate to this section. It certainly confers no authority to extend a tax levied for the purpose of paying municipal indebtedness incurred by one county, township, city or town, upon the taxable property of a different county, township, city or town; nor does it authorize the $3,500,000 to be apportioned otherwise than equally upon the assessed value of all the taxable property in the State.

No words that we can conceive can add force or precision to the language of the constitution before quoted, that "the General Assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for State purposes." Even the General Assembly, which levied the present tax, derived its existence from the provisions of the same constitution; and if this provision was not binding upon it, it is impossible to conceive that it ever can have any obligatory force. It is impossible for us to escape the conclusion that, under the constitution and law now in force, so much of the act of 1869 as requires the State revenue to be collected on the valuations of the taxable property in the State remaining after deducting, in counties, townships, cities and towns which

have outstanding indebtedness incurred in aid of the construction of railroads, the increased valuation of the taxable property over that of the year 1868, is abrogated, and can not be enforced.

The same question, substantially, as that presented by the present case was before this court, in *People ex rel. Kaskaskia Navigation Co.* v. *Lippincott*, 65 Ill. 548, and the views here expressed are in harmony with what was there said.

We forbear the expression of any opinion as to whether so much of the $3,500,000 actually and legally levied for State purposes, as shall be collected from the increased valuation over that of 1868, which is claimed to be appropriated to the particular counties, townships, cities and towns, can be maintained as a standing appropriation, as that question is not now before us.

The decree of the court below is reversed and the cause remanded, with directions to that court to ascertain the rate per cent required to produce the sum levied by the act in force July 1, 1873, for State purposes, and to enjoin the collection of all State taxes levied on the property of appellee in excess of that rate.

Decree reversed.

Mr. JUSTICE SCOTT, dissenting.

WILLIAM H. COGSHALL

v.

JOHN M. BEESLEY, Guardian, etc.

1. AMENDMENT—*of declaration after verdict.* Under the practice act of 1874, the court may allow the plaintiff, after verdict against two defendants, to amend his declaration by discontinuing the suit as to one of the defendants.

2. BILL OF EXCEPTIONS—*must show that it contains all the evidence.* Where a bill of exceptions fails to show that it contains all the evidence,

this court will not examine whether the evidence it does contain supports the verdict. The certificate of the reporter who reported the evidence, at the foot of the testimony, that it contains all the evidence, will not answer. The judge who tried the case must so certify.

APPEAL from the Circuit Court of Mason county; the Hon. LYMAN LACEY, Judge, presiding.

The opinion of the court states the facts of the case necessary to an understanding of the points decided, except that the amendment of the declaration was simply to strike out the name of Francis S. Cogshall, and discontinue the suit as to him.

Messrs. FULLERTON & ROGERS, for the appellant.

Messrs. WALLACE & FREEMAN, and Messrs. DEARBORN & CAMPBELL, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee, in the circuit court of Mason county, against appellant and Francis S. Cogshall.

A trial was had before a jury, which resulted in a verdict in favor of appellee for $398.50. A motion was made for a new trial, whereupon appellee entered a motion to amend his declaration and dismiss as to Francis S. Cogshall, which the court allowed, and rendered judgment in favor of Francis S. Cogshall for his costs, against appellee.

The court then overruled the motion for a new trial, and rendered judgment upon the verdict against appellant.

The decision of the court in allowing the amendment to the declaration, and the dismissal of the suit as to Francis S. Cogshall, is assigned as error.

The amendment allowed by the court was proper under the Practice Act. Revised Statutes of 1874, page 778, sec. 24.

It is also insisted by appellant that the verdict is contrary to the evidence.

The evidence, so far as the record discloses it, is conflicting. This court has repeatedly held, the verdict of the jury will not be disturbed where there is a conflict in the testimony, unless the verdict is clearly and manifestly against the weight of the evidence. Such, however, is not this case. But, independent of this question, we could not disturb the verdict for another reason: the bill of exceptions in the record does not purport to contain all the evidence.

The practice is well settled, that, where the bill of exceptions fails to show that it contains all the evidence in the case, we will not examine whether the evidence it does contain supports the verdict. *Minor* v. *Phillips*, 42 Ill. 123.

It is true, the reporter who reported the evidence on the trial, adds a certificate at the foot of the testimony that the foregoing is all the evidence in the case, but the judge before whom the cause was tried does not state that the bill of exceptions contains all the evidence, or that the certificate of the reporter is even a part of the record.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

The Illinois Central Railroad Company

v.

The City of Bloomington.

1. Corporations—*liable to new duties and burdens the same as natural persons.* Corporations, when brought into existence, except so far as may be otherwise provided in their charters, or the general laws which enter into their charters, become liable to perform all the duties to the public that may be required of natural persons to the extent that they are capable of their performance, and they are entitled to protection in their rights to the same extent as natural persons.

2. Same—*duty to make approaches and crossings over new streets.* Where, long after the construction of a railroad, a street was extended so as to cross the same, and the city passed an ordinance requiring the railway company to make a safe and proper crossing by grading the approaches

of the street at the crossing, there being nothing in the charter of the company imposing such duty, or any such duty imposed by any general law in force at the time the company was created: *Held*, that the company was not liable to this new burden any further than might have been required of an individual, and that, as the whole burden was sought to be placed upon the company without regard to benefits, the ordinance was in violation of the constitution, and could not create any liability upon the company, and that the legislature itself could not impose such burden without making compensation.

Appeal from the Circuit Court of McLean county; the Hon. Thomas F. Tipton, Judge, presiding.

This was an action on the case, by the city of Bloomington, against the Illinois Central Railroad Company. All the material facts of the case are stated in the opinion of the Court.

Messrs. Williams, Burr & Capen, for the appellant.

Mr. Ira J. Bloomfield, for the appellee.

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

The railroad was built through the corporate limits of the city of Bloomington in the year 1852. When built, Chestnut street, which runs at right angles with the railroad, did not reach it by a half mile or more. The railroad ran on the line dividing the lands owned by Flagg and Davis. The company, before building their road, condemned the right of way over Flagg's, and Davis gave the right of way over his ground. Their lands were, at that time, used for farming purposes, but were within the city limits, until an addition was laid out in 1871. By several additions to the city, the streets were extended, and Chestnut street crossed the railroad.

Davis and Flagg gave the city, by conveyance, the right of way across the railroad, and its right of way. The city thereupon, by ordinance, directed the street to be opened, and

required the railroad company to make a proper and safe crossing by grading the approaches of the street at the crossing. This, the company refused to do, and the city thereupon did the grading and constructed the crossing, which cost $634.25, and the city brought suit against the company to recover that sum expended in making the crossing. On a trial, a jury was waived, and a trial had by the court. There being no contest as to the price paid for the work or the manner in which it was performed, the only question being whether the company was, under the facts in the case, liable to construct the crossing, the court found they were, and rendered judgment for the amount claimed. This appeal is brought, and questions the decision of the court below.

We are of opinion that appellee states the real question in controversy correctly when he says that the question is, whether it is within the power of the legislature to require existing railroad companies to construct suitable and proper crossings for streets and highways which are laid or extended across their tracks after they have graded and built their railroads. We do not see that any question was raised in the court below as to the right of the city to open this street over and across their right of way. We shall, therefore, omit all discussion of that question, and confine ourselves to the main question in the case.

That the General Assembly may, in granting a charter to a railroad company, impose, as a condition, that all such companies shall restore existing streets and highways across which the railroad shall run, to their former condition, as near as may be, would seem to be a proposition that admits of no doubt. And it is equally true that, if their charters were to contain a provision that they should so construct crossings over roads and streets subsequently located and opened, such a provision would be binding. And if the General Assembly were to provide, by general law, that railroad companies should make and keep up such structures at crossings when the road is built, as well as those that might be thereafter

laid out and opened, all railroads subsequently constructed would be compelled to conform to the requirement unless exempted by their charters.

But the charter of the company contains no such provision, nor does the 25th section of the general railroad law of 1849 make such a requirement. (Laws 2d Sess. p. 28.) Nor has appellee referred us to any such provision in existence when this road was located and constructed.

Counsel for the city relies upon the provisions of the city charter, passed the 13th of February, 1861. The 20th paragraph of section 22 empowers the city, by ordinance, "To require railroad companies * * * to construct and keep in repair, and unobstructed, suitable crossings at the intersections of their roads with the streets." And the same is re-enacted by the amended charter of 1867, which also provides that this latter act shall not deprive the city of any of the powers previously possessed under former charters, unless by express enactment.

Incorporations, when brought into existence, except so far as exempted or further burthens are imposed, become liable to perform all duties to the public that devolve upon citizens. When brought into existence, they become endowed with the powers necessary to perform the functions and to accomplish the purposes of their creation, and they are under the same burthens and owe the same general duties to the public which can be rightfully required of natural persons, to the extent that they are capable of their performance. They are incapable of being endowed with political rights, but may be and are with many, if not all, of the rights of natural persons. They may sue and be sued, contract and be contracted with; they may buy, sell and hold property so far as authorized by their charters; they may earn, receive and have, and pay out money in the line of their business and according to the objects of their creation, but they are incapable of holding office, or, in fact, exercising any political rights beyond those conferred upon them by their charters. But, having the

rights of natural persons to the extent acquired at their creation, they are entitled to protection in those rights to the extent as all natural persons are in their rights. The same duties to the public may be required and enforced, but no greater or different burthens can be imposed than may be on individuals.

Suppose a natural person had the right of way across his neighbor's grounds, and afterwards the city were to locate and open a street across his right of way, does any one suppose the owner of the right of way could be compelled, by legislative enactment, or an ordinance in pursuance thereto, to construct the crossing of the street at his own expense, even if his use of the right of way would render the use of the street impracticable or dangerous until the approaches should be constructed? We presume no one would contend for the power in that case. And why? Because it would impose an unequal and unjust public burthen on the owner of the right of way that, in spirit, would be the taking of private property for public use without just compensation, which must be paid under the constitution.

If, then, such burthens can not be imposed upon a natural person, why, or by what reasonable means, can it be required of an artificial person? When brought into existence, these bodies are created persons so far as to become amenable to the same burthens in the support of the government, by taxes and the like, as natural persons coming into and subject to the government. But they are only liable to the performance of such duties to the same extent, on the same terms and conditions as natural persons. The legislature can exact of them no greater or higher duties than it can of natural persons, unless the right is reserved in their charters, or by some law that enters into their charters. One of the fundamental principles upon which all good government is constructed and is administered, is equality of burthens and protection. Any other principle is unjust and oppressive.

In the cases of *The City of Chicago* v. *Larned*, 34 Ill. 203, *The City of Ottawa* v. *Spencer*, 40 Ill. 211, and *Bedard* v. *Hall*, 44 Ill. 91, it was held, that the whole burthen of paving a street, laying a sidewalk, or improving a street upon the frontage of the property adjoining the improvement, is repugnant to the constitution, and that, in making such improvements, the benefits must be assessed upon all property enhanced in value thereby, and imposed on the same to the extent of the benefits, if required, or the improvement must be made by general tax.

Now, here is an improvement of a street that was required, and the city endeavored to impose the whole burthen upon the railroad company. It had never agreed to make this improvement. The duty was not imposed upon the company by their charter, or, so far as we can see, by any other law then in existence; and this being true, the General Assembly had no more power to fix this burthen on the company than to impose a similar burthen upon an individual, which we have seen, by the cases to which reference has been made, can not be constitutionally done. The principle announced in these cases is conclusive of this question.

Whether the right of way of the company is to be considered so far public property that it need not be again condemned where a street or highway crosses it, is not presented by this record. Nor is the question presented whether, the city having made the improvement, the railroad company may be required, as a police regulation, to keep it repaired, and hence these questions are not discussed.

But the court below erred in rendering judgment in favor of appellee, and it must be reversed.

Judgment reversed.

Mr. Justice Scott took no part in this decision.

GEORGE PINCKARD

v.

GEORGE MILMINE *et al.*

1. ESTOPPEL—*by deed.* A party claiming under a deed can not be permitted to deny any fact admitted to exist by the recitals therein. Whatever rights legitimately arise on such admitted facts may at all times be asserted, whether it be to obtain or to defend the possession of such rights.

2. SAME—*to deny name of grantee in deed.* The fact that one of the grantees or mortgagees in a deed or mortgage is described by a wrong name, will not invest such party with the right to sue in a fictitious name; and if he sues, not in his real name, but in the name as stated in the deed, the grantor or mortgagor will not be estopped from pleading the misnomer in abatement.

3. MISNOMER—*may be avoided by averment and proof.* Where a contract or deed is executed to a party by a wrong name, he must, nevertheless, sue in his proper name, and may aver in his declaration that the defendant made the deed or contract to him by the name mentioned therein.

WRIT OF ERROR to the Circuit Court of Piatt county; the Hon. C. B. SMITH, Judge, presiding.

Messrs. REED & BARRINGER, and Messrs. CREA & EWING, for the appellant.

Messrs. LODGE & HUSTON, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action of ejectment, brought by George Milmine and Edwin C. Bodman against George Pinckard, to recover the lands described in the declaration, which premises they claimed "in fee simple, as mortgagees of Charles Fisher, for condition broken."

Defendant filed a plea in abatement, in which he averred the "said Edwin C. Bodman," one of the plaintiffs, was named Edward C. Bodman, and not Edwin C. Bodman. The plea was, in all respects, formal; was subscribed and sworn to by defendant.

Plaintiffs replied, they claimed possession of the property in the declaration mentioned under a mortgage made by Charles Fisher to plaintiffs, by the names of *Edwin* C. Bodman and George Milmine, the condition of which mortgage had been broken, and that defendant holds possession of the same premises as tenant of Robert Fisher, who bought the same of Charles Fisher after the execution of the mortgage and subject to the lien thereof, and hence they aver defendant is estopped to deny the name of plaintiff, Bodman, as stated in the mortgage. A general demurrer was interposed to this replication, which was, by the court, overruled, and the defendant electing to stand by his demurrer, judgment was rendered for the plaintiffs.

The demurrer ought to have been sustained.

We recognize the doctrine of estoppel by the recitals in a deed, and that a party claiming under such deed can not be permitted to deny any fact admitted to exist by such recitals, as that doctrine is declared in *Byrne* v. *Morehouse et al.* 22 Ill. 603, and *Riggs* v. *Cook*, 4 Gilm. 336. The principle of these cases is, that whatever rights legitimately arise on such admitted facts may at all times be asserted, whether it be to obtain or defend the possession of such rights.

But what fact did the grantor in this case admit by the recitals in the mortgage? Simply that he conveyed the land to plaintiffs, but to one of them by a wrong name. This fact the grantor and all persons claiming under him, however remote, are estopped to deny. So far as they are concerned, it must stand as an incontrovertible fact. But can it be that this admission in the mortgage, however conclusive as against the grantor and all privies in estate, invests plaintiff with the right to sue in courts of law in a fictitious name? There is nothing in the mortgage that admits plaintiff's right to sue in an unreal name. Parties can only sue in their true names. Where the contract or deed is executed to them by a wrong name, nevertheless plaintiffs must sue in their proper names, and may aver in the declaration that defendants made the

deed or contract by the name mentioned. *Board of Education* v. *Greenebaum*, 39 Ill. 609.

For the error of the court in overruling the demurrer, the judgment will be reversed and the cause remanded.

Judgment reversed.

GILBERT J. BURR *et al.*

v.

THE CITY OF CARBONDALE.

1. CONSTITUTIONAL LAW—*locating State institutions in locality bidding the highest.* The act of April 19, 1869, entitled "An act to authorize cities and towns in Southern Illinois to issue bonds in aid of the Southern Illinois University," taken in connection with the charter of the University, which makes the location of that institution to depend upon the aid and inducements which may be offered in the different localities, is not liable to any constitutional objection, although such legislation is not calculated to advance the credit and renown of the State, and in the judgment of the court, is unwise and impolitic.

2. SAME—*taxation of one locality more than its just share in a State expenditure.* Where a law authorized the imposition of a tax in a county, without any vote of the people, to aid the State in establishing a State institution therein, and the taxable property of such county was also required to bear its proportion of taxation equally with that in the other counties as to the residue of the cost, it was *held*, that the first tax was compulsory taxation under the general power to tax, and in violation of the constitutional provision requiring such taxation to be equal and uniform.

3. SAME—*whether a tax voted for the location of a State institution of learning is for a corporate purpose.* Where the people of a city, under the authority of a special act of the legislature, voted that the city should donate $100,000 in aid of the Southern Illinois Normal University in the event it should be located in such city, and it was so located, and the bonds regularly issued and put in circulation, it was *held*, on bill filed by the city to enjoin the collection of taxes assessed to pay interest on the same, that such debt was incurred for a corporate purpose within the meaning of the constitutional provision allowing taxation for corporate purposes, and

that as the taxation was *voluntarily* imposed, its collection would not be enjoined.

4. MUNICIPAL BONDS—*not invalidated by mere irregularities.* Where municipal bonds are issued in the exercise of a power constitutionally conferred, they will be binding upon the municipality, although irregularities may have occurred in the form of the notice of election and the like, not going to the power. The acts of such bodies, done under lawful power and in substantial conformity to the power, are binding. But where such bonds are issued under a void authority, or without authority, they will be void, into whatever hands they may come, and there can be no innocent holders of them.

5. There is a distinction to be observed between the want of power to issue municipal bonds, and irregularities in the exercise of the power, the latter being unavailing against *bona fide* holders without notice of the irregularity.

6. CONSTITUTIONAL LAW—*release of indebtedness to State.* Section 23, article 4, of the present constitution, which provides that the General Assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to the State, was not intended to embrace a release of claims doubtful or hazardous which the State may hold against a municipal or other corporation.

7. MUNICIPAL BONDS—*given to fund debts.* Where the legislature authorized the Governor to deliver up to a city $100,000 of its bonds, which were valid obligations, upon the payment of $30,000, and the city to raise the latter sum, under the act of March 26, 1872, entitled "An act to enable counties, cities, townships, school districts and other municipal corporations to take up and cancel outstanding bonds and other evidences of indebtedness, and fund the same," issued its bonds to the amount of $40,000, which were sold, and the proceeds paid to the Governor, it was *held*, that if the action of the legislature was in violation of section 23 of article 4 of the constitution, the city would, nevertheless, be liable upon the bonds last issued by it.

8. SAME—*whether issued for a corporate purpose.* Where a city issued $40,000 of its bonds under legislative authority and upon a vote of its legal voters, whereby it was relieved from the payment of over $100,000 of its prior indebtedness, it was *held*, that the bonds last issued were for a corporate purpose.

9. SAME—*to purchase lands for donation to secure the location of a State institution.* And where, in pursuance of an act of the legislature, such city was also authorized to give lands, etc., to aid in the establishment and foundation of a university, and for that purpose purchased grounds, etc., and submitted to vote of the people the question of issuing $30,000

of corporate bonds to make payment, which was carried, and there appeared no fraud, combination or oppression, it was *held*, that these last bonds were issued for a corporate purpose, and were valid obligations against the city.

WRIT OF ERROR to the Circuit Court of Jackson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. WM. J. ALLEN, and Mr. D. H. BRUSH, for the plaintiffs in error.

Mr. ANDREW D. DUFF, for the defendant in error.

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

This was a bill in chancery, in the Jackson circuit court, exhibited by the city of Carbondale, to enjoin the collection of taxes assessed to pay interest on certain bonds issued by that city under the act of March 9, 1869, of April 19, 1869, and March 29, 1872, in aid of the Southern Normal University. To the bill, the county treasurer, the collector of taxes, and the unknown bondholders, were made defendants.

The main charge in the bill is, that these several acts were passed by the legislature without competent constitutional authority, and the acts done under them consequently void and of no effect.

The prayer of the bill was to enjoin these officers from acting in the premises—from collecting the taxes levied for the payment of interest upon the bonds, and from paying the money on the interest coupons, collected for such purpose, and also to restrain the holders of the bonds from proceeding to collect the interest or principal thereof by action at law, by *mandamus* or otherwise.

A general demurrer to the bill was interposed, which, on argument, was overruled, and the court decreed in all things as prayed.

*This case was decided at the January Term, 1874.

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

The bill alleges these several acts to be unconstitutional and void, and charges specially, that the act of the 19th of April, 1869, and that portion of the tenth section of the charter of the Normal University which favors the selling out the location of this university to the highest bidder, under and by virtue of which all of the bonds of the city have been issued, are and were void, because of being against public policy; and that the act itself is in conflict with section 5 of article 9 of the constitution of 1848, and therefore void, and that all the bonds of the city mentioned in the bill were issued without authority of law, in violation of the State constitution, and therefore void.

The bill also charges that the levy and collection of taxes within the corporate limits of the city for the payment of interest or principal of these bonds, are in violation of section 2 of the same article of the constitution.

These are the principal and only important charges in the bill, on which the controversy turns.

An able argument has been presented by appellee in support of the decree, which we have attentively read and maturely considered. It is based on the charges in the bill we have specified, and the authority for the argument is, in great measure, the opinion of this court in the case of *The Board of Supervisors of Livingston County* v. *Weider*, 64 Ill. 427. If this case is like that in any or all of its prominent features, it must be decided in the same way.

The charge in the bill is, that the act of the 19th of April, 1869, and that portion of the charter of the university which favors the selling out the location of this institution to the highest bidder, under which the bonds in question were issued, were void, "because of being against public policy."

The charter is found among the Session Laws of 1869, at page 34, and is entitled "An act to establish and maintain the Southern Illinois Normal University." The first section

of this act provides for a corporation by the name of the Southern Illinois Normal University, with the usual rights, powers and privileges of corporations. Section 2 declares the objects to be to qualify teachers for the common schools of this State by imparting instruction in the art of teaching, etc. Section three vests the powers of the corporation in a board of trustees, to be appointed (Sec. 4,) by the Governor and Senate, prescribing their term of office, etc. By section 5 they are to hold their first meeting at Centralia, at which meeting a president and secretary of the board are to be chosen, who were to be members of the board, and cause a regular record to be kept of all their proceedings. A treasurer was also to be appointed, not a member of the board, and to give bond. By section 6 the treasurer's duties are prescribed. The subsequent sections are matters of detail.

Then follows section ten, to which exception is taken by appellee as unconstitutional, because against public policy:

Section 10. The trustees shall, as soon as practicable, advertise for proposals from localities desiring to secure the location of said Normal University, and shall receive, for not less than three months from the date of their first advertisement, proposals from points situated as hereinafter mentioned, to donate lands, buildings, bonds, moneys, or other valuable consideration, to the State in aid of the foundation and support of said university, and shall, at a time previously fixed by advertisement, open and examine such proposals and locate the institution at such point as shall, all things considered, offer the most advantageous terms. The land shall be selected south of the railroad or within six miles north of said road passing from St. Louis to Terre Haute, known as the Alton and Terre Haute Railroad, with a view of obtaining a good supply of water and other conveniences for the use of the institution.

It is unnecessary now to notice any other provisions of that act. Its object and purpose is plainly perceived.

We will now quote such portions of the act of April 19, 1869, as are necessary to a proper understanding of the case. It is entitled "An act to authorize cities and towns in Southern Illinois to issue bonds in aid of the Southern Illinois University." Sess. Laws 1869, p. 297.

The first section provides, that the city council of cities, and the board of trustees of incorporated towns in Southern Illinois within the limits designated for the location of the Southern Illinois Normal University, are hereby authorized and empowered, in each of said cities and towns, to issue bonds in such amounts as said city council or board of trustees may determine upon by ordinance, not exceeding one hundred and fifty thousand dollars, payable in not less than five years nor in more than twenty years, and bearing seven per cent interest per annum; which said bonds, or the proceeds arising from the sale thereof, to be used by the said city council or board of trustees in aid of the Southern Illinois Normal University, if the same is located at any such city or town issuing said bonds.

Section 2 provides, that a tax shall be annually levied on all the property listed for taxation in said city or town, to pay the interest and principal on such bonds as may be issued under the provisions of this act; which tax, when collected, shall be deemed a special fund, and shall be used for no purpose other than the payment of said principal and interest. Said tax shall be assessed and collected in said city or town in the same manner as taxes are assessed and collected in such city or town for corporation purposes.

Section 3 provides, before any such bonds shall be issued, an election shall be first had in any such city or town as the people thereof may desire to avail of the provisions of this act, to determine whether such bonds shall be issued. A certain notice of the election is to be given, all tickets to be prepared with the words "for the loan," or "against the loan," and no bonds shall be issued or tax assessed, unless a majority of the votes cast be for the loan; only qualified voters to

vote, and the notice shall give the amount and duration of the bonds. No other portions of this act need be noticed.

In the able argument of the defendant in error, the successful party below, and the party who had issued the bonds in question, the right to avoid their payment or the interest upon them as stipulated on their face, is placed upon three grounds: *First.* That the principle and spirit of the act of April 19, 1869, is contrary to good morals and public policy. *Second.* That a tax levied to pay bonds issued under this law would be a State tax, and therefore a violation of section 2 of article 9 of the constitution of 1848. *Third.* That such tax would not be levied for a corporate purpose, within the meaning of section 5 of the same article of the constitution.

In support of the first proposition, counsel rely on the case of *Livingston County* v. *Weider*, *supra*. There are some strong expressions in the opinion in that case, but, as we read it, it fails to establish the proposition advanced. We think now, as we thought then, that such modes of providing State institutions hardly comports with the dignity of an independent and wealthy State, possessed of abundant resources. Setting up the location of State institutions to the highest bidder is, in our judgment, impolitic and unwise, resulting, in many cases, most disastrously to the best interests of the State. It should be the paramount object in locating public institutions, to place them where the interests of the State demand them, and not to promote individual interests, however strongly fortified by money or by representation. By the power of money, the very place least fitted may become the chosen spot, whilst those having every required advantage are overlooked. It gives occasion to bargaining and corruption, or at least strong suspicion thereof, for it is argued, if a locality can afford to offer such large inducements, is it not natural and reasonable to suppose they will supply others, so that success may be certain? It is humiliating to our State pride that resort should be had to such means, but this court has never said or entertained the opinion it was against the constitution

so to legislate. It was not so decided in the Livingston county case, nor in any other. It may be the court went out of its way in saying as much as it did on this point, in that case, but the most mature reflection upon the whole subject has satisfied us that such a course of legislation is not calculated to advance the credit and renown of the State. Further than this, in this respect, that case does not go.

The second point made by complainants is, that a tax levied to pay bonds issued under the act of April 19, 1869, would be a State tax, and therefore a violation of sec. 2 of art. 9 of the constitution of 1848.

This point brings in review some of the considerations involved in the opinion in the Livingston county case, and were the facts the same, the conclusions would of necessity be the same.

That was a case where the county authorities, without the vote of the people, were allowed to make a subscription in aid of a reform school for juvenile offenders and vagrants, established as a State institution, by resolution, to be adopted by a majority of the board of supervisors, at a regular or special meeting, whilst the same law required, if a township, town or city desired to subscribe, the proposition to make the subscription should first be submitted to a vote, and adopted by the legal voters of such township, town or city by a majority of all the votes cast.

The taxables of the county had no voice in the matter, but were taxed to provide for the payment of the principal and interest of such subscription as the board, without their consent, might make, and to be collected in the same manner that other taxes were collected in the county, township, town or city.

It was this legislation which was attacked, and its validity denied, in view of the provisions of the constitution on the subject of taxation by corporate bodies.

The court then quoted sec. 2 of art. 9, on the general subject of taxation, and the Larned case, 34 Ill. 203, holding

that equality and uniformity were the leading principles of the system, and then argued that, tested by this clause, it was very apparent the taxable inhabitants of Livingston county, to promote a State institution for which the property owners in every county of the State are taxable in proportion to the value of their property, were required to pay a greater share of taxes for the same object, in the benefits of which they can only participate in common with the other counties. The adjoining county of La Salle was only required to pay on its taxable property its ratable share of the expense of this State institution, whilst the taxables of Livingston were required to pay, not only this amount, but the additional amount imposed by the action of the board of supervisors, and to be collected by the sale of their property if necessary.

Here, the court was speaking of taxes imposed *in invitum* of compulsory taxation under the section quoted. Such taxes, we have always held, must have for their basis equality and uniformity, and showed wherein these principles were disregarded by this law. It was compulsory taxation under the general power to tax, and was held illegal for the reasons given, and which, we think, are sound and conclusive.

Is this the case here? Had the county authorities of Jackson county, without a vote of the people, levied a tax on the property of the whole county to pay the principal and interest of these bonds, it would be the Livingston case repeated, and the collection of the tax would be enjoined, and the bonds issued by the arbitrary will of the authorities would be held invalid.

The next question discussed was, were the bonds issued by competent authority? And in arguing that question, the court quoted sec. 5 of the same article (9): "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."

We then endeavored to answer the question, what is a tax for a corporate purpose? and said it was answered in part in *Taylor* v. *Thompson et al.* 42 Ill. 9, where it was held to mean a tax to be expended in a manner which should promote the general prosperity and welfare of the municipality which levied it. But in that case, a vote of the people authorizing the tax was first to be taken, and the people in fact voted the tax. This was an important fact in determining that case.

We thought it difficult to determine with precision what was "a corporate purpose," in the sense of the constitution, but came to the conclusion it was such a purpose, and such only, as might have a legitimate connection with objects and purposes promotive of the welfare of the municipality and a manifest relation thereto.

We then endeavored to show it was not a corporate purpose to provide a location for a State institution—such a purpose as shall justify the authorities of the corporation in imposing upon the property owners a tax to pay the expense.

This very clearly has reference to a tax imposed *in invitum* —compulsorily, under the taxing power previously commented upon.

We then undertook to show that the location of this school for vagrants specially promoted no corporate interest of the county; that the tax-payers of the county, or non-residents owning property there, could have no peculiar interest in having such an institution located in their midst, and questioned its advantages, holding it, like the penitentiary, an evil, and not to be desired by any town.

It will be perceived the stress of the argument and reasoning of the court is placed on the facts of that case. It was an imposition of a tax, without the consent of the people, under the pretext it was for a purpose beneficial to the whole county, and therefore a corporate purpose. This was controverted. But that is not this case. Here, complainants, by a vote of the citizens and property owners of their municipality, voluntarily imposed this tax upon themselves, being

authorized so to do by a law of the State, which the General Assembly had the constitutional power to pass, however impolitic it may have been. The property owners vote these bonds, the institution is established at Carbondale, the complainants or their predecessors issue the bonds, they pass from hand to hand, interest is regularly paid on them, their validity never questioned, until it is thought a loop-hole of escape from further payment of interest is discovered, of which the city, to her discredit be it said, seeks to avail. To make this case like the Livingston county case, it would be requisite the authorities of the county should have imposed this tax upon the taxables of the county for a purpose local to Carbondale alone, and therefore not corporate as to the county. So, in the Livingston county case, had the citizens and tax payers of Pontiac voluntarily imposed a tax upon themselves under the authority of a law passed for such purpose, for the location of the Reform School within its limits, and issued their bonds, and we could be satisfied it was a legitimate corporate purpose, the bonds would not be held invalid. But it was claimed it was a corporate purpose, so far as the county was concerned, which we could not see, and as the people had not voted for it—had no voice in the matter—the levy of the tax, for the reasons there given, violated the principles of equality and uniformity.

How different is this case? They have been briefly pointed out. Whilst the location of the Reform School was not a corporate purpose for Livingston county, subjecting all its property owners to compulsory taxation, the location of an institution of learning—an university—founded and fostered by this great State, can not fail to give character and notoriety to the place of its location, and in a greater or less degree enhance the value of property there, independent of any exclusive advantages to be derived by its citizens in fitting pupils as teachers in the various branches of education. Still, it can not be seriously questioned its location at Carbondale so blends the interests of its people with the institution, as to

prompt an unhesitating acquiescence in the conclusion that the tax was for a legitimate corporate purpose, germane to the welfare and best interests of the municipality imposing the same.

These considerations dispose of the third point raised.

In addition to what we have said on the second point, it can not fail to be observed that the strong ground upon which we placed the Livingston county case was, that the principles of equality and uniformity were disregarded in this, that the tax payer of Livingston was compelled to pay for a State institution, not only the same proportion of taxes a property owner in La Salle had to pay, but, in addition, this tax assessed against the same property. Consequently there was inequality. But had the people of the county voluntarily voted this additional tax under an enabling law, the principle of equality could not be alleged to have been disregarded. It would not be *in invitum* and compulsory. Most courts, this among others, have held subscriptions to railroad companies, to aid in the construction of a railroad through a county or through a town or city, and bonds issued in pursuance thereof, are valid, if the affirmative voice of the people of the municipality has been had. The power of the legislature to authorize such municipalities to issue bonds or to tax themselves in aid of such improvements, has never been successfully questioned. The location of an university, though not a kindred subject, seems to be one worthy the consideration of a municipality—so worthy and so deserving as to be deemed a corporate purpose, and to which the principles of those cases will well apply.

It may be difficult to define precisely what is a corporate purpose in the sense of the constitution. We said in *Taylor* v. *Thompson, supra*, that levying a tax to pay military bounties whereby the town might escape a draft, was for a corporate purpose, the court holding that this purpose had a legitimate connection with objects and purposes promotive of the welfare of the municipality and a manifest relation thereto.

The General Assembly would not have enacted the law in question had it not been their conviction the establishment of this university in Southern Illinois would promote the welfare of that municipality which should succeed in obtaining the location, and the same may be said of the vote of the people of Carbondale, offering these bonds and lands for the location. This vote is the highest evidence from those most interested, that its establishment in their midst would tend to their benefit. The expenditure of two hundred and fifty thousand dollars on the construction and embellishment of the building located within the corporate limits of the city, with the necessary residences for the accommodation of the various professors, teachers and officers which such an institution requires, must add to the taxables of the city. The annual expenditure by the State in its support will operate in the same direction. Can it be doubted that the establishment of the State charitable institutions at Jacksonville, in Morgan county, has contributed greatly to the growth of that place, enhancing the value of real estate and giving it prominence over municipalities of the same class in other parts of the State?

The establishment of the Normal school at Bloomington, furnishes an apt illustration of the benefits derivable from such an institution. That school was established by an act of the General Assembly of February 16, 1857, and proposals were invited as in this case. It appears, from the brief of appellants, and such we understand is the fact, that soon after the passage of this act and the acceptance of the offer of this particular tract of land for the location of this "school," the town of Normal was surveyed and platted, and in 1870 its population, by the census of that year, was eleven hundred and sixteen. The population of Bloomington in 1860 was six thousand nine hundred and thirty; in 1870 it had increased to fourteen thousand five hundred and ninety, more than one hundred per cent! It has been supposed, some portion of this vast increase might be fairly attributed to the

establishment of this school and its successful operation in its immediate vicinity, whilst Normal, from a prairie farm, is now a town of more than ordinary pretensions.

It is true, as urged by appellee's counsel, the act under which this university was created gives to the resident of Carbondale, or Jackson county, no special advantages for admission within its precincts over those of any other county in the State. The same may be said of a railroad. No municipality, by donations or by subscriptions to its stock, secures any advantages not enjoyed by the public at large in the transportation of themselves or their property. The enhancement of the material interests of the municipality renders such donations and subscriptions valid, and the taxes levied to pay them rightfully imposed, as for a corporate purpose.

This university is under the fostering care of the State, and under the provisions of the law it may be expanded to vast proportions. It may be the germ of an institution which, in time, may rival the most famous institutions of learning of other countries and states.

We are constrained to believe, the purpose for which these bonds were issued was a corporate purpose, and the tax levied to pay the interest on them valid, and its collection should be enforced.

The case of *Musick et al.* v. *Inhabitants of Amherst et al.* 12 Allen (Mass.) 500, supports the views we take of this case.

It has always been the policy of this State to afford means for the education of the youth of the State, and a duty also. A normal university enters into our plan of education, wherein teachers of our youth shall be taught how best and most effectually to discharge their duty.

The bill of complaint states fully and clearly that each subscription on which these bonds were issued was voted for by a majority of the votes cast at such election. It alleges further, that the subscriptions were duly made by the city council, and the bonds which were issued contained recitals of their being issued in pursuance of law, and that they were all,

subsequent to the issue, repeatedly ratified by the city authorities making assessments, collecting the taxes and paying the interest on them. The bill charges no fraud, and the inference is reasonable, from the allegations in the bill, that these bonds are in the hands of innocent holders, ignorant of any irregularities if such there were prior to their issue.

We said, in the Livingston county case, that, as the action which gave birth to the bonds was illegal and contrary to the constitution, there could be no innocent holders. These bonds having been issued in the exercise of a power constitutionally conferred, must be binding on the municipality, although some irregularities in the form of notice of the election, want of the precise words on the ballots, and others of like character, may have occurred.

The principle has always been acknowledged by this and other courts, that the acts of a municipality done under a power, and in substantial conformity to the power, are binding. Bonds issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are held valid commercial interests; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid, even in the hands of innocent holders. *St. Joseph Township* v. *Rogers*, 16 Wallace, 644.

So, by parity of reasoning and analogy, if a municipal corporation, authorized by law, issue its bonds in furtherance of a corporate purpose, and in substantial compliance with the law authorizing their issue, and such bonds come into the hands of an innocent holder, even if there be irregularities not going to the power, the bonds must be held valid. If the power existed, the act is binding. The principal question to be determined is one of power. This is the drift of the reasoning of this court in *Marshall County* v. *Cook*, 38 Ill. 44. Where the power to issue bonds existed, the corporation is estopped from setting up irregularities in the issue of the bonds after repeated payments of interest thereon. *Town of*

Keithsburgh v. *Frick*, 34 Ill. 405; *Mercer County* v. *Hubbard*, 48 ib. 139.

The rule may be considered settled, that a municipal corporation may successfully defend against bonds, in whosesoever hands they may be, if its officers or agents, who assumed to issue them, had no power to do so. The distinction must be ever remembered between want of power to issue the bonds and irregularities in the exercise of the power, the latter being unavailing against the *bona fide* holder without notice of the irregularity. 1 Dillon on Mun. Corp. 524.

It appears, from the bill, that the trustees of the university, in the month of May, 1869, provided, under the tenth section of the charter, (act of March 9, 1869,) quoted above, and under the first section of the act of April 19, 1869, also quoted, to advertise for proposals from the towns and cities desiring to secure the location, inviting them to send in their bids in the shape of lands, buildings, bonds, moneys, etc.; and that, after so advertising, on the 16th of July thereafter, and in pursuance of due notice given, an election was held in the city of Carbondale for the purpose of voting upon this question: Shall the city of Carbondale appropriate to the State of Illinois its bonds to the amount of one hundred thousand dollars, for the purpose of securing the location of the Southern Illinois Normal University at Carbondale? The result of the election was, that a majority of the ballots cast thereat, had the words "for the loan" written or printed thereon.

It also appears, from the bill, that the city council, at a regular meeting thereof, on the 29th day of the same month of July, adopted an ordinance appropriating one hundred thousand dollars by the city, in bonds of the city, to the State, to aid in the erection and maintenance at that city of this university. By the second section of this ordinance, these bonds were to be tendered by the mayor of the city, in the name of the city, to the trustees of the university, as the proposition of Carbondale to secure its location at that place.

It also appears, by the bill, that a short time prior to the 13th of September, 1869, the board of trustees located the university at the city of Carbondale, and on the said 13th day of September, the city council passed an ordinance directing the issue of one hundred thousand dollars in bonds of the city, to be issued in the denomination of five hundred dollars each, payable to ——, or bearer, within twenty years, and bearing seven per cent interest per annum, and, by a subsequent ordinance, were made payable at the office of the city treasurer of the city of Carbondale.

It appears by the bill these bonds were engraved and issued, bearing date January 1, 1870, payable as above; that the same, on the 12th of that month, were delivered by the city of Carbondale to the trustees of the university, who receipted for them.

As we understand the points made by complainant, no objection, on the score of irregularity, is taken to any of these proceedings.

Then, on the 12th day of January, 1870, the proposals of the complainant were finally consummated by the delivery of the bonds to the trustees, who delivered them to the contractor for the work.

Whilst these bonds were so situated, the General Assembly, on the 15th of April, 1871, passed an act entitled "An act to appoint commissioners to construct the Southern Illinois Insane Asylum and the Southern Illinois Normal University, and to make an appropriation therefor."

By this act the construction of this university was taken out of the control of a board of trustees and lodged with three commissioners to be appointed by the Governor and Senate.

By section 6 of this act, they were required to examine the contract the trustees had made for the construction of the university; to examine and determine if the contract was in full force; to examine the plans and specifications, etc., and determine if they could be abridged, so that the expense

might be curtailed, and to continue the contract, if expedient, and allow the contractor, out of the fund hereinafter appropriated, the amount due him for extra work; and it was provided, on making a settlement with the contractor, he should return to the commissioners all the assets paid and delivered him by the former board of trustees which remained unexpended in his possession, "including one hundred thousand dollars in bonds issued by the city of Carbondale"—the commissioners to deposit these bonds with the Governor. Sess. Laws 1871, p. 274.

At the adjourned session of the General Assembly, held in November, 1871, a joint resolution was adopted instructing the Governor to sell these bonds to the city of Carbondale for no less than thirty thousand dollars in full of said bonds and the interest that had accrued on them, "which amount, when so paid, shall be transferred to the commissioners of the said Southern Illinois Normal University, located at Carbondale, to be used by them in the construction and completion of the same: *Provided*, that said sum of thirty thousand dollars be paid on or before the first day of July, 1872." Sess. Laws 1871, p. 785.

The General Assembly, on the 26th of March, 1872, passed an act, in force on that day, entitled "An act to enable counties, cities, townships, school districts and other municipal corporations to take up and cancel outstanding bonds and other evidences of indebtedness, and fund the same." By this act, the question was to be submitted to a vote of the people of the municipality to accept the advantages and provisions of this act.

Accordingly, it appears from the bill, on the 29th of May, 1872, in pursuance of an ordinance passed by the city council, and of notice duly given, whether the city should issue bonds under the provisions of the last cited act, an election was held in the city, by which it was decided, by a majority of those voting upon the question, that the city authorities should issue bonds to an amount not exceeding forty thousand dol-

lars, for the purpose of raising a fund of thirty thousand dollars in cash, with which to purchase these one hundred thousand dollars in bonds held by the Governor, and thus generously offered to the city for thirty thousand dollars in cash.

We can not appreciate the objection complainants, the defendants in error, make to this election. It was strictly in pursuance of law, and the bonds were to subserve a great corporate purpose: relief from a debt, self-imposed, of one hundred thousand dollars, with the annual interest, by the payment of thirty thousand dollars.

The defendants in error seem to yield the point, if the act of 19th April, 1869, is constitutional there is nothing in the objection, and we fail to perceive any. Complainants, however, do make some special objections to these forty thousand dollar bonds. Without questioning the constitutionality of this act of March 26, 1872, they insist that they show on their face an attempt to cover up an illegal transaction, by reciting that they are issued under that act. Complainants insist that act gives no authority to issue them—that it is an act authorizing certain municipal corporations to fund their debts, but they must be binding, subsisting obligations against the municipality.

As we hold the original issue of one hundred thousand dollars of bonds to be valid, and as these bonds of forty thousand dollars were to be converted into cash, in order to take them up, they must be valid if the act of March, *supra*, has been complied with. The argument of complainants is, as the original issue was invalid, those which are to discharge must also be invalid. But they contend, if the original issue was legal, then they insist that the resolution of the General Assembly of 1871, authorizing the Governor to sell them to the city issuing them, is an infraction of section 23, of article 4, of the present constitution. That section is as follows: "The General Assembly shall have no power to release or

extinguish, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State."

We can not suppose this provision was designed to embrace a case like this. If it does, then the original issue being held valid, those bonds are still binding upon the city, and they must pay them. But we do not think this section of article 4 was intended to embrace a release of claims doubtful or hazardous, which the State might hold against a municipal or other corporation or individual. On the face of those bonds the State was not named as the obligee. They do not purport to be an undertaking in which the State is a party. They had become the property of the State, which the Governor, under the resolution, was authorized to sell to the obligors for less than one-third of their nominal value. The bonds were payable to ————, or bearer—not to the State. It was a question for the legislature, when the bonds came into the possession of the State, what, under the circumstances, was best to do with them. The result appears in the joint resolution.

But if this joint resolution contravenes this section of the constitution, could it affect the validity of these bonds, having in view the act of March 26, 1872, authorizing counties, cities, etc., to take up and cancel outstanding bonds and other evidences of indebtedness, and fund the same? But independent of this act, under the authority of *The City of Galena* v. *Corwith*, 48 Ill. 423, the city would have this power.

These bonds thus issued were sold by complainants' agent, and the proceeds thereof, being twenty-eight thousand dollars in cash, were paid over to the Governor, who, thereupon, surrendered ninety-three thousand of said one hundred thousand dollar bonds, leaving seven thousand dollars in bonds in his possession, and about which there is no controversy. The interest on these bonds thus surrendered to the city amounted to more than ten thousand dollars, so that by this arrangement the city paid a debt of one hundred and three thousand dollars with the proceeds of these forty thousand dollars. It

surely does not become the city now to attempt their repudiation.

These bonds were regularly voted, issued and sold by complainants in the city of New York, reciting on their face that they were issued under the funding act above mentioned, and by virtue of the ordinances of the city, after a vote of the voters of that city had been taken, authorizing their issue. These bonds are commercial instruments, are now in the hands of innocent holders, for value, without notice of any infirmity, and they must be paid. See authorities referred to *supra*.

In another view these bonds are valid and binding, having been issued for a corporate purpose, which purpose was to relieve the city from the payment of more than sixty thousand dollars of valid indebtedness. No one will deny this was a purpose closely connected with the best interests and welfare of the municipality, and therefore "a corporate purpose."

Complainants also question the validity of the bonds for thirty thousand dollars, which were issued by them, which, with the forty thousand, and the seven thousand of the original issue of one hundred thousand, yet in the hands of the Governor, are the subject of this controversy.

Now, as to these thirty thousand. Holding, as we do, the act of April 19, 1869, to be in conformity with the constitution, all that has been legally done under that act must be upheld. Complainants make the point, when the city voted the hundred thousand dollars of bonds under the provisions of this act, the power had been exercised and exhausted—the trustees had accepted the bid, and in consideration thereof located the university at Carbondale. But this election was held to determine whether the city should issue thirty thousand dollars in bonds, carrying seven per cent per annum interest, and payable within five years, in payment for the Southern Illinois College property, and lots Nos. 58, 60, 61, 62, purchased by the city and donated by it to the Normal. It is complained, there was no election by the people to

determine whether the city should contract a debt of $30,000 for this real estate; no election by the people to say or determine whether this real estate should be handed over as a gift to the State of Illinois—but these matters were all arranged without consulting the tax-payers or the law, but in the absence and defiance of the law.

What does the act referred to provide? We see, by reference to the first section, that city and town authorities in incorporated towns in Southern Illinois, within certain limits designated for the location of this university, were authorized and empowered, in each of them, to issue bonds, in such amounts as they might determine upon by ordinance, not exceeding one hundred and fifty thousand dollars, payable in not less than five years, nor in more than twenty years, and to bear seven per cent interest per annum. The statute then declares, "which said bonds, or the proceeds arising from the sale thereof, to be used by the said city council or board of trustees in aid of the Southern Illinois Normal University, if the same is located at any such city or town issuing said bonds." Sess. Laws, 1869, p. 297, *supra*.

The only limitation upon the power to issue bonds found here, is, they shall not exceed in amount one hundred and fifty thousand dollars, and in such amounts and in as many different issues as the people, by their votes, might determine, keeping in view the prescribed limit.

But what are the provisions of the tenth section of the act of March 9, 1869? We have quoted it, *supra*, by which it will be perceived, proposals were authorized to give land and buildings, and bonds, moneys or other valuable consideration in aid of the support and foundation of the university. This act is the charter of the university.

The bill of complaint shows, by the first exhibit, (A), that the city appropriated not only one hundred thousand dollars of bonds which had been voted, but also authorized its mayor, in the name of and in behalf of the city, to offer these bonds, the college and grounds, and lands and other things subscribed

for that purpose, to the trustees of this university, as the bid of the city to secure to that city the location. An ordinance was duly passed for an election to determine, as provided in the act of 19th April, 1869, whether the city council should issue bonds of the city, payable in five years, to an amount not exceeding thirty thousand dollars, at seven per cent, etc., to be used by the city council in aid of said university, in making payment of the Southern Illinois College property, and for out-lots in Carbondale, Nos. 58, 60, 61, 62, purchased by the city, and for paying for transportation of stone for the foundation of the university, and donated to the said normal university at Carbondale, the trustees having located the said university at Carbondale. Exhibit I. Exhibit J, which is a part of complainants' bill, shows that the election to determine the above questions was held on the 8th day of October, 1869, and that the vote was in favor of the propositions, and that an ordinance was passed and approved, providing for the issue of these bonds, to be used in the payment for the Southern Illinois College property, and for out-lots Nos. 58, 60, 61, 62, and other expenses and liabilities incurred by the city in aid of this university.

We infer from exhibit A, and from the terms of the second section of the ordinance therein, that the city had bargained for the college and grounds and these out-lots as a proper site for the university, conditioned that the university should be located at the city. These were offered besides the bonds, as an inducement to the location, and the trustees having determined the location at Carbondale, the conditional purchase became absolute, and the city was bound to provide "ways and means" of payment, which was effected by this issue of thirty thousand dollars in bonds. It was done by a free vote of the majority—it was in aid of the university, and, added to the one hundred thousand dollars before issued, do not exceed the limits fixed by the legislature, but are greatly within that limit. The tax-payers were consulted, and voted, and their vote was had in conformity to law. The bonds are in the

hands of innocent holders, and must be held valid, for the reasons we have given.

In reviewing the whole ground of this controversy, we will repeat, that the mode adopted by the legislature to locate this university does not comport with the dignity of the State, but we have never said it violated any provision of the constitution.

We can not agree with complainants, that this tax, self-imposed by the voters of Carbondale, is in violation of any provision of the constitution, and that the foundation and establishment of this university at Carbondale was not a corporate purpose, to aid in which the citizens might tax themselves as for a corporate purpose.

No charge of fraud, combination or oppression is made. Every act seems to have been fairly done, and in pursuance of law. The disreputable feature of the case is, that the same authority doing all these acts, and whose city has received the benefit of them, now seeks to repudiate them. There is no rule of law, equity, justice or morals compelling this, and we can not sanction it.

The decree of the circuit court is reversed, and the bill dismissed. *Decree reversed.*

Mr. JUSTICE WALKER, Mr. JUSTICE MCALLISTER and Mr. JUSTICE CRAIG dissent, on the ground that the normal school, being a State institution, can not be regarded as a corporate object of the city of Carbondale, and its erection or support a corporate purpose of such city. And we are of opinion that the vote of the people is not a circumstance which affects the question, because the 5th section of article 9, of the constitution of 1848, limits the power of taxation to "corporate purposes," and contains no provision in respect to a vote by the electors. The power is limited in the same way in the constitution of 1870. This case, in our opinion, is not distinguishable from the case of a county tax to pay the interest upon bonds given by the county of Livingston to obtain the location there of the State Reform School.

Syllabus.

PILCHER G. W. SIMMONS
v.
CHARLES W. JENKINS, Admr.

1. CHATTEL MORTGAGE—*when the legal title passes.* It is well settled that upon the failure of the mortgagor to perform the condition of the mortgage, the legal title to the chattel mortgaged becomes vested absolutely in the mortgagee. Before default or the exercise of the right to take possession under an insecurity clause in the mortgage, the general property is not in the mortgagee so as to draw to it a possession in law.

2. SAME—*right of mortgagee to maintain action for levying execution on chattels.* If mortgaged chattels be levied upon in the hands of the mortgagor under a right given to retain possession until the debt secured matures, and such levy be before default, then, whether the mortgage contains the insecurity clause or not, the officer is not a trespasser in making the levy, and neither the action of trespass nor replevin in the *cepit* will lie in favor of the mortgagee for such act.

3. Where a mortgage contains no insecurity clause, and the debt matures before sale under the officer's writ, or where the mortgage contains such clause, and the property is levied upon, the mortgagee may demand the property of the officer, and, on refusal to surrender the same, maintain trover or replevin in the *detinet* for the wrongful detention.

4. SAME—*mortgagor's interest liable to execution.* A mortgagor in possession of the mortgaged chattels under a clause in the mortgage giving him the right to retain possession until his debt matures, has such a legal interest in the property as may be seized under execution, and but for an insecurity clause giving the mortgagee the right to reduce the same to possession, may be sold under execution against him.

5. SAME—*rights of mortgagee in case of intermixture.* Where the mortgagor, without the *knowledge* or *consent* of the mortgagee, intermixes the goods mortgaged with other goods, so as to destroy the identity of those mortgaged, the lien of the mortgagee will not be thereby destroyed.

6. But where the identity of the mortgaged goods is destroyed by the mortgagor carrying on a retail business with the same, and filling up the stock with others, the mortgagee can not hold the substituted goods unless they pass into his hands before other liens attach, and then his lien will be only an equitable one cognizable in a court of equity.

7. SAME—*permitting mortgagor to sell at retail.* If, by any arrangement, express or implied, the mortgagee permits the mortgagor to continue in the sale of the mortgaged goods at retail for his own benefit, the mortgage will be unavailing against a judgment creditor of the mortgagor, and such arrangement or permission may be shown by circumstances.

8. REPLEVIN—*in cepit.* To sustain the action of replevin for a wrongful *taking* and detaining a personal chattel, it is necessary to show that the defendant wrongfully took it from the actual or constructive possession of the plaintiff.

9. ADMISSION—*by the pleadings.* It is a fundamental rule in pleading that a material fact asserted on one side, and not denied on the other, is admitted. Where a wrongful taking is alleged in a declaration in replevin, the plea of *non detinet* admits the fact of the wrongful taking.

10. SAME—*by failing to reply to plea.* In replevin, where the defendant pleaded property in a third person, and justified the taking under execution against such third person, and a trial was had without answer to such pleas: *Held*, that the defendant was entitled to a verdict of property in such third person, and to a return of the property, the truth of the pleas being admitted.

APPEAL from the Circuit Court of Montgomery county; the Hon. HORATIO M. VANDEVEER, Judge, presiding.

Messrs. MCWILLIAMS & TALLEY, for the appellant.

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

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was replevin, in the Montgomery circuit court, by Wood, as mortgagee of Marshall, against Simmons, who, as constable, and having an execution from a justice's court, on a judgment against Marshall, levied upon and took the goods out of Marshall's possession, before default under the mortgage; whereupon Wood sued out a writ of replevin in the *cepit* against Simmons, by virtue of which the goods levied upon were replevied. The declaration contains but one count, and that is for the *wrongful taking* and detention of the goods.

The defendant filed three pleas: (1.) That he does not wrongfully detain the goods, etc., concluding to the country, etc. (2.) Property in Marshall, concluding with a verification. (3.) Justification under the execution; also concluding with a verification. No replication was filed.

The jury returned the following verdict: "We, the jury, find for the plaintiff all the goods described in the affidavit,

with the exception of the stoneware and one barrel of vinegar—that subject to execution."

The defendant moved the court to set aside the verdict for uncertainty and want of form, and for a new trial. The court, overruling the motion, gave judgment in the following form: "It is therefore considered and ordered by the court that the said plaintiff recover of and from the defendant all the property described in the plaintiff's affidavit, except the stoneware and one barrel of vinegar, which is subject to execution, and a writ of *retorno* awarded to defendant." From this judgment defendant appealed and assigns various errors.

It appears that, at the time of the levy, Marshall was in possession under a clause in the mortgage giving him the right to retain the possession and use of the chattels until the day of payment of his debt to Wood, which had not then arrived. He therefore had such a legal interest in the property as might be seized, and, but for the insecurity clause in the mortgage, sold on execution against him. *Prior* v. *White*, 12 Ill. 261; *Mattison* v. *Bancus*, 1 Comstock, 295, and cases there cited.

It is well settled that, upon failure of mortgagor to perform the condition of the mortgage, the legal title to the chattel mortgaged becomes vested absolutely in the mortgagee. *Brown* v. *Bement*, 8 Johns. R. 96; *Ackley* v. *Finch*, 7 Cow. 290; *Langdon* v. *Buel*, 9 Wend. 80; *Patchin* v. *Pierce*, 12 Wend. 61.

If the chattels mortgaged be levied upon in the hands of the mortgagor under a right given to retain the possession and use until the debt secured matured, and such levy be before default, then, whether the mortgage contain the insecurity clause or not, the officer is not a trespasser in making the levy, and neither the action of trespass nor replevin in the *cepit* will lie in favor of the mortgagee for such act. But where the mortgage contains no insecurity clause, and the debt matures before sale under the writ, the mortgagee may demand the property of the officer, and, on refusal, maintain trover or replevin in the *detinet*. So, where the mortgage

contains the insecurity clause, the mortgagee may, immediately upon the taking by the officer, exercise the right given by that clause, and demand possession of the property. If refused, he may maintain trover or replevin in the *detinet* for the wrongful detention. Before the exercise of such right or default, the general property is not in the mortgagee so as to draw to it a possession in law. The general rule laid down in the books is as follows: "The person in whom the general property in a personal chattel is, may maintain an action of trespass for the taking of the chattel by a stranger; for a general property always draws to it a possession in law, which is, in the case of a personal chattel, by reason of the transitoriness of its nature, sufficient to found this action upon." *Barrett* v. *Warren*, 3 Hill, 353.

To sustain the action of replevin for wrongfully *taking* and detaining a personal chattel, it is necessary to show that the defendant wrongfully took it from the actual or constructive possession of the plaintiff. This is elementary law. Hence the plaintiff could not, under the circumstances, have maintained replevin in the *cepit* under a plea of *noncepit*. But it is a fundamental rule in pleading, that a material fact asserted on one side, and not denied on the other, is admitted. *Dana* v. *Bryant*, 1 Gilm. 104; *Pearl* v. *Wellman*, 3 id. 311; *Briggs* v. *Dorr*, 19 Johns. 95; *Jack* v. *Martin*, 12 Wend. 316; *Raymond* v. *Wheeler*, 9 Cow. 295.

The wrongful taking alleged in the declaration was traversable, and the defendant admitted it by denying the wrongful detention only.

The allegation of property in plaintiff was not admitted, because it was traversed in both the plea of property in Marshall, and justification under the execution. These pleas remaining unanswered, entitled the defendant to a verdict of property in Marshall and judgment of return.

Evidence was given tending to show that Marshall, after giving the mortgage to Wood, continued to carry on his retail trade from the stock mortgaged, as before, making additions

by purchases, and that Wood had knowledge that the mortgagor was thus dealing with the property.

The court instructed the jury for plaintiff that, if the mortgagor mixed his goods with those of the mortgagee, that fact would not, in law, prejudice the rights of the mortgagee under his mortgage, and would not, of itself, justify an officer in levying upon the mortgaged property.

It will be perceived that this instruction has no hypothesis as to whether this intermixture was with the knowledge and consent of the mortgagee or not. The instruction was calculated to mislead. It is implied that the mortgagee would be entitled to the substituted goods, if there was such an intermixture as destroyed the identity of those covered by the mortgage, whether the mortgagee knew of it and assented or not.

In *Dunning* v. *Stearns*, 9 Barb. 630, it was held that, where the mortgagor intermixed the ashes mortgaged with other ashes without the *consent or knowledge* of the mortgagee, the lien was not destroyed. The case at bar is where the identity was lost, measurably, at least, by the mortgagor carrying on a retail business with the mortgaged goods, and filling up the stock with others as it became diminished. It is settled that the mortgagee could not hold the substituted goods, especially unless they passed into the hands of the mortgagee before other liens attached, and then it would be only an equitable lien, cognizable in a court of equity. *Hunt* v. *Bullock*, 23 Ill. 325; *Titus* v. *Mabee*, 25 id. 257.

If, by any arrangement, express or implied, between the mortgagor and mortgagee, the former continued in the sale of the goods mortgaged, at retail, for his own benefit, the mortgage would be unavailing against the judgment creditors of Marshall, and such arrangement or permission might be shown by circumstances. *Gardner* v. *McEwen*, 19 N. Y. 123; *Edgell* v. *Hart*, 5 Seld. 213.

The verdict of the jury was not only informal, but erroneous. As the pleadings stood, the verdict could not find

property in plaintiff, if that is its meaning. It should have found that the property was that of Marshall, the defendant in the execution. *Hanford* v. *Obrecht*, 49 Ill. 146.

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

Judgment reversed.

HENRY CEASE

v.

WASHINGTON COCKLE.

1. EVIDENCE—*parol to vary written contract.* Where the written contract of parties showed a bargain by two of them for the sale and delivery of 20,000 bushels of corn to the other party, it was held that parol evidence could not be received to show that each of the parties of the first part had sold 10,000 bushels, which he was to deliver, and that each was surety for the other as to the part to be delivered by such other, as this would be to vary the legal effect of the written contract.

2. CONTRACT—*whether change in terms not complied with will release.* Where A and B agreed to sell and deliver to another 20,000 bushels of corn, to be delivered at Mason City by a day named, and A and the vendee subsequently agreed that one-half of the corn should be delivered in Chicago: *Held*, in a suit by the vendee for damages growing out of a failure to deliver the corn at Mason City, that the subsequent agreement furnished no excuse for not delivering at Mason City, unless it was shown that the subsequent agreement was complied with by the vendors.

3. INTEREST. Where money is advanced upon the purchase of grain, only a portion of which is delivered, interest is recoverable upon the excess of money advanced above the amount of grain delivered.

APPEAL from the Circuit Court of Mason county; the Hon. LYMAN LACEY, Judge, presiding.

Mr. E. A. WALLACE, and Messrs. DEARBORN & CAMPBELL, for the appellant.

Messrs. FULLERTON & ROGERS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit, brought by Washington Cockle against Henry Cease, to recover damages for a breach of the following written contract:

Article of agreement made and entered into by and between D. W. Tamblyn & Co., and Henry Cease, all of Mason City, Illinois, of the first part, and Washington Cockle, of the city of Peoria, of the second part.

The condition of this obligation is such that the parties of the first part have, jointly and severally, sold to the party of the second part 20,000 bushels of shelled corn, to be good, dry, sound, merchantable corn, to be either white or yellow, as would be called, by competent judges, merchantable corn of either kind, said corn to be delivered on board of cars at Mason City, any time when called for up to the first of July next, at buyer's option, for the consideration of $13,000, or 65 cents per bushel, $6000 to be paid down, $2000 by the first of March next, and the remainder upon the delivery of said corn as per contract, or as fast as delivered, the buyer to give seller ten days' notice as to when he wants said corn delivered, and the buyer have cars to put the corn in as fast as he (buyer) wants. It is further agreed that the parties of the first part are not compelled to furnish more than 8000 bushels by the 1st of May next, provided it should be called for by that time, but is optional with said Cockle, at the same time, as to whether he takes any of said corn before the 1st of July, 1870.

Dated and signed this 28th day of December, 1869, at Mason City.

D. W. TAMBLYN & CO.,
HENRY CEASE,
WASHINGTON COCKLE,
Per *J. L. Winters.*

The firm of D. W. Tamblyn & Co. was composed of D. W. Tamblyn and J. B. McCable. Tamblyn died sometime before July 1, 1870. There having been $9300 advanced upon the

contract, and only 8209 bushels of corn delivered, this action was brought May 8, 1873. Plaintiff recovered a verdict and judgment for $1347.75, and defendant appealed.

The defendant below attempted to set up in defense that he signed the contract as security for 10,000 bushels of the corn on the contract of Tamblyn & Co. to sell and deliver that amount, and that the other 10,000 bushels the defendant was to sell and deliver himself, and that Tamblyn & Co. signed the contract as his securities for the 10,000 bushels to be delivered by him; that there was a subsequent agreement between Cockle and Tamblyn & Co. that the latter should deliver their 10,000 bushels in Chicago, instead of at Mason City as called for by the contract, and that in consequence of that arrangement, defendant suffered corn to a large amount to pass out of Tamblyn & Co.'s warehouse in Mason City, in June, 1870, without objection, which he would not have done but for such arrangement. Defendant had himself delivered all of 10,000 bushels, except five car-loads, and had them ready to deliver, if plaintiff would complete the payment for 10,000 bushels; but the latter refused to make any further payment until the delivery of the 10,000 bushels agreed to be received at Chicago was made; and defendant refused to deliver any more than to the amount of 10,000 bushels.

This offered defense, so far as related to the suretyship of defendant, was overruled by the court, and the main ground of error insisted upon is, the denial of the benefit of this defense, which was done in the way of the exclusion of parol evidence to prove the alleged suretyship, and in the refusal of instructions bearing upon the effect of such suretyship, and the subsequent agreement to receive 10,000 bushels in Chicago.

We are of opinion the court was correct in excluding parol evidence to prove the alleged relation of principal and surety between the parties of the first part to this written contract. This case is not like that of *Ward* v. *Stout et al.* 32 Ill. 400, and other similar cases cited, where it was held competent,

when two or more have signed an obligation for the payment of money jointly, or jointly and severally, for one to show by parol evidence that he was surety for the other.

Such proof, in such case, is held to do no violence to the rule that a written instrument can not be varied by parol evidence, for it does not affect the terms of the contract, but establishes a fact collateral to the contract, showing the relation in which the promissors stand to each other. But here is not a mere promise to pay money, which, in its nature and full effect as such a promise, would not be changed by the fact of one of the parties being a surety, but it is a joint and several contract for the sale and delivery of a quantity of corn. By the contract, Cease was the seller of the whole of 20,000 bushels of corn. The proposition was, to show that the contract was one of a different character—a contract for the sale and delivery, by Cease himself, of only 10,000 bushels of corn, and that as to the other 10,000 bushels, Tamblyn & Co. alone were the sellers, and that Cease only undertook that they would sell and deliver the same. It was, as to 10,000 bushels of the corn, to change the contract from one of a sale by the party himself, to that of a guaranty of a sale by another person. This would be a different contract from the one the purchaser took and had a right to rely upon. We do not think it admissible thus to vary the terms of a written instrument by parol evidence.

There being no evidence of any suretyship, but a plain contract of sale by two persons, we can not perceive how the mere agreement with Tamblyn & Co. to receive delivery of 10,000 bushels of the corn in Chicago, instead of Mason City, should constitute any matter of defense to Cease. It was through no fault of Cockle that he did not receive the corn in Chicago; he was there ready to receive, and applied for it, but the agents of Tamblyn & Co. refused to deliver the corn because the latter had not paid for it. Cease had contracted that he would sell and deliver 20,000 bushels of corn at Mason City, and it was incumbent upon him to see that the

whole amount was delivered either there or at Chicago. He failed as to either place, with no sufficient excuse.

It is objected that the agreement to receive the 10,000 bushels in Chicago made a change in the contract, and that, the declaration being upon a contract to deliver at Mason City, there was a variance which would preclude a recovery on that ground.

But the contract as declared upon to deliver at Mason City was proved, and it was for defendant to show compliance, or an excuse. Had he delivered at Chicago the amount which had been subsequently agreed to be received there, that would have been sufficient; but failure to do so leaves him without excuse for not delivering at Mason City, and guilty of a breach of the contract declared upon.

It is also objected, that it was error to instruct the jury to allow interest upon the excess of the money advanced above the amount of the corn delivered. We think such interest a legitimate item of damage for the breach of the contract.

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

Judgment affirmed.

AARON HATFIELD

v.

JAMES W. CHEANEY.

1. PLEADING—*plea not answering all it professes.* A plea must contain a good answer to all it professes to answer. When it is in bar of the whole action and its matter is but an answer to a part of the cause of action, it is bad on demurrer.

2 PRACTICE—*giving jury memorandum of calculation.* It is not correct practice to permit a witness, who makes a computation of the sum due on a note, to place a memorandum of the result on the note itself to go to the jury. The testimony of witnesses in open court should go to the jury orally, and not by means of memoranda.

APPEAL from the Circuit Court of Menard county; the Hon. LYMAN LACEY, Judge, presiding.

This was a suit by James W. Cheaney against Aaron Hatfield and Thomas E. Clark, upon four promissory notes. The plaintiff recovered, and Hatfield appealed.

Messrs. KETCHAM & EDGAR, for the appellant.

Mr. T. W. MCNEELY, and Mr. EDWARD LANNING, for the appellee.

Per CURIAM: There is nothing in any of the errors assigned demanding the reversal of the judgment below. The plea to which the court below sustained a demurrer purported to be to the whole declaration and all the causes of action; while the matter of the plea, if a good answer to any, is but an answer to a part of the cause of action. A plea must contain a good answer to all it professes to answer. This does not, and the demurrer to it was properly sustained.

According to our computation of the amount due upon the notes sued on, at the time of the trial, the sum found by the verdict is not too large. For that reason we will not reverse the judgment, although it was not correct practice to permit the witness, who made the computation on the trial, to place a memorandum of the result on the notes themselves, to go to the jury. The testimony of witnesses in open court should go to the jury orally, and not by means of memoranda.

Perceiving no substantial error in the instructions, the judgment of the court below will be affirmed.

Judgment affirmed.

THOMAS O. SMITH
v.
JOB A. RACE *et al.*

1. TEXAS CATTLE—*ownership or possession to create liability.* To make one liable to damages as the owner of Texas or Cherokee cattle for infection to other cattle, he must be the owner in the natural and ordinary sense of that term. A conditional ownership growing out of a lien will not make a party liable unless he has the actual possession and control of the cattle.

2. Thus, where a party signed notes with the owner of a lot of Texas cattle, upon which money was raised, and such surety was to have a lien upon the same, but they continued in the possession of the original owner until they had communicated disease to the plaintiff's cattle, it was *held*, that such surety, by virtue of his lien, was not liable to the plaintiff under the statute.

APPEAL from the Circuit Court of Moultrie county; the Hon. C. B. SMITH, Judge, presiding.

Mr. ANTHONY THORNTON, for the appellant.

Messrs. CREA & EWING, and Mr. A. B. BUNN, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by appellees, in the circuit court of Moultrie county, against Thomas O. Smith, John L. Mansfield, Ira W. Hatch, Harvey May, First National Bank of Decatur, and William Montgomery, to recover damages sustained to cattle owned by appellees, under the act of Feb. 27, 1867, Sess. Laws of 1867, page 169.

The first section of the act provides that it shall not be lawful for any one to bring into this State, or own, or have in possession, any Texas or Cherokee cattle.

Under the second section, all persons who violate section one are rendered liable for damages which may accrue by reason of such violation.

After the evidence had been introduced, and before the cause was submitted to the jury, appellees dismissed as to all of the defendants except appellant.

The jury returned a verdict against appellant for $4900. The court overruled a motion for a new trial, and rendered judgment upon the verdict.

The controverted question of fact on the trial was, whether appellant was the owner or had in his possession the Texas cattle that communicated the disease to the cattle of appellees.

We have held, in another case, in placing a construction upon the statute in question, that, when the legislature used the term "own," we would presume it was understood to be used in its natural and ordinary sense, and not a conditional ownership; and in the use of the term "possession," it must have been intended that usual and well known possession that men generally have of personal property; that where a party had a mere lien, and not the actual control of property, he could not be regarded in the possession in the sense the word is used in the statute.

It is not pretended that appellant was in any manner whatever connected with the bringing the Texas cattle into the State.

It appears from the evidence that, in the spring of 1868, Hatch & May purchased 1900 head of Texas cattle on Red river, and shipped them to Tolono, in this State. They were shipped in the name of Mansfield, who had previously agreed to furnish the money to pay for them, which he did, advancing for that purpose $20,000. About the first of June, 1868, some 300 head of these cattle were placed in the Montgomery pasture, which had been leased by Hatch the year previous. This pasture joined land occupied by appellees with their native cattle. The last of July, appellees' cattle became infected with a disease contracted from the Texas cattle in the Montgomery pasture, from which they died.

On the 27th day of June, 1868, Mansfield notified Hatch that he could not carry the cattle any longer, and that the money he had advanced on the purchase must be raised or he would sell the cattle. Hatch then made an arrangement with

appellant by which appellant and his brother, Edward O. Smith, signed two notes with him for $10,000 each. Upon these notes the money was procured from the Union National Bank of Chicago, and Mansfield paid. Appellant was to receive five per cent for signing these notes, the notes and commission to be paid when the cattle should be sold.

Appellant was to have a lien upon the cattle to secure the payment of the notes, and they were to be sold at any time he might direct.

The cattle remained in the Montgomery pasture under the control of Hatch and his hired hands until about the first of December, when he shipped them to Chicago, and all that were fit for packing were slaughtered and packed, and the proceeds paid over to appellant, who paid the same upon the notes given to the Union National Bank, and the balance of the cattle were placed in a barn in Chicago to be fed.

It does not appear that appellant took possession of the cattle while they were in the pasture, or in any manner controlled them, and, as appears, never saw them until the last of November. Under such circumstances, we can not regard appellant as the owner or possessor of the cattle in the sense these terms are used in the statute. He did not own, for the proof fails to show a purchase. He did not have the possession, as the evidence is clear the cattle remained in the possession and under the control of Hatch after the arrangement made with appellant as they did before.

It is true, it was in proof before the jury that appellant admitted that he owned the cattle. These statements are not, however, inconsistent with the real arrangement entered into between appellant and Hatch.

Money had been raised on the credit of appellant's name, for the payment of which he was responsible, which was used to pay Mansfield the claim he held upon the cattle.

Under the agreement between Hatch and appellant, he had a lien upon the cattle to indemnify him for the responsibility incurred, and in that sense he might very properly have

regarded himself as the owner, but at the same time he was not the absolute owner, or the owner in that sense contemplated by the legislature in the enactment of the statute.

It is true, as insisted by appellees, that the question of ownership of the cattle was one of fact for the jury, yet, when the evidence is clearly insufficient upon which to base a verdict, we can not do otherwise than reverse.

The judgment of the circuit court will, therefore, be reversed and the cause remanded.

Judgment reversed.

JOHN E. THOMAS

v.

THOMAS COULTAS *et ux.*

1. CHANCERY PRACTICE—*relieving against mistake in pleadings.* While, in cases where the bill is sworn to, the courts always act with great caution in permitting the complainant to amend the same, and make repugnant allegations, and to prove them, and have relief thereon, yet such a practice is always allowed to prevent the failure of justice, on a proper showing. Where it is manifest the complainant is honestly mistaken as to facts charged in his bill, it may be allowed.

2. Where a husband and wife file a bill to rescind a contract for the exchange of the wife's real estate for lands of the defendant, on the ground of fraud, and for injunction, which was sworn to by the husband, and afterwards the complainants asked to be relieved from certain statements in the bill as to the terms of the contract, and to amend the same by stating the contract correctly, and it was shown that they were denied the privilege of examining the contract until obtained under rule of court, the same not having been recorded, which was allowed: *Held*, that there was no error in relieving from the mistake and allowing the amendment, as the wife ought not to lose her rights because her husband, acting as her agent, did not state the contract correctly.

3. FRAUD—*rescission of contract for exchange of lands.* Where the complainants exchanged a house and lot for defendant's farm, which he represented as incumbered by a mortgage of $2500, and which the complainants were to assume, and pay the defendant $700, and convey to him

also a half section of land in Kansas, and it appeared that there were judgment liens upon the farm to the amount of $1300, and that the defendant owned only five-sixths of the farm, the other one-sixth being outstanding, all of which the defendant knew, but concealed the fact from the complainants: *Held*, this was such a fraud as authorized the complainants to rescind the agreement upon discovery of the fraud.

4. TENDER—*not necessary to a rescission for fraud.* Where one of the contracting parties is guilty of fraud, the other may, without offering to perform his part of the contract, rescind. It is only in cases free from fraud that a party must put the other in default by performing, or offering to perform, before he can rescind. The fraud vitiates the contract, and absolves the party upon whom it is practiced, from performance.

5. RESCISSION—*right to, for fraud not avoided by subsequent matters.* Where a party filed a bill to rescind a contract for the exchange of lands on the ground of fraud in concealing the fact of there being judgments which were liens on defendant's lands at the time, the discharge of such liens, after bill filed, will not affect the complainants' rights in the least. The filing of the bill in such a case is a rescission, and an election to recover back the property given in exchange, and the complainant, after that, could not revive the contract without the defendant's assent.

6. EXCEPTION TO MASTER'S REPORT—*decree in pursuance of, virtually overrules.* Where the master in chancery reported in favor of the relief sought by complainants, to which the defendant excepted, and the court decreed relief on the report as made: *Held*, that this was, in effect, an overruling of the exception.

7. CHANCERY—*practice as to hearing.* It is only where no replication is filed that the court is required to set a chancery cause for hearing. Where a replication is filed, the law sets the case for hearing without any order of the court.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. GAPEN & EWING, for the appellant.

Mr. JOHN E. POLLOCK, and Messrs. BLOOMFIELD & LOOMIS, for the appellees.

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

It appears that Mrs. Coultas was the owner of a house and lot in the city of Bloomington, and appellant owner of a farm

in the county, and he and her husband, Thomas Coultas, agreed to exchange the same, Mrs. Coultas to give, in addition to the house and lot, a half section of land in Butler county, in the State of Kansas. The farm was subject to a mortgage of $2500, which appellees were to pay and discharge, and to pay appellant $700, as the difference between the house and lot and Kansas lands, and the farm. The house and lot was conveyed to appellant, and a bond was given for the conveyance of the Kansas lands by the 1st of September, 1873, and appellant was to pay a mortgage of $1200 on the house, and Mrs. Coultas was to pay $3200 to appellant if she should be unable to convey the Kansas lands with good title.

The bill alleges that appellant was the owner of but five-sixths of the farm, and that he knew the fact, and that he fraudulently represented the title to the same as being perfect, and fraudulently represented that it was free from incumbrance except the $2500 mortgage, when he in fact knew that there were judgments against him to the amount of about $1300, which were liens on the farm. That conveyances were made, and appellant was let into possession of the house and lot, and appellant's tenant attorned to appellee, but it is charged that, being a brother of appellant, he was under his control.

Appellees gave the trust deed on the farm to secure the $700 they were to pay in money, and also a trust deed for $3200, to become binding in case title could not be conveyed to the Kansas lands by the first of September following, as agreed by appellees. This, with the contract, was left with one Spaulding, to carry the agreement into effect. They also made another trust deed of $3500 on the farm, as is claimed, to raise the money to pay off the $2500 and the $700 mortgage. The application was made to Weed, who held the $2500 mortgage, but the loan was not consummated. Some time in July, 1873, Howell, who was an heir to a former owner of the land, and owned an undivided one-sixth of the

farm, came of age, and held his interest at $1300, thus making the incumbrances on the farm somewhere near $2600 more than the mortgage which appellees had agreed to pay. The original bill was at once filed, signed by Mrs. Coultas, and sworn to by her husband. Afterwards, appellees' counsel, in September, after the bill was filed, were allowed, for the first time after their execution, to see the contract and trust deed given to secure the Kansas land, and thereupon they applied to the court for leave on affidavit to file an amended bill, and were relieved from certain specified allegations made in the original bill.

The court, on its own motion, ordered that the following questions be submitted to a jury for decision: *First.* Were complainants to pay any money to defendant over and above the mortgage? *Second.* Did Thomas Coultas know of the interest held by Howell as heir, when the contract was made? *Third.* Did Mrs. Coultas know of that fact when the contract was entered into by the parties? The jury, after hearing the evidence, answered each interrogatory in the negative.

It is first objected, that the court below erred in relieving complainants from the allegations of their bill. The order, of course, must be construed as being no broader than the application, which only asked to be relieved from those which related to a statement of the terms of the contract.

Whilst in applications for injunctions on sworn bills, or in fact in any case where a bill is sworn to, courts always act with great caution in permitting the complainant to amend and make repugnant allegations, and to prove the same, and have relief thereon, yet such a practice is always allowed, to prevent the failure of justice, where a proper case is shown. Where it is manifest the complainant is honestly mistaken as to facts charged in his bill, it may be allowed; and more readily where a bill is sworn to by an agent or attorney, than where it is sworn to by the complainant. It is not to be expected that a person, months after a contract is reduced to writing, can give accurately and in detail all of the terms of

an agreement. And where the inspection of an agreement can only be had under a rule of court, the practice should not be as rigid as where it is on record or may be inspected at pleasure. No reason is perceived why appellees did not have an equal right to inspect the agreement as appellant, or why the latter should be permitted to withhold the information in such a case to the injury of the opposite party.

After a careful inspection of the affidavit of Thomas Coultas, we are clearly of the opinion that there was no error in relieving appellees, and permitting them to strike out the allegations as to the terms of the contract, and filing an amended bill. Mrs. Coultas had the entire interest in the property in litigation, and she should not be compelled to lose her rights thereto, simply because her husband, acting as her agent, could not accurately remember the terms of the agreement.

Only so much of the bill was stricken out as contained the allegations as to the terms of the agreement, and all else therein remained unaffected thereby. Hence the charge of fraud was unaffected by the amendment. And the jury have found that appellees had no knowledge of an outstanding title when they entered into the agreement, and the evidence justifies the conclusion that appellant knew that Howell owned one-sixth of the land, and that he concealed the fact from appellees until after he had consummated the sale, and for months afterwards. And the evidence justified the chancellor in finding that there were fraudulent representations in making the sale, and there is no evidence that appellees ever waived it, but on the contrary they promptly brought this suit on learning the fact.

It is urged that appellees having failed to convey the lands in Kansas, and not being able to convey them when the suit was brought, they were not in a position to rescind. Where one of the parties is guilty of fraud, the other may, without offering to perform his part of the contract, rescind. This is an elementary principle known to the entire profession. The fraud vitiates the contract, and the party on whom it was

perpetrated is not bound by his part of the agreement, and is not bound to offer to perform his part. It is only in cases free from fraud that a party must put the other in default by performing, or offering to perform, before he can rescind. Here, the fraud of appellant placed him in default, and released appellees from all obligation to proceed further under the contract. They were induced, by fraudulent representations, to receive a deed for land that was incumbered for $2600 above the price they were to pay. To compel them to go on, and convey land worth $3200 or pay that sum in money, and then pay off and remove incumbrances equal to $2600 in addition to the consideration they agreed to pay, would be inequitable in the extreme, and could never be sanctioned by a court of justice.

Nor does it matter that the judgments have been paid since the suit was commenced. When appellees filed their original bill, they thereby rescinded the contract, and elected to recover back their property, and to place appellant *in statu quo*, and from that time forward, appellant could do no act unassented to by appellees that would revive the contract or change the right of appellees to rescind. He, by his fault, placed it in the power of appellees to rescind, and he could not deprive them of that right.

It is also urged that appellees were to pay $1000 towards extinguishing Howell's title. The jury found that they had made no such agreement, and we think the evidence warrants the finding. But even if they had, they were absolved by the fraudulent representations that the farm was free from all but the $2500 incumbrance, when it was bound to the extent of Pusey's judgment of $800, and it may be by Baird and Tuttle's judgment for $500, recovered on the day the deed was executed, depending on when the deed was recorded. But we think the evidence warrants the finding that appellees did not agree to pay that sum.

It is urged that the court below did not overrule the exceptions to the master's report. We had supposed there could

be no more effectual mode of doing so than by decreeing the relief on the report as made by the master. We are not disposed to thwart justice by stickling for mere useless forms, but are inclined to look at substance without enforcing hypercritical objections, that can only produce delay and increase expense of litigation.

It is urged that the court erred in trying the case without setting it down for hearing. The 29th section of the chancery code provides that, on the filing of a replication, the cause shall be deemed at issue, and stand for hearing, but in default of replication the court may set the case for hearing on bill and answer. Replications were filed in this case, and the statute does not require that it should be set for trial. It stood for trial without any order therefor.

It is also said that it should have been tried in its order on the docket. We fail to find anything in the record to show it was not. The decree states that the case came on for hearing on the master's and receiver's reports and oral testimony introduced on the hearing. From this we can only conclude that the trial was in the regular and due course of the practice of the court. There is no force in these objections.

No error is perceived in the record, and the decree must be affirmed. *Decree affirmed.*

LEWIS MARTIN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

CRIMINAL LAW—*judgment on conviction for several offenses.* Where a defendant is convicted of several offenses under different counts of the same indictment, it is error to render judgment ordering the imprisonment of the defendant a gross number of days in all. It should fix the imprisonment for a specific number of days on each count on which a conviction is had, the imprisonment on the several counts to commence at the expiration of each preceding term.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

This was an indictment against Lewis Martin for selling intoxicating liquors without a license, to be drunk on the premises where sold. The indictment contained twelve counts. On a trial, the defendant was found guilty, as charged in each of the twelve counts, and the court rendered judgment for a fine of $600, and ordered that the defendant be committed to the county jail for 180 days.

Messrs. SWEET & DAY, for the plaintiff in error

Mr. JAS. K. EDSALL, Attorney General, for the People.

Per CURIAM: The judgment in this case was fatally defective. The judgment for imprisonment was for 180 days in gross. It should have fixed the imprisonment for a specific number of days on each count on which the jury found the defendant guilty, the imprisonment on the several counts to commence at the expiration of each preceding term of imprisonment. This is the rule announced in the case of *People ex rel. Massy* v. *Whitson*, 75 Ill. ——. That case governs this.

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

Judgment reversed.

Statement of the case.

HARRY P. HEAZLE

v.

THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY

1. NEGLIGENCE—*whether injury caused by, or the result of unavoidable accident.* Where a passenger train was thrown from the track by a broken rail on the outside of a curve in the road, from which a passenger received a severe personal injury, and was found outside the coach in an insensible condition, and it appeared that the train was not running at an unusual or dangerous speed; that the track was kept in good repair, and had just been carefully inspected and no defects were discoverable; that everything connected with the train was in good order, and it was managed by skillful and prudent operatives, and the proof seemed to show that the passenger jumped out of the car in the confusion, while if he had remained he would have received no serious injury: *Held*, in a suit by the passenger against the company to recover damages, that the injury was either attributable to the plaintiff's own want of care, or to one of those accidents occurring in very cold weather, which no skill or prudence could foresee and guard against, and that he could not recover.

2. SAME—*degree of care required of railroads.* In a suit against a railway company to recover for personal injury to a passenger, occasioned by a train being thrown from the track in consequence of a broken rail, the court, at the instance of the plaintiff, instructed the jury "that the throwing of the train from the track, if they believe, from the evidence, it was thrown from the track, and that plaintiff was thereby injured, is *prima facie* evidence of negligence, and plaintiff need prove nothing more; but it then devolves upon the defendant to prove that the injury sued for was occasioned without the least negligence, or want of skill, or prudence, or vigilance on the part of defendant, its agents or servants:" *Held*, that the instruction stated a stricter rule of liability, and imposed a higher degree of carefulness, than the law warrants.

APPEAL from the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

This was an action on the case, by Harry P. Heazle against the Indianapolis, Bloomington and Western Railway Company, to recover damages for personal injuries. The material facts of the case are found in the opinion.

Messrs. ROWEL & HAMILTON, for the appellant.

Mr. C. W. FAIRBANKS, and Mr. G. W. GERE, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

On the night of the 20th of February, 1872, the passenger cars on defendant's road were thrown from the track, at a point a short distance east of Mahomet station, by which plaintiff was severely injured. The accident was caused by a broken rail. It was on the outside of a curve in the track. A switch entered on the inside of the curve, and the broken rail was the one which would commonly receive all the force of the cars entering the main track from the switch, as the cars run westward. After the cars left the track, the train ran a distance of eight hundred feet upon the ties before it was stopped. The rear car was entirely off the track, and the rear trucks of the next car were also off. Neither car tipped over. Previous to the accident, plaintiff occupied the third seat from the rear door, in the last car but one composing the train. The night was cold, and the doors and windows of the car were closed. After the train was stopped, plaintiff was found, in an insensible condition, at the bottom of a culvert, over which the cars had passed after encountering the broken rail. How he got out of the car, or at what precise point of time, is not explained by the evidence. By the accident plaintiff sustained very severe, perhaps permanent injuries, suffered great pain, and incurred considerable expenses in being cured.

The declaration contains three counts, and a different liability is attempted to be set forth in each. The first count charges defendant with carelessness in propelling its train too swiftly around a short curve, and thereby throwing the train from the track, injuring plaintiff, with an allegation of special damages. The second charges defendant with neglect in examining and keeping its track in repair near Mahomet station,

whereby one of its trains was thrown from the track by a broken rail, and plaintiff injured. And the third charges carelessness in the management of the train, in not slacking the speed while running round a curve, whereby its train was thrown from the track, and plaintiff damaged. Upon a plea of not guilty, issue was joined, a trial before a jury was had, with verdict for defendant, and plaintiff prosecutes this appeal.

On the trial, at the instance of plaintiff, the court instructed the jury, "that the throwing of the train from the track, if they believe, from the evidence, it was thrown from the track, and that plaintiff was thereby injured, is *prima facie* evidence of negligence, and plaintiff need prove nothing more; but it then devolves upon defendant to prove that the injury sued for was occasioned without the least negligence, or want of skill, or prudence or vigilance on the part of defendant, its agents or servants."

This instruction states a stricter rule of liability, and imposes a higher degree of carefulness, than the law warrants, but assumes the burden thus thrown upon it by the rulings of the court. Defendant offered evidence to prove the accident occurred under circumstances where negligence could be attributed neither to the company, nor its agents or servants. And while the evidence is, in some respects, conflicting, we think it clearly warrants the finding of the jury that defendant was not guilty, as charged in the declaration.

Upon the question of the speed of the train when the accident occurred, the proof shows it was not unusual or at all dangerous. It had just left a station, and it seems improbable it had so suddenly attained any high rate of speed. While some of plaintiff's witnesses state the train was running with great rapidity, perhaps thirty miles an hour, in their judgment, the conductor and engine-driver both give it as their best judgment it was not running at a rate of speed exceeding fifteen miles per hour. The latter witnesses were certainly the most competent to judge of the speed of the train.

The proof is, the track was in good repair. No negligence in this regard is shown. On the contrary, it is proven the track inspector or walker had just been over the road. It was found to be all in order and the track safe, so far as anything could be discovered.

The charge defendant was guilty of negligence in the management of the train, in not slacking the speed while running on the curve, is fully rebutted by the evidence. According to the testimony of the engine-driver and the conductor, there was no necessity for reducing the speed—the train was moving slowly. The jury had the right to regard this as the better testimony in the case, and we do not feel authorized to say they judged incorrectly. It was their province to settle the controverted facts, and we see no reason to interfere with their conclusion.

Great stress is laid on the fact, a switch entered the track on the inside of the curve, at the place where the accident occurred. It is insisted the broken rail is the one that would receive the force of the cars as they came upon the main track out of the switch. It is not averred in any count of the declaration, the cause of the injury to plaintiff was the defective construction of the track in this particular. But, if it had been, it is not perceived how that fact could have tended to produce the accident that occasioned the injury to plaintiff. The switch opened west, and we do not understand how it could affect a train running east, in the manner suggested. Could it produce the result insisted upon at all, it is manifest it could only affect a train running westward. This train was moving eastward. But this is not considered a material point in the case.

By special verdict, the jury found that "plaintiff was guilty of greater negligence than defendant." In what particular is not stated; but doubtless the jury believed plaintiff, in the midst of the confusion of the sudden shock occasioned by the accident, left his seat, and on attempting to jump from the train sustained the injuries. Just how the injury to plaintiff

was produced, no one can tell. He was found at the bottom of the culvert, when the train was stopped, severely injured. How he got out of the car is one of the questions in the case. He must have gone out, voluntarily, either before or after the accident, or else he was thrown out by the violence of the motion of the cars. The latter theory is the one insisted upon by plaintiff; but this theory of the case seems almost incredible. The night was cold, and all the witnesses agree the doors and windows of the car were closed. When it was discovered the cars were off the track, the conductor enjoined it upon all passengers to remain in their seats. No one saw plaintiff leave the car. He has no recollection himself as to how he got off. His impression is, if he had jumped off he would have remembered it. Why he would be more likely to remember jumping off than being thrown off the cars, is not easy to comprehend. No other passenger was seriously injured. We are inclined to adopt the view the jury must have taken of the case, that plaintiff must have gone out of the car, either just before or after it was discovered to be off the track. His seat was the third from the door, and it is unexplainable how he could have been thrown out of the car, however violent the motion, with the windows and doors all closed just before the accident happened. If he attempted to leave the car after it was discovered it was off the track, it was imprudent in the extreme. Had he remained in his seat, it seems more than probable he would have sustained no injury.

Although plaintiff has suffered very great injury, we see no ground on which to base a recovery. It was through no fault of defendant, or its agents or servants. They omitted no duty imposed upon them by law, or by a due regard for the safety of passengers. Everything connected with the train was in good order, and it was managed by skillful and prudent operatives. The track had been constructed with skill and care, and, in the opinion of a competent engineer, the road was as safe as it could reasonably be constructed. It was patrolled, at frequent intervals, by a careful inspector,

and found to be in order, with no defects discoverable. The injury to plaintiff must, therefore, be attributed, if not to his own want of care for his personal safety, to one of those accidents that sometimes occur in extreme cold weather, which no engineering, however skillful, and no management, however observant, could foresee or guard against.

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

Judgment affirmed.

HENRY B. FUNK

v.

JOSEPH J. IRONMONGER.

1. ABATEMENT—*defendant sued out of his county.* Under the statute in force in April, 1872, a plea in abatement to a suit brought in Morgan county, where the defendant was served in Macon county, which contains no averment that he was not a resident of Morgan county, or that the contract was not made therein, is bad on demurrer.

2. SUMMONS TO FOREIGN COUNTY—*what law governs.* Where a suit was brought before the Practice act of 1872 took effect, the law in force at the time the suit was brought was held to govern as to the right to send summons to another county for service.

WRIT OF ERROR to the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

This was an action of assumpsit, by Joseph J. Ironmonger, against Henry B. Funk. The suit was commenced April 3, 1872, and summons issued to the sheriff of Morgan county, which was returned not found. An *alias* summons issued August 31, 1872, to Morgan county, which was returned not

served. At the December term, 1872, on motion, it was ordered that the cause be continued with *alias* summons to Macon county, which was served in that county April 30, 1873. The defendant, at the next term, pleaded in abatement, to which plea the court sustained a demurrer.

Mr. WM. H. BARNES, for the plaintiff in error.

Messrs. MORRISON & WHITLOCK, for the defendant in error.

Per CURIAM: This suit was commenced April 3, 1872, by the issuing of summons out of the circuit court of Morgan county, and is to be governed by the statute in force at that time. The plea in abatement contains no averment that the plaintiff was not a resident of that county, or that the contract was not made therein. It was, for that reason, bad, and the demurrer to it was properly sustained. The judgment will therefore be affirmed.

Judgment affirmed.

HAGGARD BROS.

v.

W. & T. SMITH.

PRACTICE—*affidavit with declaration so as to require affidavit of merits to pleas.* The affidavit required under section 36 of the Practice act of 1872 to be filed with the declaration, to entitle the plaintiffs to judgment by default unless the defendant will file an affidavit that he has a defense, etc., with his pleas, may properly be made by one of several plaintiffs, and will be sufficient if, in connection with the declaration, it shows the nature of the cause of action.

Statement of the case.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was an action of assumpsit, by William and Thomas Smith, partners, against David D. Haggard and John W. Haggard, partners under the firm name of Haggard Bros., and James Grover, upon a promissory note. Grover was not served with process. William Smith, one of the plaintiffs, made the following affidavit, which was filed with plaintiffs' declaration:

"William Smith, being sworn according to law, on oath says, that he is one of the plaintiffs in the above entitled cause now pending and undetermined in the circuit court within and for the county of McLean, and State of Illinois; that said defendants in said cause are justly indebted to the plaintiffs, on and by virtue of the promissory note sued on in said cause, to the amount of $696.50; that said amount was, before the commencement of said suit, and is, due to plaintiffs on said note from the defendants after allowing to the defendants all their just credits, deductions and set-offs.

WILLIAM SMITH."

The defendants, Haggard Bros., moved to strike this affidavit from the files, because it did not show the nature of the plaintiffs' demand, and because it was an affidavit of only one of the plaintiffs. The court overruled the motion and defendants excepted. Haggard Bros. then filed the plea of the general issue, which the court struck from the files on plaintiffs' motion, and defendants excepted. The court then rendered judgment by *nil dicit*, and assessed plaintiff's damages at $717.75, and rendered final judgment for that sum and costs, from which judgment Haggard Bros. appealed.

Mr. W. M. HATCH, for the appellants.

Messrs. WELDON & BENJAMIN, for the appellees.

Syllabus.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was assumpsit, brought in January, 1873, upon a promissory note. One of the plaintiffs made an affidavit under the 36th section of the Practice act of 1872, which was filed with the declaration. The defendant served failing to file any affidavit of merits, judgment by default was entered and the damages assessed by the court.

The points made are frivolous. The affidavit was properly made by one plaintiff, and is sufficiently definite, when taken in connection with the declaration. Neither party requiring a jury, the damages were properly assessed by the court under section 40, Laws 1871–2, p. 344.

The judgment of the court below is affirmed.

Judgment affirmed.

WILLIAM B. GILKERSON

v.

HARRIET B. SCOTT.

1. APPEAL—*trial, whether de novo—drainage act.* Under the Drainage act of 1871, on an appeal from the proceedings to the county court, a trial *de novo* may be had; but on appeal from the county to the circuit court, a trial *de novo* is not given.

2. SAME—*act relating to, construed.* The present law, R. S. 1874, p. 344, § 187, which provides that appeals from the county to the circuit court shall be tried *de novo*, has no application to appeals taken before such law took effect.

3. DRAINAGE—*referring cause back to commissioners.* Section 14 of the Drainage act of 1871, which provides for referring back to the commissioners of highways their report for amendment, relates to the time of hearing upon the question of confirmation of the report. The court has no power to make such order after the jury have reported, whose action is based upon the report of the commissioners.

4. SAME—*waiver of defective notices by appearance.* Objections to defective notices in proceedings under the Drainage act will be waived by subsequent appearance.

5. It is a fatal irregularity at the meeting of the jury to correct their assessment of damages and benefits, at which they are to hear objections and evidence, to select a new juror in place of one who acted in making the preliminary assessment, but who failed to attend on the second meeting; and a party who does not appear at such latter meeting does not waive the irregularity.

6. SAME—*each tract must be assessed according to benefits.* It is error to assess the whole of the expense of making a drain and the costs of the proceeding upon one tract of land, leaving another benefited not charged with its proportionate share.

APPEAL from the Circuit Court of Ford county; the Hon. OLIVER L. DAVIS, Judge, presiding.

This was a petition by William B. Gilkerson, filed before a justice of the peace, for a drain over the lands of the petitioner and Harriet B. Scott, the defendant. After the report of the commissioners of highways, and the confirmation of the assessment of the jury, the defendant appealed to the county court. The county court, on motion, dismissed the proceeding, and the petitioner appealed from this order to the circuit court. The circuit court refused to refer the matter back to the commissioners of highways or try the cause *de novo*, but tried the cause on the record, and found for the defendant, and the petitioner appealed to this court. The main facts appear in the opinion.

Mr. CALVIN H. FREW, and Mr. M. H. CLOUD, for the appellant.

Messrs. POLLOCK & SAMPLE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a proceeding commenced by petition before a justice of the peace of Ford county, on the 31st day of September, 1873, for the construction of a drain, under the Drainage

act of 1871, Laws 1871–72, p. 356. On the hearing of the petition and finding in its favor, the justice of the peace directed the commissioners of highways of the proper town to lay out and construct the drain. The commissioners proceeded in the performance of their duties and made their report, finding that the proposed work could be done at a cost and expense less than the benefits to the lands to be affected. The report was confirmed and a jury impanneled for the assessment of damages and benefits, who made their report finding benefits to appellant's, the petitioner's, land, $40; damages, nothing; amount of ditch theretofore made on his land, $2.50. Benefits to appellee's land, $150; damages, nothing; amount of ditch theretofore made on her land, worth to the owner $15, allowing and estimating the cost of making the rest of the drain to be $15, and the probable costs of the court proceedings, to be paid by her, $135.

Upon the subsequent meeting of the jury, before the justice, for the correction of their assessment, on the 4th day of March, 1874, they amended and confirmed their assessment of damages and benefits and costs, finding the balance of benefits to the land of appellant to be $37.50, and the balance of benefits to appellee's land to be $135, which the justice charged to be a tax on her land. The total costs were $121.15.

On the 7th day of March, 1874, defendant, Scott, appellee here, took an appeal to the county court. At the July term, 1874, of the county court, the court, on motion of the defendant, Scott, dismissed the cause, and the petitioner, Gilkerson, appealed to the circuit court of Ford county. At the August term, 1874, of the circuit court, the court heard the cause and found and rendered judgment in favor of the defendant, whereupon the petitioner, Gilkerson, appealed to this court.

It is assigned for error that the circuit court refused to try the cause *de novo*.

Section 26 of the Drainage act provides that, after the assessment roll of the jury has been corrected by the county court, if necessary, the court shall confirm the same and cause

it to be spread upon the records, from which an appeal or writ of error will lie; a different section providing that appeals may be taken from the final judgment of the justice of the peace to the county court in the same manner as appeals may be taken from the findings of the jury in cases commenced in the county court.

We are of opinion that section 26 does not contemplate a trial *de novo* on appeal. The appeal is given in conjunction with a writ of error. Trials *de novo* are not had on writs of error. On the appeal to the county court a trial *de novo* might be had in that court, as in other cases of appeal from justices of the peace; but not so, we think, in the circuit court, on appeal to that court from the decision of the county court.

The provision of the present County Court act, Rev. Stat. 1874, p. 344, sec. 187, giving appeals merely, from the county court to the circuit court, and that upon appeal the case shall be tried *de novo*, does not govern, we think, as that act did not take effect until July 1, 1874, and the appeal to the circuit court was taken previously to that time; and section 189 of the act provides that county courts shall have power to render judgment, etc., in any cause of which they may have had jurisdiction previous to the taking effect of the act, and that appeals and writs of error may be prosecuted from such judgments, etc., thus indicating that, with respect to all causes previously in the county courts, the former practice as to appeals and writs of error should prevail.

This assignment of error substantially includes the 2d, 3d, 4th and 5th ones, so that the latter are sufficiently disposed of by what has already been said.

Appellant made a motion in the circuit court to refer the cause back to the commissioners, which the court overruled, and this is assigned for error.

Section 14 of the Drainage act, which provides for referring back to the commissioners their report for amendment, relates to the time of hearing upon the question of the confirmation

of the report. The court has no power to make such order after the jury have reported, whose action is based upon the report of the commissioners, and it being only until after the confirmation of the report that the jury are impanneled.

The further error assigned is, the rendering judgment in favor of the defendant.

Various objections are taken to the proceedings before the justice of the peace, which are insisted upon as rendering them illegal and void on their face. Several of them we do not consider tenable, as some in relation to defect of notices in different stages of the proceedings, which we regard as waived by subsequent appearance. But we are of opinion that there is one fatal defect in the proceedings, in the calling of a new juror at the time of hearing for confirmation of the jury's assessment.

The statute provides that, when the jury shall have completed their assessment of damages and benefits, they shall fix a time and place, giving ten days' notice, when and where they will attend for the correction of their assessment. At this time the jury are to hear objections, receive evidence, and make such alterations of their previous assessment as shall seem to them just; and upon the assessment being found correct, or being corrected upon the hearing, the jury shall confirm the assessment, and from this confirmation by the jury of their assessment a right of appeal is given.

At the time of hearing for confirmation of the assessment which had been made by the jury, one of the jurors failed to appear, and a new juror was summoned and placed upon the jury. Appellant was present, introduced evidence of witnesses, and the jurors, after hearing the evidence, confirmed the assessment which had previously been made. Appellee was not present, and so did not waive the irregularity by appearance and acquiescence. The jury, in making their original assessment, go upon the land to be affected and examine it. This is not done upon the hearing for confirmation. So that this new juror had not the benefit of the others, of a personal

examination of the land. The original assessment is incomplete, until its confirmation has been acted upon and had, the confirmation being the final act in the making of a complete assessment. The original assessment and the confirmation are parts of one thing, and the same persons should act in the making of both. It may have been the influence of the new juror which prevented a correction of the assessment in favor of appellee. Or, had the old juror been in his place upon the jury, his influence might have secured such a correction. It is sufficient, however, as a fatal irregularity, that the confirmation, and hearing therefor, were by and before a different body, in part, from that which made the assessment.

The entire cost of the work and expenses of the proceeding seem to have been placed upon the land of appellee, while the statute provides, in section 18, that in no case shall any tract of land be assessed in a greater amount than its proportionate share.

The jury, in their assessment, estimated the cost of making the drain to be $15, and the probable costs of the court proceedings, to be paid by appellee, $135. The confirmed assessment finds the balance of benefits to appellee's land to be $135, and the justice of the peace then charges that to be a tax on her land. The total costs are stated to be $121.15. The balance of benefits to appellant's land is found to be $37.50, but no tax is charged against his land, nor any indication in the proceedings that he is to pay any part of the cost or expenses. We think there was error in the proceedings before the justice of the peace, in disproportionately assessing the land of appellee.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

DENNIS CULLINER

v.

JOHN H. NASH.

1. BILL OF EXCEPTIONS—*must show all the evidence—when.* Where a bill of exceptions fails to state that it contains all the evidence, this court will not examine to see if that which appears in the record does sustain the verdict.

2. SAME—*making of, a judicial act.* The making of a bill of exceptions is a judicial act, and can not be delegated. Therefore a certificate of one styling himself "reporter," that the bill contains all the evidence, will not be considered. The judge alone can certify to such fact.

APPEAL from the Circuit Court of Mason county; the Hon. LYMAN LACEY, Judge, presiding.

This was an action of assumpsit, brought by John H. Nash against Dennis Culliner, upon a promissory note. The plaintiff recovered judgment, and the defendant appealed.

Messrs. FULLERTON & ROGERS, for the appellant.

Messrs. DEARBORN & CAMPBELL, and Mr. JOHN W. PITMAN, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The questions discussed by appellant depend entirely upon what the evidence was in the court below. It has been many times declared by this court, that where the bill of exceptions fails to state that it contains all the evidence, we will not examine to see whether that which appears in the record does sustain the verdict. The bill of exceptions in this record fails to state that it contains all the evidence given on the trial. There is a certificate to that effect, signed by one Watson, who styles himself "reporter." We are aware of no law authorizing such a certificate to be accepted by us, in lieu of

the proper statement in the bill of exceptions, signed by the judge. We have no doubt that this individual may be a man of truth and respectability, still the law gives him no power to usurp the province of the judge, and certify to us what evidence was given. If the judge knew that the evidence, as taken down by the reporter, was correctly reported and copied in the bill of exceptions, it was for him and not the reporter to so certify. The making of the bill of exceptions is a judicial act, and it can not be delegated. *Emerson* v. *Clark*, 2 Scam. 489.

The judgment is affirmed.

Judgment affirmed.

JOHN WELBORN *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. PRACTICE—*time of objecting to evidence.* If a recognizance is variant from that described in the *scire facias*, the defendant must make the objection at the time it is offered in evidence. If the objection is not urged in the circuit court, it can not be in this court.

2. PLEADING—*averment against the record.* It is a maxim in law that there can be no averment in pleading against the validity of a record, although there may be against its operation. Therefore, pleas to a *scire facias* upon a recognizance, which attempt to question the verity of the record, are bad on demurrer.

3. RECOGNIZANCE—*power of sheriff to take.* The power of a sheriff to take a recognizance from a person who is indicted, is not limited to the time of making the arrest, but he may take the same at any time after he has committed such person to jail.

4. EVIDENCE—*to contradict record.* Where the record shows that a recognizance of a prisoner was taken and approved by the sheriff, parol evidence is inadmissible to contradict it, or to show that when the same was filed there was no approval on it.

APPEAL from the Circuit Court of Shelby county; the Hon. HORATIO M. VANDEVEER, Judge, presiding.

Messrs. MOULTON & CHAFFEE, for the appellants.

Mr. L. B. STEVENSON, 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 Shelby county, on a proceeding by *scire facias* upon a recognizance, entered into before a sheriff, by William Spicer as principal, and John Welborn as surety.

At the February term, 1869, of the circuit court of Shelby county, an indictment was presented by the grand jury against Spicer, for larceny. The court fixed the bail at $300.

On the 19th day of August, 1869, Spicer was arrested on a *capias* by the sheriff, and in default of bail he was committed to jail.

On the 19th day of October, after the arrest, Spicer entered into the recognizance before the sheriff, with Welborn as his surety, to appear at the next term of the circuit court.

The recognizance was accepted by the sheriff, Spicer discharged from jail, and it was filed with the clerk of the circuit court, and became a record.

At the next term of the circuit court Spicer failed to appear, and a forfeiture of the recognizance was taken.

The first point relied upon by appellant to secure a reversal of the judgment is, that there is a variance between the *scire facias* and the recognizance; that it is averred in the *scire facias* that the defendants jointly and severally acknowledged themselves to owe and be indebted, and the recognizance offered in evidence shows that the obligation of defendants was joint only.

We do not consider that we would do violence to the language used in the recognizance, to hold it to be a joint and several obligation.

But if it be true that the variance claimed by appellants in fact existed, it is a sufficient answer to the position assumed, that the recognizance was offered and read in evidence without objection.

The *scire facias* is to be regarded as a declaration. If there was a variance between it and the recognizance offered under it, appellants were required to make the objection at the time the evidence was offered. The question not having been raised in the circuit court, but urged for the first time here, comes too late.

The next question urged by appellants is, that the court erred in sustaining a demurrer to the third and fourth pleas by them filed.

It is said in Chitty on Pleading, page 485: "It is a maxim in law that there can be no averment in pleading against the validity of a record, although there may be against its operation."

Each of these pleas attempted to question the verity of the record of the circuit court of Shelby county. We understand the law to be well settled, that the record imports absolute verity, and no averment can be taken against it. For this reason the pleas were bad, and the demurrer properly sustained. Stephen on Pleading, 158; *People* v. *Watkins*, 19 Ill. 118; *Johnson* v. *The People*, 31 Ill. 472.

It is, however, insisted, that the sheriff had no power to take the recognizance, and that it was not approved by him.

It is provided in section 1, page 202, Gross: "That the circuit court, where an indictment shall be found, shall make an order fixing the amount of bail, which shall be indorsed on the process by the clerk; and the sheriff or officer who shall arrest the indicted person, shall let such person to bail upon his entering into recognizance, which recognizance shall be signed by the persons entering into the same, and certified by the officer taking the same."

Under this provision of the statute it is not pretended that the sheriff, when he made the arrest of Spicer, did not have authority to admit him to bail, but it is insisted that after the arrest and commitment of the prisoner to jail the sheriff had no power to take bail.

We do not think a proper construction of the statute would limit the power of the sheriff to the time of arrest to admit to bail. The statute does not so read—it is more comprehensive in its terms.

We are unable to perceive any good reason for placing the construction upon the statute contended for by appellants.

If the sheriff was competent to exercise the power of taking bail when he arrested a prisoner upon a *capias*, we fail to perceive any reason why he can not discharge the duty with as much fidelity, and as satisfactory to the public, after he has placed the prisoner in jail as before.

In case of *Sloan* v. *The People*, 23 Ill. 77, it was held, where a person was indicted while in jail, and the amount of bail had been fixed by the court, and after the adjournment of court, that the sheriff had power to admit the prisoner to bail, although he had not made the arrest and held no *capias*.

If, as was held in that case, the sheriff could admit to bail where he had not made the arrest and held no *capias*, certainly his power could not be disputed in the case before us.

In regard to the position that the recognizance was not approved by the sheriff, that question was settled by the record, which showed the taking and approval of the bond, and that it was filed and became a matter of record.

The evidence of appellants, that after the recognizance had been filed in the office of the clerk of the circuit court, the approval of the sheriff had not been indorsed upon the bond, could not impeach the record.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

THE MERCHANTS' DESPATCH TRANSPORTATION CO.

v.

MOSES KAHN *et al.*

1. COMMON CARRIER—*duty as to route.* It seems that the duty of a common carrier, in the absence of any special contract, is to transport the property to the place of destination by the most usual, safe, direct and expeditious route, and failing in any of these, unless prevented by inevitable accident, he must be held liable for loss.

2. SAME—*destruction by fire not necessarily inevitable accident.* Where the common carrier received goods at Worcester, Mass., to transport to the consignees at Mattoon, Ill., and carried them by way of Chicago instead of the most usual and direct route by way of Indianapolis, and while stored in Chicago awaiting a reshipment they were destroyed by the great fire on the 9th of October, 1871: *Held*, that the carrier was not excused from liability on the ground of inevitable accident, as there was no compulsion to take the goods through Chicago.

3. SAME—*general rule of liability.* Where a transportation company receives goods for transportation, they assume all the duties of common carriers, and their liability must be determined by the obligations which are imposed upon that character of bailees. And the rule is, that such persons are insurers against every loss except when occasioned by the act of God or the enemies of the country.

4. SAME—*liability does not terminate until goods have reached their destination.* Where common carriers take goods being transported by them, from the cars, and place them in a warehouse for reshipment, and they are there destroyed by fire, the goods still being in transit, their liability as insurers continues, and they are liable. Their liability as insurers does not terminate until the goods have reached their destination and have been stored in a safe warehouse.

APPEAL from the Circuit Court of Coles county; the Hon. OLIVER L. DAVIS, Judge, presiding.

This was an action, commenced by Moses Kahn, Mark Kahn and Felix Kahn, against the Merchants' Despatch Transportation Company, before a justice of the peace, and taken by appeal to the circuit court, to recover for the loss of two cases of boots shipped at Worcester, in the State of Massachusetts, to the plaintiffs at Mattoon, in the State of Illinois. The cause was tried at the May term, 1874, of the

Coles circuit court, and a judgment rendered in favor of the plaintiffs and against the defendant for $116 and costs of suit. To reverse this judgment the defendant appealed.

Mr. O. B. FICKLIN, and Mr. JAMES W. CRAIG, for the appellants.

Mr. HORACE S. CLARK, for the appellees.

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

It appears, from the record in this case, that, on October the 2d, 1871, appellants received at Worcester, Massachusetts, two packages of goods to be transported to appellees at Mattoon, in this State. It seems they reached Chicago and were placed in a warehouse, it is contended, and were destroyed by the fire of the 9th of that month. Refusing to pay for the loss, appellees brought suit before a justice of the peace, where they recovered a judgment, but the case was removed to the circuit court by appeal, where a trial was had with like result, and the record is brought to this court on appeal and errors assigned.

It is contended that the goods having been destroyed by fire, the company are excused from their delivery. When they received the goods for transportation, they assumed all of the duties of common carriers, and their liability must be determined by the obligations which are imposed upon that class of bailees. And the rule is, that such persons are insurers against everything but the acts of God or the enemies of the country.

It is urged, that the fire which destroyed the goods is of the former character of excuses. This, we think, is not correct. There was no compulsion on the company to ship the goods by the way of Chicago. In fact, the evidence shows that a number of previous shipments from the same place or its vicinity had been made by the way of Indianapolis, and not coming through Chicago, and that this was the nearer and

more expeditious route for their transportation. Had they shipped the goods by the way of Indianapolis, as they had previously shipped other goods to these parties, the loss would not have occurred.

Even if it was proved that the goods had been taken from the cars and placed in a warehouse awaiting reshipment to Mattoon, still they were in transit, and the liability of insurers continued. *Western Transportation Co.* v. *Newhall*, 24 Ill. 466. The liability of insurers does not terminate until the goods have reached their destination and they have been stored in a safe warehouse. There is no pretense that such was the fact in this case.

It seems that the undertaking of a common carrier, in the absence of any special contract, is to transport the property to the place of destination by the most usual, safe, direct and expeditious route. Failing in any of these, unless prevented by inevitable accident, he must be held liable for loss.

We can see nothing in this case that should relieve appellants from the liability of common carriers.

The evidence sustains the verdict, and the judgment of the court below must be affirmed.

Judgment affirmed.

LEONARD MORRIS

v.

THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY

REVOCATION—*of license, for breach of conditions subsequent.* Where the owner of land executed an agreement with a railway company, which constituted not only an irrevocable license to enter and occupy a part of the same as a right of way, but obligated the owner, so soon as the road was finally located and built, to convey to the company the right of way of fifty feet on each side of the center of the road, it was *held*, that the failure of the company to perform conditions subsequent contained in the

agreement, such as fencing, etc., furnished no ground for the revocation of the license under which the company entered and constructed its road, as complete indemnity in damages were recoverable therefor in an action at law, and therefore the owner could not recover possession of the right of way in ejectment for breach of such conditions.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. WILLIAMS, BURR & CAPEN, for the appellant.

Mr. C. W. FAIRBANKS, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This action was brought in ejectment to recover a strip of land 100 feet in width, being the right of way on which defendant's road-bed is constructed through a tract of land owned by plaintiff. No question is made that plaintiff was the original owner of the land.

Prior to the construction of the railroad, he entered into a written contract with the "Danville, Urbana, Bloomington and Pekin Railroad Company," a corporation created under the laws of this State, and which has since been consolidated with the Eastern Division, under the name of the defendant company, by which he agreed, in consideration the railroad company would make and maintain a fence on each side of its road and give a crossing, in case it should locate its road across his land, the company might, "at any time, enter upon and use said land for the purpose of locating, building, operating and maintaining said railroad."

Under that agreement the company did enter upon the land, constructed its road, and has operated it since 1870. It constituted not only an irrevocable license to enter and occupy the right of way for its road-bed, but the contract obligated plaintiff so soon as the road was finally located and built upon his land, to convey to the company the title to the right of way, not exceeding fifty feet on each side of the center stake of the survey of the road.

It will be observed the conditions contained in the agreement, which it is insisted have not been complied with, are all conditions subsequent. If broken, complete indemnity may be obtained in damages, recoverable in an action at law. The fact the company may not have kept all its covenants and undertakings contained in the agreement with plaintiff, constitutes no ground for the revocation of the license under which the company entered and constructed its road.

The court found correctly, and its judgment must be affirmed.

Judgment affirmed.

PAULSEN B. BUSH

v.

WILLIAM SCOTT *et al.*

1. HOMESTEAD—*as against purchase money.* The statute is plain that no homestead right can exist as against the claim for the purchase money of the land to which it is attached.

2. Where a party purchased several parcels of land for $1300, paying $500 down, and gave a mortgage on one of the tracts for the balance of the purchase money, and on sale under foreclosure it did not satisfy the debt, and a decree was taken for the balance under which another of the tracts was sold on execution, it was *held*, on bill in chancery by the purchaser to set aside the sheriff's sale of the last tract, on the ground that it was occupied as a homestead, that the bill was properly dismissed on demurrer, as there was no homestead right as against the purchase money due on the entire purchase.

WRIT OF ERROR to the Circuit Court of Edgar county; the Hon. OLIVER L. DAVIS, Judge presiding.

In this case, the plaintiff in error purchased of Samuel Scott, in his life time, the S. W. S. W. 7, 15 N., R. 10 W., the S. E. S. W. 7, 15 N., R. 10 W., except 15 acres off the east side, and two acres for a cemetery, also S. E. S. E. 12, 15 N., 11 W., for the sum of $1300, paying down the sum of $500, and

giving notes for $800 secured by a mortgage on the last named tract. After the death of Scott, his executors obtained a decree of foreclosure of the mortgage, under which the mortgaged tract was sold. The sale not satisfying the debt, the executors obtained judgment against the plaintiff in error for $631.52, the balance due on the notes given for the purchase money, and sold the other lands under execution issued thereon. The plaintiff in error then filed this bill to have the latter sale set aside, on the ground that the premises were his homestead. The court below sustained a demurrer to, and dismissed the bill, from which decree the complainant below prosecuted this writ of error.

Messrs. BOYLE & DYAS, for the plaintiff in error.

Messrs. BISHOP & JAQUITH, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, in the Edgar circuit court, the scope of which was to set aside a sale made by the sheriff of that county, of certain lands therein, on the allegation that the same were the homestead of complainant.

There was a demurrer to the bill and judgment thereon for the defendants, that the bill be dismissed. The record is brought here by writ of error, and this decree is assigned as error.

The allegation on which the claim to relief is based, is founded in a misconception of the true position appellant occupies. The statute is plain to the point that no homestead right can exist as against a claim for the purchase money of the land to which it is attached. Sec. 3 of the Homestead act expressly provides that no property shall be exempt from sale for a debt or liability incurred for the purchase or improvement thereof. Rev. Stat. 1874, p 497.

The foreclosure of the mortgage was accompanied by a decree for the amount of the mortgage money, and that became

a debt due mortgagee which his executors could collect by execution. These proceedings were not in the nature of a proceeding to enforce a vendor's lien. That exists independent of any contract and can be enforced only in equity.

We are referred, by plaintiff in error, to the case of *Phelps* v. *Conover*, 25 Ill. 309, as bearing on this case. We do not perceive the resemblance. Here was no sale of the note given for the purchase money which the mortgage was executed to secure, and given up to the maker and a new note taken. This proceeding is between the original parties, and that the note and mortgage were given to secure the purchase money, is not denied. There is no foundation for the claim of a homestead right.

The decree was right, and it must be affirmed.

Decree affirmed.

FREDERICK BAUMAN, Admr.

v.

MARY T. STREET *et al.*

1. MARRIED WOMEN—*contracts for necessaries, at common law.* The husband being bound to provide necessaries for his wife and infant children suitable to their condition in life, the wife, while living with her husband, by the common law can not bind herself by contract even for necessaries.

2. SAME—*under statute of* 1861, *wife may contract respecting her separate property.* Where the marriage takes place after the passage of the Married Woman's act of 1861, and the wife had property, whether real or personal, belonging to her at the time of the marriage, or if, during coverture, she, at any time after that act took effect, derives property from any person other than her husband, she, in either case, will be entitled to hold, possess and enjoy the same as though she were sole and unmarried, and, by implication, has the legal capacity to contract with reference to and for the benefit of such separate estate, and such contracts are enforceable at law.

Statement of the case.

3. SAME—*contracts of, not in respect to their separate property.* There doubtless may be cases when the wife has a separate estate under the act of 1861, and her contracts are not in relation to or for the benefit of such estate, that although such contracts would not fall within the implied legal capacity conferred by the statute, yet if they were made for her own personal benefit, upon the faith and credit of such separate estate, they might be enforced in equity, the same as in cases where the wife, independently of the statute, had a separate estate in equity under a settlement.

4. SAME—*requisites of bill to enforce their contracts in equity.* In order to show a case by bill in equity to enforce a contract of a married woman entered into prior to the act of 1874, the bill must distinctly show that she held a separate estate under such circumstances as would clothe her with the right to hold, possess and enjoy it as though she were sole and unmarried, under the statute of 1861, or show a settlement giving her an estate in equity without reference to any statute, and if the latter, whether the settlement specifies the mode and manner of her creating a charge upon it, and what that mode is.

WRIT OF ERROR to the Circuit Court of Madison county; the Hon. JOSEPH GILLESPIE, Judge, presiding.

This was a bill in equity, by Conrad Schaub against Mary T. Street and her husband, Kennedy Street. The bill alleged that the defendants were indebted to complainant in the sum of $500 for necessaries bought of him at divers times by the said Mary T. Street between June 1, 1867, and March 1, 1870, and for interest on accounts for said necessaries after settlement, and balance agreed on by said Mary T. and the complainant; that the necessaries were charged to said Mary T. by her express order and direction, and with her personal knowledge of the same, she agreeing at the time of the purchase, and subsequently, to pay for the same out of her own separate property, the complainant refusing to give credit to the husband, understanding him to be insolvent, and understanding and believing that the said Mary T., from her own statements, was the owner in fee of a large farm in the county of Madison, Illinois, also of personalty to a large amount, and that she and her family were in absolute want and need of the articles so bought; that the said Mary T. was a married woman, and was married at the time of the sales to her,

and was the wife of Kennedy Street; and that said Mary T. had been frequently requested to pay said indebtedness, but refused to do so, and also refused to discover and set forth what such real and personal estate was, or the particulars whereof the same consisted, or the value thereof, or how the same has been disposed of particularly. The prayer of the bill was, that defendants be compelled to pay complainant the amount so due him, and that the separate property of the said Mary T. be subjected to the payment of the same, etc.

The complainant having departed this life, his death was suggested, and Frederick Bauman, his administrator, was substituted in his place. The court sustained a demurrer to the bill, and ordered its dismissal, and the administrator prosecuted this writ of error.

Mr. DAVID GILLESPIE, for the plaintiff in error.

Messrs. IRWIN & KROME, for the defendants in error.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

This was a bill in equity, brought in the Madison circuit court, by Conrad Schaub, a merchant engaged in the retail of dry goods and groceries, against Mary T. Street and Kennedy Street, her husband, upon an account, for the purpose of charging the separate property of the wife for the amount thereof, the same being for necessaries furnished by complainant out of his store to the defendants while living together as husband and wife.

The court below sustained a demurrer to the bill, and complainant declining to amend, a decree of dismissal was entered, and error brought to this court.

At law, the husband is bound to provide necessaries for his wife and infant children, suitable to their condition in life. The wife, while living with her husband, can, by the common law, bind herself by no contract, not even for necessaries.

Cookson v. *Toole*, 59 Ill. 515. In that case, and the rule has been followed in subsequent cases, it was held that, where the marriage was after the Married Woman's act of 1861, and the wife had property, whether real or personal, belonging to her at the time of the marriage, or if, during coverture, she, at any time after the act went into force, derived property from any person other than her husband, then, in either case, she was entitled, by that statute, to hold, own, possess and enjoy such property the same as though she were sole and unmarried; that such a right of enjoyment gave her a capacity, by implication, to contract with reference to and for the benefit of such separate estate; that the right itself of enjoyment of the estate, being conferred by statute, it was a legal right, and she would have a legal estate where, under the same circumstances of the title, an unmarried woman would; and that it followed from the premises, the capacity thus given by implication was a legal capacity; so that contracts made within the limited capacity here conferred would be enforceable at law.

There doubtless may be cases where she has a separate estate under the statute of 1861, and her contracts are not in relation to or for the benefit of such separate estate, that, although such contracts would not fall within the implied legal capacity conferred by the statute, yet, if they were made for her own personal benefit, upon the faith and credit of such separate estate, they might be enforced in equity, the same as in cases where the wife, independently of the statute, had a separate estate in equity under a settlement. This is the doctrine announced in the case of *Cookson* v. *Toole, supra,* and we perceive no objection to it.

If this bill had been properly framed in other respects, a question might arise whether a contract for necessaries for the family, which the husband was bound to furnish, could be regarded as for her *personal* benefit. As this case must be disposed of upon other grounds, it is unnecessary here to discuss it.

Syllabus.

In order to show a case by bill in equity to enforce the engagements of a married woman, entered into prior to the act of 1874, it must be distinctly shown by the bill, that she held a separate estate under such circumstances as would clothe her with the right to hold, possess and enjoy it, as though she were sole and unmarried, under the statute of 1861, above referred to; or to show a settlement giving her an estate in equity, without reference to any statute.

The bill in this case shows neither. It was impossible for the court below to have intelligently, and upon defined principles, passed a decree charging the separate estate of the wife upon what appeared upon the face of the bill. *Non constat*, the only interest she had was under a deed of settlement which specified the mode and manner in which she should create any charge upon it. *Conkling* v. *Doul*, 67 Ill. 355.

The decree of the court below will be affirmed.

Decree affirmed.

ENOCH COMSTOCK *et al.*

v.

JAMES S. HANNAH.

1. ASSIGNEE OF NOTE—*negligence in inquiring into consideration before purchase.* In a suit by the assignee before maturity, against the maker, upon a promissory note, where a failure of consideration was set up, averring that plaintiffs had notice of the same, the court modified one of the plaintiff's instructions, by adding the following: "unless the jury further believe that the consideration of the note in suit was for the sale of a patent planter, and the right to sell the same under conditions named in the evidence, and that the plaintiffs, or their agent, at the time of the purchase of the note, had notice of what the note was given for; and in that event it would be the duty of the plaintiffs to use a higher degree of diligence in informing themselves of the consideration of such note than would be required of them in purchasing ordinary commercial paper not connected with patent-right transactions:" *Held*, that the modification was clearly erroneous.

Statement of the case.

2. SAME—*effect of gross negligence in purchasing note before due.* Where a person takes any assignment of a promissory note for a valuable consideration, before due, and is not guilty of bad faith, even though he may be guilty of gross negligence, he will hold it by a title valid against the world, and it will not be subject to the defense of failure of consideration in his hands.

3. A party who takes commercial paper before due for a valuable consideration, without knowledge of any defect of title or defense to it, will take a good title unaffected by any defense going to its consideration. Suspicion of the defect of title, or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the assignee at the time of the transfer, will not defeat his title, or let in a defense not otherwise admissible against it in his hands. That result can only be produced by bad faith on his part.

4. In a suit by an assignee of a note, taken before due, for a valuable consideration, without knowledge of any defense against the maker, it is error to instruct the jury that it was the duty of the plaintiff to exercise reasonable diligence and caution in the purchase of the note, to ascertain if any defense existed to it, and that if he was negligent in this respect, and took the same under circumstances that would have caused a reasonably prudent man to inquire about it, and be informed as to its character, then it makes no difference whether the note was assigned before or after due, and is subject to any defense that may have been proven.

5. Mere negligence on the part of an assignee of negotiable paper is not sufficient to deprive him of the character of a *bona fide* holder. There must be proof of bad faith. That alone will deprive him of that character.

APPEAL from the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

This was an action of assumpsit, brought by Enoch Comstock, Timothy H. Castle, Frederick Collins, Samuel H. Emory, Jr., Chauncey H. Castle, and Henry A. Castle, against James S. Hannah, upon a promissory note given by the defendant to Geo. W. Kenworthy, and by him assigned to the plaintiffs. The defendant pleaded both total and partial failure of consideration, and that plaintiffs had notice of the same when they bought the note. There was a verdict and judgment for the defendant, to reverse which the plaintiffs prosecute this appeal.

Messrs. CUNNINGHAM & WEBBER, for the appellants.

Mr. J. S. WOLFE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action upon a promissory note, given by the defendant to one George W. Kenworthy, and by him assigned to the plaintiffs.

A verdict and judgment were rendered for the defendant in the court below, and plaintiffs appealed.

On the trial below, plaintiffs asked an instruction, which the court gave, with the following modification, plaintiffs excepting to the modification:

"Unless the jury further believe that the consideration of the note in suit was for the sale of a patent planter, and the right to sell the same under conditions named in the evidence, and that the plaintiffs or their agent, at the time of the purchase of the note, had notice of what the note was given for; and in that event it would be the duty of the plaintiffs to use a higher degree of diligence in informing themselves of the consideration of such note than would be required of them in purchasing ordinary commercial paper, not connected with patent-right transactions."

The following instructions were given for the defendant:

"The court instructs the jury that, in this case, it was the duty of the plaintiffs to employ reasonable diligence and caution in the purchase of the note in question, to ascertain if any defense existed to the note before they purchased the same.

"The court further instructs the jury, that a party purchasing a promissory note in good faith and before maturity, is bound to make such inquiries concerning it as a person of ordinary prudence would make in and about his ordinary business.

"If the jury believe from the evidence that the plaintiffs bought the note in question by their agent, and that at that

time said agent did not inquire for what consideration said note was given, and if they also believe, from the evidence, that, at the time, the defendant was a stranger to the said agent, and resided 150 miles from where said note was bought by the plaintiffs, then the jury may regard such omission to inquire into the character and consideration of said note as evidence tending to prove negligence on the part of the plaintiffs; and if they further find, from the evidence, that said note was made for the consideration stated in defendant's pleas, and that said consideration has failed, in whole or in part, and if they also find that plaintiffs were negligent in the purchase of said note, and took it under circumstances that would have caused a reasonably prudent man to inquire about it, and be informed as to its character, then, in that case, it makes no difference that the note was assigned before maturity, and the jury will find for the defendant to the extent of the failure of consideration proven, if any, if the jury also believe plaintiffs' agent failed to make such inquiry concerning the consideration of the note in suit, as a prudent man ought to have made under the circumstances."

The modification of plaintiffs' instruction, as above, and the giving of said instructions for defendant, are assigned as error.

The note was taken by plaintiffs for value before maturity, and duly assigned to them. No question is made in that respect.

All the evidence in the case tending in any way to affect plaintiffs with bad faith, notice, or to show circumstances of suspicion, was as follows: Plaintiffs, residing in Quincy, in this State, having a note for some $900 against Kenworthy, residing in Bushnell, Ill., and engaged in the manufacture of corn planters, instructed their agent to proceed to Bushnell and make a settlement of their claim against Kenworthy. The agent did so, and took the note in suit for $150, and five others of the same amount, and one for $75, in settlement of

the $900 note, surrendering that up, Kenworthy giving his due bill for a small balance.

The agent inquired of the bankers at Bushnell about the notes, and learned from them the notes were given to an agent of Kenworthy, for corn planters, and the right to sell corn planters.

The defense was, a failure of consideration, that the corn planter for which the note was given was worthless.

We know of no different rule of law, as applicable to citizens dealing in rights secured to them by letters patent from the United States, and to those citizens concerned in traffic in other species of property, which recognizes the former class of persons or their transactions as any more subject to the imputation of dishonesty and fraud than are the latter; and we think it error to lay down, as a matter of law, such a distinction as existing against the vendor of the subject of a patent-right. This the modification of plaintiffs' instruction virtually did, and we regard it as wrong. See *Goddard* v. *Lyman*, 14 Pick. 268.

Neither one of the above instructions given for the defendant do we regard as in accordance with the existing rule of law.

For a short period, commencing with the case of *Gill* v. *Cubitt*, 3 Barn. and Cresw. 466, decided in 1824, the doctrine did prevail in the English law, which would have afforded countenance to the third above instruction for the defendant, so far as respects taking the note under suspicious circumstances. It was established in that case, that the purchaser of negotiable paper for value, before maturity, was not entitled to the privileges which belong to a *bona fide* holder, when he took the paper under circumstances which ought to have excited the suspicion of a prudent and careful man. But that case was distinctly overruled in the same tribunal where it was decided, in *Goodman* v. *Harvey*, 4 Ad. and Ell. 870.

Lord DENMAN there, in delivering judgment, said: "I believe we are all of opinion that gross negligence only would

not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title." This decision was in 1836, and the rule established in this case has ever since, as we understand, obtained in the English courts.

In *Goodman* v. *Simonds*, 20 How. 343, the doctrine of the case of *Goodman* v. *Harvey* is approved and sanctioned by the Supreme Court of the United States, where the subject was elaborately examined, and see the authorities there cited. *Murray* v. *Lardner*, 2 Wall. 110, is to the same effect.

In the latter case, speaking of the former one of *Goodman* v. *Simonds*, it is said: "That case affirms the following propositions: The party who takes it (commercial paper) before due, for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it."

The same rule is held by the Court of Appeals of the State of New York, in *Magee* v. *Badger et al.* 34 N. Y. 247, where the court say, that the duty of active inquiry does not rest on the purchaser of commercial paper, to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. And see *Welch* v. *Sage*, 47 N. Y. 143; *Seybel* v. *National Currency Bank*, 54 id. 288; *Chapman* v. *Rose*, 56 id. 137. In the latter case, upon this subject, the court say: "It is now, however,

the settled law, that mere negligence, however gross, is not sufficient to deprive a party of the character of a *bona fide* holder. There must be proof of bad faith. That alone will deprive him of that character." See also 1 Pars. Notes and Bills, 258.

We accept the doctrine of these cases as correct in principle, and the one sustained by the great weight of authority.

There may be found some decisions of this court, as in *Russell* v. *Hadduck*, 3 Gilm. 233, and other cases, where there has been a seeming recognition of the opposite doctrine, as asserted in the instructions, at least to the extent that a purchaser of negotiable paper, with knowledge of any facts and circumstances which would excite the suspicion of a prudent and careful man, is bound to make inquiry, and in neglect thereof will take the paper subject to any equities which may exist between the previous parties to it.

But there never has been more than an incidental assumption, without discussion, that such was the rule. It has never been presented before the court as a subject of question, and as such discussed or considered, and a direct adjudication made thereon.

We find nothing in previous decisions which should conclude us from adopting what, upon investigation, we are satisfied is the correct doctrine in principle, and the prevailing rule of law.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

ANTHONY ALMOND *et al.*

v.

DAVID T. BONNELL.

1. EJECTMENT—*plaintiff may recover a less interest than claimed in his declaration.* Under the ejectment act of 1872, the plaintiff in ejectment,

under a declaration claiming the fee simple of certain lands, may recover one-half, or any other fractional quantity of the whole, if the proof warrants it.

2. SAME—*under claim in fee, a life estate can not be recovered.* But when the plaintiff claims the fee simple title to land in his declaration, he can not recover an estate therein for life or for years.

3. TENANCY BY THE ENTIRETY. Where land was conveyed to husband and wife prior to the passage of the Married Woman's act of 1861, it was *held*, that both became seized of the entirety, and that neither could dispose of any part without the assent of the other, but the whole must remain to the survivor, and that the act referred to could not have the effect to divest the parties of rights which were completely vested when it took effect.

4. Where land is held by husband and wife as tenants by the entirety, as at the common law, the sale of the same on execution against the husband, followed by a sheriff's deed, will fail to pass any title whatever. It will not pass the undivided half, as in the case of the sale of the interest of one of two tenants in common.

APPEAL from the Circuit Court of Montgomery county; the Hon. HORATIO M. VANDEVEER, Judge, presiding.

This was an action of ejectment, by David T. Bonnell against Anthony Almond and Alice C. Almond, to recover a certain tract of land. The opinion of the court states all the material facts in the case.

Messrs. ROBINSON, KNAPP & SHUTT, and Mr. JESSE J. PHILLIPS, for the appellants.

Messrs. JOHN M. and JOHN MAYO PALMER, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellee brought this ejectment in the court below against appellants, claiming, by his declaration, to be seized in fee simple of the lands in controversy. The appellants pleaded not guilty, and, by agreement of parties, the cause was tried by the court without the intervention of a jury. Judgment was given that appellee recover one undivided half of the

land in fee simple, and the other undivided half for the life of the appellant Anthony Almond.

Appellee's proof of title consisted of a sheriff's deed to the property in controversy, supported by a judgment and execution thereon, in his favor and against the defendant Anthony Almond, and one Weston.

Appellants' title, as proved, is this: The lands in controversy were patented by the United States to Robert Stanley, May 1, 1851, who died the same year, intestate, leaving no wife or child or children, or descendants of children, surviving him. His heirs at law were his father and mother, two brothers (John and Matthew C. Stanley) and four sisters—the defendant, Alice C., wife of the defendant Anthony Almond; Loxey, wife of Mark W. Risley; Jane Tichenor, and Hannah Stanley. Of these, the father and mother, and John and Hannah Stanley, subsequently died intestate, leaving Matthew C. Stanley, the defendant Alice C. Almond, Loxey Risley, and Jane Tichenor their only heirs at law. After this, and on the 14th of February, 1856, Mark W. Risley and Loxey Risley, his wife, and Matthew C. Stanley and wife, by their several quit claim deeds of that date, conveyed to the defendants, by the description of "Anthony Almond and Alice C. Almond, his wife," the lands in controversy, and on the 14th of April, 1857, Jane Tichenor executed a like deed of conveyance.

The first question presented by this appeal is, that the court below erred in rendering judgment for an undivided half in fee and the other half for life, when the declaration claimed the whole in fee. It is conceded by counsel for appellee, that this objection would have been good under the Ejectment act, as found in the Revised Statutes of 1845; but it is insisted that it can not now be sustained, by reason of an amendment made to the seventh section of that act by the revision thereof, in 1872. The section was originally as follows: "The premises so claimed shall be described in such declaration with convenient certainty, so that from such description

possession of the premises claimed may be delivered. If such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration." By the revision of 1872 there is added this sentence: "But the plaintiff, in any case, may recover such part, share or interest in the premises as he shall appear on the trial to be entitled to." Prior to this amendment, it had been always held that, under a declaration in ejectment for the entire premises, an undivided interest less than the whole could not be recovered. We are of opinion that the amendment changes that rule, and that now, under a declaration claiming certain premises, one-half or any other fractional quantity of the whole may be recovered, if the proof warrants it.

But this only partially answers the objection urged. Under a declaration claiming that the plaintiff was seized in fee of the entire premises, there was not only a recovery of the undivided one-half in fee, which we think was admissible under the amendment referred to, but there was also a recovery for the other undivided half for the life of one of the defendants. Neither the section nor amendment alluded to has any reference to the duration of the estate of the plaintiff—that is, whether it is for fee, for life, or for years—but they relate exclusively to the quantity or portion of the premises which he claims. Any doubt which might otherwise exist in this respect from the language employed, is removed by the next section, which is clearly independent, and relates to a different subject. It is: "In every case the plaintiff shall state whether he claims in fee, or whether he claims for his own life or for the life of another, or for a term of years, specifying such life or the duration of such term."

It was said by this court, in *Ballance* v. *Rankin*, 12 Ill. 420: "We hold that the plaintiff is bound by his allegations. He must recover according to the case made in his declaration. He can not recover a different estate than the one he claims. If he claims an estate in fee, he can not recover a less estate." And this has ever since been adhered to as being the law.

Inasmuch, therefore, as the statute in respect to the duration of the estate claimed by the plaintiff in his declaration remains as it was in the Revised Statutes of 1845, we feel constrained to adhere to the construction which it has always received, and must hold that it was error, under the declaration in the present case, to render judgment for the one undivided half of the premises in controversy, during the life of the defendant Anthony Almond. It is true, we do not perceive why the statute should have been changed as to the quantity of the premises claimed, and not also, at the same time, as to the duration of the estate; but it is sufficient the legislature had the power to and seem to have changed the law in the one respect and not in the other.

The only remaining question is, did the court err in rendering judgment for one-half of the property in fee? Of this, we think, there can not be, under the facts stated, the slightest doubt. It has been seen that the defendant Alice was the owner in fee of the undivided one-fourth of the property, and that the remaining three-fourths were conveyed to the defendants, as husband and wife, which they were at the time. The common law doctrine was: "If an estate be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for, husband and wife being considered as one person in law, they can not take the estate by moities, but both are seized of the entirety *per tout et non per my*, the consequence of which is, that neither husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." 2 Blackstone's Coms. 182. This language was cited and the rule approved by this court in *Mariner* v. *Saunders*, 5 Gilm. 124, and has since been applied in *Lux* v. *Hoff*, 47 Ill. 425; *Strawn* v. *Strawn*, 50 id. 33.

But appellee argues this rule has been changed by the act in force Feb. 21, 1861, relating to the separate property of married women. Without stopping to inquire whether property so conveyed can, since that act was in force, be considered

as the separate property of the wife, it answers the present purpose that the title of the defendants to this property was vested several years prior to its enactment, and it can not be held to have the effect to divest parties of rights which were completely vested when it took effect. *Rose* v. *Sanderson*, 38 Ill. 250; *Lux* v. *Hoff*, *supra*.

It necessarily follows that plaintiff could not have been seized in fee of the undivided half of the property, since the defendant Anthony Almond never owned such an interest, and there is no pretense that his title is derived otherwise than through the sale and purchase of the defendant Anthony Almond's interest. The judgment is reversed and the cause remanded. *Judgment reversed.*

MARIANNA SONTAG
v.
ROSINA SCHMISSEUR *et al.*

HOMESTEAD. Under the homestead act of 1851, and the amendatory act of 1857, the widow has not the right to claim a homestead in addition to her dower, as against the heirs, in the premises occupied by her as a homestead. Under those acts the exemption exists only as against forced sales, or voluntary alienations by the husband in which the homestead is not released.

WRIT OF ERROR to the Circuit Court of St. Clair county.

Mr. WM. WINKELMAN, for the plaintiff in error.

Messrs. C. W. & E. L. THOMAS, for the defendants in error.

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

The question presented by this record is, whether the widow of a person dying seized of real estate, leaving children as heirs, but no debts, can claim, in addition to her dower in the premises, a homestead worth $1000, as against the heirs of her husband, in a proceeding for partition and assignment of dower. The question was presented in the court below, but the court refused to allow the widow such a right, and the case is brought to this court and a reversal is asked.

The language of the statute only applies to forced sales under process of courts of law or equity. The act declares that the homestead shall be exempt from levy and such sale for debts contracted after the 4th of July, 1851. The amendatory act of 1857 provided that the husband should not release the right unless the wife should join with him for that purpose. But still, in both enactments there is an entire absence of all allusion to any exemption from partition with the heirs on their claims or right of possession. The law has not declared that the widow may hold a homestead against the heirs, and we are unable to hold that such was the legislative intention, but must, on the contrary, hold, as we did in the case of *Eggleston* v. *Eggleston*, 72 Ill. ——, that the acts of 1851 and 1857 only create an exemption from forced sales or alienations by the husband, and did not extend the right to the widow as against the heirs. That case presents and determines this question, and we have no inclination to repeat the discussion, but are fully satisfied with the decision there made, and the decree of the circuit court must be affirmed.

Decree affirmed.

THE MERCHANTS' DESPATCH COMPANY

v.

ROBERT P. SMITH *et al.*

1. COMMON CARRIER—*what is act of God.* Where a carrier undertakes to transport goods, he will be held liable for their loss or destruction, unless the same was caused by the act of God or the public enemy. By the term "act of God," is meant something superhuman, or something in opposition to the act of man. Loss by fire, as in the great Chicago fire, therefore, will not relieve the carrier from his undertaking.

2 PARTY, PLAINTIFF—*action against carrier.* When goods are consigned without reservation on the part of the consignor, the legal presumption is, that the consignee is the owner, and in case of a loss, an action against the carrier is properly brought by the consignee.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Messrs. HUGHES & MCCART, for the appellant.

Messrs. ROWELL & HAMILTON, for the appellees.

Mr JUSTICE CRAIG delivered the opinion of the Court:

This was an action, brought by appellees against the Merchants' Despatch Co., appellant, to recover the value of two cases of boots, consigned to them from Boston, in the fall of 1871.

A trial was had before the court, a jury having been waived, which resulted in a judgment in favor of appellees for $74, the value of the goods.

It appears from the record that appellees resided in Bloomington, Illinois, and appellant was a common carrier of goods from Boston to Bloomington; that the goods were consigned to appellees from Boston, and shipped upon appellant's line, but were never received by appellees.

One of the appellees testified that about one month after the Chicago fire of 1871, he was in Boston and had a conversation with Mr. French, who was agent of appellant, and was told by him that the goods arrived in Chicago on the 8th or 9th of October, and were burned in the great fire.

The first point relied upon by appellant is, that the consignee of the goods could not maintain a suit for the loss; that the action should have been brought in the name of the consignor.

Where goods are consigned without reservation on the part of the consignor, the legal presumption is the consignee is the owner. Angell on Carriers, sec. 497.

This court held, in *Diversy* v. *Kellogg*, 44 Ill. 114, that when goods were delivered to a carrier under a contract of sale, the title to the property vests in the consignee, subject to stoppage *in transitu*, but with no other lien unless expressed in the terms of the sale.

We are, therefore, of opinion that the title to the goods shipped was in appellees, and the suit for the loss was properly instituted in their names.

It is, however, urged by appellant, that as the goods were destroyed in the great fire at Chicago, the loss should be regarded as an inevitable accident for which the company should not be held responsible.

The law required the appellant to carry the goods from Boston to Bloomington, and safely deliver them to appellees. This duty it failed to perform, and it must be held liable for the value of the goods, unless the destruction of the goods can be attributed to the act of God or the public enemy.

A common carrier is not relieved of responsibility where the loss occurs even from inevitable accident, unless it arose from the act of God or the public enemy. It only remains to be seen whether the loss of the goods in question comes within the exception.

We have held, in another case, that the proper construction to be given to the phrase "the act of God," was, where goods were destroyed by something superhuman, or something in opposition to the act of man.

Under this rule it needs no argument to show that the loss of the goods involved in this case, did not fall within the class that will relieve the common carrier of the liability as warrantor for the safe delivery of the goods to appellees.

The judgment of the circuit court will, therefore, be affirmed.

Judgment affirmed.

THE BOARD OF SUPERVISORS OF CUMBERLAND COUNTY

v.

ANDREW J. EDWARDS.

1. COUNTY—*error to award execution against.* It is palpable error and in the teeth of the statute to award an execution against a county for the costs of suit.

2. FEES AND COMMISSIONS—*county collectors and treasurers for* 1871. Under the laws in force in 1871, county collectors and treasurers were

entitled to receive, as commissions, one per cent for receiving the county and town tax, and the same for paying it out, but nothing for paying it over to his successors, five per cent on all moneys collected under $8000, and three per cent on all additional sums collected by him, and county treasurers one per cent on all moneys, county orders and jury certificates received by them for county purposes, and the like per cent on all moneys paid out by them, except to their successors.

3. SAME—*for taxes of* 1872 *under act of* 1872. Under the act of 1872, county collectors in counties of the first class were entitled to receive as commissions three per cent on all moneys collected by them and paid over to the proper officers, one and a half per cent on moneys collected by township collectors and paid over to them, and one per cent for paying out the same as county treasurers.

4. BOARD OF SUPERVISORS—*power to estop county by allowing illegal fees.* A county is not estopped by the board of supervisors passing upon and approving a collector's account, containing charges for illegal fees. The board are powerless to allow as fees or commissions more than the sum fixed by law, and such allowance binds no one.

APPEAL from the Circuit Court of Cumberland county; the Hon. JAMES C. ALLEN, Judge, presiding.

This was an action of assumpsit by the board of supervisors of Cumberland county, against Andrew J. Edwards, to recover money in the hands of defendant, which came to his hands as county treasurer and collector for the years 1871 and 1872.

Mr. H. B. DECIUS, and Mr. A. J. LEE, for the appellant.

Messrs. BREWER & WARNER, and Messrs. LOGAN & SCRANTON, for the appellee.

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

The judgment in this case was against the county for costs, and in the teeth of the statute awards execution against the county. This is palpable error, caused by carelessness or inattention of the clerk.

But the principal question presented by this record is, whether the evidence sustains the verdict, and whether or not

the finding is not contrary to law. To determine this, it is proper that we should refer to the provisions of the statute allowing the treasurer commissions for receiving and disbursing the funds of the county, as it is upon the charges made by appellee therefor that this controversy arises. The services performed by appellee in collecting the taxes of 1871 were under the revenue laws of 1861, and his compensation was fixed by sec. 10, p. 140, and sec. 72, p. 88, of Laws of 1853. These acts fix the compensation of the collectors or treasurers of counties. The act of 1853 provides that the collector shall receive five per cent on all moneys collected under $8000, and three per cent on all additional sums collected by him, and county treasurers one per cent on all moneys, county orders and jury certificates received by them for county purposes, and one per cent on all moneys paid out by them, but no compensation for paying moneys over to their successors.

The 10th sec. of art. 15, Laws 1861, provides that county collectors or treasurers shall be allowed one per cent for receiving the county and town tax, and one per cent for paying out the same, but shall be allowed nothing for paying over to his successor. These enactments are believed to be all that relate to the commissions for the taxes for the year 1871, and by their provisions the compensation of appellee must be determined.

The report of appellee to the board of supervisors shows that he allowed the township collectors to retain as their commissions $335.18, from which it would appear that he received from them near $11,173. That amount taken from the full amount he reported as collected, $13,951.40, would show that he collected about $2778, on which he was entitled to retain approximately $290.16, and yet he retained, as appears from his report to the board, $539.60. He was allowed to retain five per cent on the amount he collected, one per cent on the amount he received from township collectors, and one per cent for all moneys paid out; and on the supposition he paid

out all that came to his hands, he retained nearly, if not exactly $149.44 more than he was entitled to under the law then in force.

As to the tax of 1872, he was allowed commissions, by the act of 1872, entitled Fees and Salaries, p. 437, sec. 21. It provides that county collectors shall be allowed a commission on all moneys collected by them and paid over to the proper officer, three per cent in counties of the first class, and on moneys paid over to them by township collectors, one and a half per cent in counties of the first class.

Appellee collected, as shown by his report, from all sources and which came into his hands, the amount of $15,843.62. Of that sum, he received of township collectors $12,292, leaving $3551.62, which he collected. If, then, this was a county of the first class, and counsel seem to so treat it, appellee was allowed, under the law of 1872, to retain on the money received from township treasurers one and one-half per cent, which would amount to, say $184.38, and three per cent on the amount he collected, say $106.54, making a sum of $290.92, and if we add to that one per cent under the previous law for paying out all that came to his hands, being $158.43, he would have, as his commissions, a total of $449.43. But he charged and received a credit of $634.24, being $184.71 in excess of his commissions on the revenue of the county for the year 1872, being for both years $334.15 in excess of his legal commissions. This is the amount that would seem to be still in his hands to which the county is entitled, if there is no error in the calculation. We have not looked into the evidence in reference to what is claimed to be an error as to back taxes, as a jury can determine that question on another trial.

The county is not estopped by the board of supervisors passing and approving an account containing charges of illegal fees. They are powerless to allow as fees or commissions more than the sum fixed by law, and an inspection of appellee's report shows that such charges were made and

allowed to appellee. The error appearing on the face of the report, no other evidence is necessary to prove the overcharge. Nor do we see any evidence in the record to prove, or that tends to prove, any credits to which appellee is entitled, which he has not received, in his reports, by which the settlements were made. Allowing all the credits claimed in his report, and there is no evidence of any others, the county is entitled to recover the commissions retained in excess of what the law gave to him.

The verdict is manifestly against both the evidence and the instructions, and the court below erred in not granting a new trial, and the judgment must be reversed and the cause remanded.

Judgment reversed.

JAMES D. KILGORE

v.

THE PEOPLE, for the use, etc.

1. OFFICE AND OFFICER—*of collector not a distinct office from that of treasurer or sheriff.* Under the constitution and laws of this State there is no such an officer as county collector. In counties under township organization the county treasurer, and in all other counties the sheriff, is required by law to collect the revenue, and as such is sometimes designated as collector; but this creates no new office—it only imposes new and additional duties on the part of the treasurer or sheriff.

2. SAME—*compensation to be fixed by county boards.* Where the board of supervisors of a county fixed the compensation of the county treasurer at $700 per annum, to include fuel, stationery and clerk hire, this was *held*, necessarily, to include his compensation for duties to be performed by him as collector as well as treasurer, the offices not being distinct. The constitution does not require the salary of such officer to be fixed separately from the stationery, fuel and clerk hire of the office, but it requires the compensation—the whole compensation of the officer, including stationery, fuel and clerk hire—to be fixed by the board.

APPEAL from the Circuit Court of Ford county.

Mr. JOHN R. KINNEAR, for the appellant.

Mr. JAS. K. EDSALL, Attorney General, and Mr. A. SAMPLE, for the People.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of debt, in the Ford circuit court, on the official bond of James D. Kilgore, as collector of the revenue of that county.

The pleas were, *non est factum* and performance of the condition of the bond. By consent, the issues were tried by the court, and a finding and judgment for the plaintiff.

The breach alleged was, as collector defendant had received the sum of five thousand dollars, which he had not paid over to the county treasury, nor any part thereof. In the second count, that defendant had converted and disposed of the money collected for his own use, and refused and neglected to surrender the same to his successor, and that his office became vacant on the 12th of August, 1874, and John B. Shaw succeeded him in office on the 19th of September, 1874.

Appellant, on this appeal, makes the point that the offices of treasurer and collector are distinct, and his right to retain the statutory fees and commissions of collector is perfect, notwithstanding his salary as treasurer may have been fixed by the board of supervisors.

This is really the only important question in the case. Are there two distinct offices: that of the treasurer and that of the collector? If two, then the claim of appellant must be allowed; if not, then he is responsible, for the facts are not controverted.

It is quite a pertinent question at the threshold of this investigation, if the office of collector is an office distinct and separate from all others, and the collector such an officer, when and under what provision of law was he elected? Appellant claiming the office of collector to be separate and distinct from the office of treasurer, to which he has been elected,

it is incumbent on him to show when, where and how he was elected to such office. By the constitution and laws of this State the election or appointment of all officers is provided for, and an express inhibition on the General Assembly to elect or appoint to office outside of their own body.

We look in vain to the constitution for a provision as to the election of a collector of a county, and the statute is equally silent. Had the election or appointment of such an officer been designed, surely there would have been some provision made to that end in the constitution or statutes.

The constitution, section 8, article 10, has this provision: "In each county there shall be elected the following county officers: county judge, sheriff, county clerk, clerk of the circuit court, * * * treasurer, surveyor and coroner." A collector is not named in the constitution as an officer to be elected in counties or appointed therein, nor is he known to the law as an officer *per se*. This is shown by reference to section 144 of the revenue law, where it is declared that the treasurers of counties under township organization, and the sheriffs of counties not under such organization, shall be *ex officio* collectors of their respective counties; that is to say, the revenues of the county in the shape of taxes shall be collected by the treasurer of the county elected by the people of the county.

This is a duty the legislature had a right to impose upon those officers, and to require of them additional bonds for the performance of such additional duties. No office was created thereby, but a legislative order that all county treasurers in certain counties shall, by virtue of their office as treasurer, collect the revenue of the county. Should one of these treasurers fail or refuse to give bond for the faithful performance of the duty of collecting, the office may be declared vacated. What office? The office of treasurer, there being no other.

This question, in a somewhat different shape, came before this court in 1863, in *Wood et al.* v. *Cook*, 31 Ill. 271.

In that case it was contended by the plaintiff in error, that the office of sheriff and collector were two distinct and separate offices, notwithstanding the act of the legislature provided that the sheriff of the county should be *ex officio* collector of taxes.

In the examination we then gave the subject, the conclusion was reached there was but one office—that of sheriff; and his deputy was authorized to collect and receipt for taxes. It was held the office of collector was gone—the duties he was required by the old law to perform devolving upon the sheriff. By the old law, from 1839 to 1845, these offices were separate and distinct, but by the act of 1845 it was declared the sheriff should be *ex officio* collector.

Appellant was the county treasurer, duly elected and qualified, executing his bond as such, and his compensation fixed by the board of supervisors at seven hundred dollars per annum, with this proviso: "*Provided*, that the said treasurer furnish his own fuel, stationery and clerk hire."

It is contended by appellant, that by this order of the board his compensation was not fixed. Section 10, of article 10, of the constitution, provides that "the county board shall fix the compensation of all county officers, with their necessary clerk hire, stationery, fuel and other expenses; and in all cases where fees are provided for, such compensation shall be paid only out of, and shall in no instance exceed, the fees actually collected. They shall not allow either of them more per annum than $1500, in counties not exceeding 20,000 inhabitants, * * * * *Provided*, that the compensation of no officer shall be increased or diminished during his term of office. All fees or allowances by them received, in excess of their said compensation, shall be paid into the county treasury."

The county board, acting under this mandate of the constitution, fixed the compensation of appellant at seven hundred dollars per annum, to include fuel, stationery and clerk hire, and although no definite sum is specified for the one or the

other, his entire compensation was fixed—it was limited to seven hundred dollars per annum. Herein we can perceive nothing wanting to make his compensation specific and certain, it being conceded Ford county is a county with not exceeding 20,000 inhabitants. The office of treasurer, being the only office provided for by this order of the county board, necessarily included the duties to be performed by him as collector, the treasurer being, *ex officio*, the collector. Appellant is in error in arguing that it was the duty of the county board to fix a specific sum for "salary," and a specific sum for the expenses of the office. Section 10, of article 10, above cited, says not a word about "salary"—it does not contain that word. The board is required to fix the "compensation"—the whole compensation, including stationery, fuel and clerk hire. This they have done, meagrely, it may be, yet it is the compensation to which the person holding the office of treasurer, who performs the duties of collector, should have, and no more. All fees or allowances by them received in excess thereof, must be paid into the county treasury.

An argument is attempted to be drawn by appellant, from the consideration that by law county collectors are required to collect all delinquent taxes of cities, towns, villages, etc., duties with which the board of supervisors have nothing to do, they concerning the county revenue in no manner whatever, and the board has no means of knowing the extent of the duties of this kind the collector may be required to perform, and can not fix a salary for unknown services.

It is error to use the term "salary," no salary being allowed the treasurer but "compensation" merely, and it is immaterial what duties this officer may be required to perform, or their extent. This whole subject must be presumed to have been under the consideration of the board of supervisors when they fixed the compensation. Besides, these duties here stated by appellant are not usually very important, as the town collectors are required to perform them by a given day, and then their

books are turned over to the county treasurer, to collect the amounts remaining unpaid.

Appellant argues, if the constitution has not created the office of collector, and has imposed no constitutional limitation on the legislature in regard to it, then that body would have the power to create the office, and asks, has the legislature so done? We look in vain to the statute book to find any law creating the office of collector, or providing for his appointment; and we can not think the indiscriminate use of the term "collector" in the statute equivalent to an election or an appointment, but rather ascribe it to the fact that the treasurer, being the collector, could be referred to by either expression, and he was the officer comprehended under the title of collector. These titles, "treasurer" and "collector," were used only, as we think, to designate the particular class of duties to be performed, and all of them by one officer: the "treasurer."

This act of 1872, making treasurers in counties under township organization, and sheriffs in counties not so organized, *ex officio* county collectors, was evidently designed to give effect to section 4, of article 9, of the constitution, requiring the General Assembly to provide that a return of unpaid taxes shall be made to some general officer of the county having authority to receive State and county taxes, and prohibiting the sale of real estate for taxes and assessments by any other general officer. These officers thus named are such "general officers." The effect of the statute is only to impose additional duties upon these officers, not to confer upon them an additional office.

On a careful re-examination of the case of *Wood et al.* v. *Cook, supra,* and the principles therein affirmed, we can not perceive wherein, in principle, this case differs from that. As in that case so in this, the proper construction of the statute referred to is to consider it as imposing additional duties only, and not as conferring an additional office upon the county treasurer. This the General Assembly had not the

constitutional power to do, and, as we think, have not attempted to do.

We are of opinion, with the circuit court, that appellant held but one office, for the performance of the duties of which, which were those of a collector also, compensation was provided by the board, which can not be increased. All the fees and allowances beyond that belong to the county treasury, and on failure to pay them over, the liability on the official bond was complete.

The judgment must be affirmed.

Judgment affirmed.

WILLIAM H. BROADWELL *et al.*

v.

THE PEOPLE, etc., for the use of Morgan County.

1. CONSTITUTIONAL LAW—*compensation of county officers.* The phrase "county board," as used in article 10, section 10, of the constitution of 1870, which requires such board to fix the compensation of all county officers, etc., was not designed to embrace any one particular body of persons, but means the body authorized to transact county business. It embraces the board of supervisors in counties under township organization, and the board of county commissioners to be elected in counties not under township organization, and also applied to the county courts in such counties until they were superseded.

2. Thus, where the county court of a county not under township organization, before that court was superseded by the election of a board of county commissioners, fixed the compensation of the sheriff of the county who was elected in 1872, it was *held*, that such court was authorized to do so under section 10, article 10, of the constitution, and that the county was entitled to all fees, etc., pertaining to the office in excess of such compensation.

3. The compensation system by the constitution was designed to apply to the county officers to be elected in November, 1872, in all the counties of the State except Cook county, whether they were under the township system or not, and to supersede the fee system which had prevailed before.

4. COUNTY COURTS. The fourth section of the schedule to the constitution, which provided that county courts in counties not under township organization should exercise "their *present* jurisdiction" until superseded by the board of county commissioners, was a limitation upon the power to change the jurisdiction from county to civil or criminal business, and was not designed as a prohibition of the enactment of additional laws regulating such court or enlarging its powers in matters of county business.

5. OFFICE AND OFFICERS—*compensation.* The offices of sheriff and collector in counties not under township organization are not separate and distinct offices within the meaning of the constitutional provision requiring the county board to fix the compensation, and therefore when the sheriff's compensation is fixed at $2000, it includes also his compensation as collector.

APPEAL from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. DUMMER & BROWN, and Messrs. MORRISON, WHITLOCK & LIPPINCOTT, for the appellants.

Mr. JAMES K. EDSALL, Attorney General, Mr. HENRY STRYKER, and Mr. GEO. W. SMITH, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit brought against William H. Broadwell, sheriff of Morgan county, in this State, and his sureties, on his bond given as collector for Morgan county of the revenue levied for the year 1872. Broadwell was elected such sheriff in November, 1872, and having been qualified as sheriff, executed, as collector, the bond sued on.

Morgan county was not under township organization, and in September, 1872, the county court of the county fixed the compensation of the sheriff of that county at the sum of $2000 per annum. The only question presented is, whether Broadwell was entitled to retain, or was bound to pay into the county treasury, all the commissions allowed by law to the collector, in excess of his said compensation of $2000.

Section 10, article 10, of the present constitution of 1870, provides that the county board shall fix the compensation of

all county officers, etc., and that all fees or allowances by them received in excess of their said compensation shall be paid into the county treasury.

The 6th section of the same article provides that, "At the first election of county judges under this constitution, there shall be elected in each of the counties in this State, not under township organization, three officers, who shall be styled 'The Board of County Commissioners,' who shall hold sessions for the transaction of county business as shall be provided by law." The first election of county judges under the constitution took place in November, 1873.

At the time of the adoption of the constitution, there were, as we understand, 66 counties in the State under township organization, and 36 not under such organization. The constitution made provision for the adoption or discontinuance of township organization as the respective counties might from time to time elect. Under township organization, the body for the transaction of county business was styled the "Board of Supervisors." In counties not under township organization, it was the county court, which, in such counties, after the adoption of the constitution, was to be superseded by a body to be termed "The Board of County Commissioners," to be elected for the first time in November, 1873.

Now what is the proper construction of the phrase "county board," as used in section 10, article 10, of the constitution? It evidently is not to be confined to any one particular body of persons. It will be acknowledged that it embraces both the board of supervisors and the board of county commissioners, bodies very differently constituted. Is it to be confined to those two particular bodies, or may it not also embrace the county court, in counties not under township organization, which, in such counties, was to be superseded by the board of county commissioners, and until so superseded, would, in such counties, be the body for the transaction of the county business? The more natural construction, no doubt, would be, that the term "county board" referred to the above

named "boards," as they were the only two bodies of county officers to whom, in such connection, the term "board" had been applied by the constitution and the laws, or by usage; and that might well be held as the proper construction, were the county court to continue as a co-existing tribunal, or were it indifferent, as respects results, which one exercised the power given. But the adoption of this construction would lead to this consequence, that section 10, article 10, would take effect in the counties under township organization, before it did in the counties not under such organization. The system of a fixed compensation of county officers would be in force in the former counties for a year and more, while in the latter counties the fee system would be prevailing.

The compensation system by the constitution was to apply to the county officers elected in November, 1872. But if, in counties not under township organization, the county court could not fix the compensation of these officers, but only the board of county commissioners, which was to be elected, and which would not be elected until in November, 1873, then the going into effect of the system of a fixed compensation of county officers in these counties would be delayed until November, 1873, or longer. This would be creative of the very evil against which the present constitution is most especially levelled, special legislation.

There is no so marked feature of this instrument as its hostility to special laws and partial legislation, and its purpose to secure the establishment of general and uniform laws. A construction which would avoid such unequal result as before mentioned should be adopted, if it well may be consistently with the language used.

We perceive no such necessity as limits the term "board" to the board of supervisors and the board of county commissioners, and excludes its application to the county court which then existed in counties not under township organization. Webster, in his dictionary, gives this as one of the definitions of the term "board:" "A body of men constituting a quorum;

a court or council, as, a board of trustees, a board of officers," etc. Under this signification may well be embraced as the "county board" this county court, composed of a county judge and two designated justices of the peace—the body of officers which existed in a county not under township organization, and which was, by the law of February 12, 1849, constituted to sit as a county court, "for the transaction of county business."

In determining the construction, we may look to the definition of the term, the general spirit and scope of the constitution, and the subject matter. The power so given to the "county board" is to fix the compensation of county officers. It properly belongs to the body which has the transaction of the business of the county, and the management of its fiscal affairs. This the county court has, until it shall be superseded by the board of county commissioners. The power to fix compensation may be exercised by the one body as well as the other, and there is no reason why it may not be exercised by the county court until it is supplanted by the board of county commissioners, and the public interest requires that it should be exercised at the earliest practicable period.

We think there is too much of literalism in the construction which would confine the meaning of the phrase "county board" to the two boards of supervisors and of county commissioners; that it is unnecessary so to do; and we are of opinion that the reasonable and fair interpretation here is, that "county board" means the board or body of officers which in any county is authorized to transact the county business; that in counties under township organization, it refers to the board of supervisors; in counties not under township organization, for the present it means the county court, consisting of the county judge and associate justices of the peace, who, for the present, were authorized to transact the county business; and that it also embraces the board of county commissioners, which, in counties not under township organization, were soon to supersede the county court in the exercise

of these powers. Under this construction, section 10, article 10, would become operative throughout the entire State at the same time. A body then existed in each of the counties in the State, which could, at the same time, exercise the powers specified in section 10 for fixing the compensation of county officers.

The 4th section of the schedule to the constitution is insisted on by appellants' counsel as being opposed to this construction, which is in these words:

"County courts, for the transaction of county business in counties not having adopted township organization, shall continue in existence and exercise their present jurisdiction until the board of county commissioners provided in this constitution is organized in pursuance of an act of the General Assembly."

It is said that this negatives the idea that the county courts could exercise any other than their present jurisdiction, and that fixing the compensation of county officers would be adding to their jurisdiction. It is sufficient, on this head, to refer to the case of *Shaw et al.* v. *Hill et al.* 67 Ill. 455, where it was held that the act of 1872, to provide for the removal of county seats, in conferring upon the county courts a new authority to order an election in regard to the removal of a county seat, was not in conflict with this section of the schedule; that the words "exercise present jurisdiction" were not a prohibition upon the legislature in the enactment of any additional laws regulating such courts, but were to be regarded as a mere limitation upon the power to change the jurisdiction from county business to civil or criminal causes.

Reference is also made to section 8, article 9, of the constitution, that "county authorities shall never assess taxes the aggregate of which shall exceed 75 cents per $100," etc. Stress is laid upon the use here of the words "county authorities." It is said the purpose was here to use terms that would include the old county court, the board of supervisors and the board of county commissioners, and that the inference

is, that the framers of the constitution understood that county board would not include county courts, and so a more generic term was used.

The two sections in question, the one forbidding the commission of an act by any person or power, and the other directing the doing of an act by a certain body, are so dissimilar from each other in purpose and scope, that no such inference as urged can justly be drawn.

The last cited section was for the prohibition of the imposition of taxes by county authority beyond a certain extent; and it was fit to use the broad terms "county authorities," which were comprehensive enough to include all the then established or proposed or future systems of county government, as also any county officer, so that there could be no room for evasion. But section 10, article 10, requires an act to be done by some tribunal of the county, and although the county court was a county authority, the substitution of the phrase "county authority" for "county board" might lead to some confusion, as, for example, the county judge of the county was a county authority.

The further position is taken by appellant that the sheriff and collector are not, as respects fees and commissions, one and the same officer; that the commissions allowed by law to the collector are in addition to the compensation as sheriff; and that even if the compensation of Broadwell as sheriff was legally fixed by the county court at $2000 per annum, he would be entitled, in addition thereto, to commissions as collector. This point has been, in principle, adjudged adversely to the claim of appellant, in the case of *Kilgore* v. *The People*, *ante*, p. 548. It was there held that, in counties under township organization, the office of county collector was not a distinct one from that of county treasurer, and that the compensation of the treasurer, which had been fixed by the board of supervisors of the county, included his compensation as collector, and was all the compensation to which he was in any way entitled, both as treasurer and county collector.

In counties not under township organization, the offices of sheriff and county collector stand in the same relation to each other as do those of county treasurer and county collector in counties under township organization; and the same principle which determines that the compensation fixed for the treasurer includes that of collector, will also decide that the compensation fixed for the sheriff includes his whole compensation both as sheriff and county collector.

The revenue act of 1845, like the present act, provided that the sheriff should be *ex officio* the collector of taxes.

In *Wood et al.* v. *Cook*, 31 Ill. 271, it was held that the act of 1845 merged the office and duties of collector into those of the sheriff.

We are of opinion that the demurrer was properly sustained to the pleas setting up that the compensation of Broadwell, as sheriff, had not been fixed by the board of county commissioners of Morgan county, and the judgment will be affirmed.

Judgment affirmed.

SAMUEL R. PORTER *et al.*

v.

THE ROCKFORD, ROCK ISLAND AND ST. LOUIS RAILROAD COMPANY.

1. TAXATION—*legislative power over, in general.* The right to tax, which, from necessity, is inherent in every government, with us is vested in the legislature, which possesses plenary power over the subject, except so far as it is restricted by the constitution of the State or that of the United States.

2. SAME—*constitutionality of the law of* 1872 *for taxing railroad corporations.* The third section of the consolidated revenue act of 1872, requiring that the capital stock of all companies and associations then or thereafter created under the laws of this State, shall be so valued by the State Board of Equalization as to ascertain and determine, respectively, the fair cash

value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association, being a general law, and uniform as to the class upon which it operates, is not in violation of any constitutional provision.

3. CONSTITUTIONAL LAW—*taxation of corporations.* Section 1, article 9, of the new constitution, does not require that the legislature, in providing for the taxation of corporations, to designate the precise amount which each corporation shall pay, and that this shall be the same on each corporation, without regard to the value of the franchise or the privileges enjoyed, nor that such taxation shall be of like character with that which may be imposed on inn-keepers, and others pursuing the particular vocations named.

4. This part of the constitution only requires that corporations shall be taxed in such manner as the General Assembly shall, from time to time, direct by *general law*, and the only uniformity required *is as to the class* upon which such general law shall operate. Its design was, to enable the legislature to make the burthen of taxation proportionate, by applying a different rule to corporations and the vocations named from that applied to individuals.

5. SAME—*mode of taxing corporations discretionary with the legislature.* It is therefore discretionary with the legislature to determine whether corporations shall be taxed only on their tangible property, on the amount of their capital stock paid in, on the amount of their gross receipts, or, as under the act of 1872, on the value of their tangible property and on the fair cash value of their capital stock, including their franchise, over and above the assessed value of their tangible property, subject merely to the limitation that it shall be directed by general law, uniform as to the class upon which it operates.

6. SAME—*assessment of property may be given to different officers.* There is no constitutional provision which either expressly or by necessary implication denies the legislature the power to commit the valuation of property for taxation to such person or persons as it, in its wisdom, may select. It is competent to require the State Board of Equalization to assess the value of a certain class of property, leaving other property to be assessed by the ordinary assessors.

7. SAME—*whether power given Board of Equalization is a delegation of legislative power.* The power given to the State Board of Equalization to "adopt such rules and principles for ascertaining the fair cash value of the capital stock of corporations as to it may seem equitable and just," is not a delegation of legislative power, and does not therefore render the act unconstitutional. No discretion is left to the board as to what shall be assessed or what degree of value shall be ascertained. Without such expression, the board would have this power by necessary implication from the power to assess.

Syllabus.

8. STATUTE—*rule of construction.* A statute should be so construed that the whole, if possible, shall stand, and when it can be so construed and applied as to avoid a conflict with the constitution, such construction must be adopted.

9. CORPORATIONS—*capital stock distinguished from shares of stock.* The legal property of the shareholder in a corporation is quite distinct from that of the corporation, although the shares of stock have no value save that which they derive from the corporate property and franchise; and a tax levied upon the property of the one is not, in any legal sense, levied upon the property of the other. A tax upon the capital stock and franchise of a corporation is not a tax upon the shares of the shareholders.

10. SAME—*distinction further explained.* The interest of a shareholder in a corporation entitles him to participate in the net profits of the corporation in the employment of its capital, during the existence of its charter, in proportion to the number of his shares, and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property belonging to him. But the capital stock and other property of the corporation is a distinct legal interest, and is taxable to the corporation itself.

11. SAME—*franchise is property.* A franchise of a corporation is property, and as such is liable to taxation, as well as the capital stock and tangible property of the corporation. The franchise may also be condemned for public use, under the right of eminent domain, upon due compensation being made.

12. The fact that it is difficult to fix a true value upon a franchise, and the danger of doing injustice in attempting to tax it, furnishes no objection to the right of the State to tax it, as no other species of property can escape taxation on account of the difficulty of ascertaining its value. Absolute accuracy in assessment of property is not essential to the validity of taxes based on it.

13. SAME—*capital stock is taxable but not shares.* Under the revenue act of 1872, the capital stock of corporations created under the laws of this State must be taxed, and the shares of stock are exempted from taxation; but when a resident of this State owns shares of stock in a corporation created by the laws of another State, they are taxable against him.

14. The words "capital stock," as used in the act of 1872, do not mean "shares of stock," either separately or in the aggregate, but are intended to designate the property of the corporation subject to taxation.

15. The fact that a railway company is required to furnish the Auditor a statement for the use of the State Board of Equalization, showing the amount of their capital, the amount paid in, its value, and the amount of its indebtedness, does not show that the legislature intended to tax the

shares of stock. This statement is intended to furnish a mode of measuring the value of the capital stock and franchise.

16. TAXATION—*corporation not taxable on debts owing by it.* A corporation is not taxable upon the value of the debts it owes, and to assess a corporation on the amount of its debts by the State Board of Equalization would be a clear violation of law.

17. SAME—*evidence of assessment including debts of corporation.* It was urged, on bill to enjoin the collection of a tax, by a railway company, that the Board of Equalization had included in the assessment of its capital stock, including the franchise, debts which the company owed. The evidence of this was the resolution of the board, declaring that the market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt, excluding indebtedness for current expenses, should be added together, and the aggregate should be taken as the value of the capital stock, including the franchise: *Held*, that it could not be presumed, from the resolution, that the company was assessed with the amount of its debts, but that it would be regarded as adopting a mode by which to approximate the value of the capital stock, including the franchise.

18. SAME—*courts can not relieve against excessive valuation.* The courts have no power to grant relief against the collection of a tax on the ground that the officers appointed by law to assess erred in the valuation of property. In fixing the value of property for taxation, the assessors or Board of Equalization act judicially, and their decision can only be impeached for fraud.

19. SAME—*assessment by recommendation of a committee.* It was objected to an assessment of the property of a railway company, that the valuation was determined by a committee of the State Board of Equalization; but it was *held*, that as the report of the committee was acted upon and adopted by the board, it was to be regarded as having been made by the board.

20. SAME—*no notice of assessment required.* It is not required that a corporation, whose property is assessed for taxation by the State Board of Equalization, shall be notified of the assessment or the rules adopted whereby to determine the value of the property, and no right of appeal is given from the assessment.

21. SAME—*excessive levy may be enjoined.* Where the State tax is limited to a given sum, a levy upon property in excess of the proportionate amount necessary to be levied on it to produce the given sum, such excess is unauthorized by law, and its collection will be enjoined.

22. INJUNCTION—*of the collection of a tax.* A court of equity will not entertain a bill to restrain the collection of a tax, except in cases where the tax is unauthorized by law, or where it is assessed upon property not subject to taxation, or where the property has been fraudulently assessed

at too high a rate. In no event will an injunction lie, unless it is clearly made to appear that the party has been wrongfully assessed, and will sustain irreparable injury unless the collection of the tax be enjoined.

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

This was a bill in chancery, by the appellee against John V. Cook, county clerk, and Samuel R. Porter, collector of Rock Island, to enjoin the collection of a tax. The opinion of the court states all the material facts of the case. The tax sought to be enjoined was assessed and levied under the consolidated revenue act of 1872.

Messrs. KENWORTHY & BEARDSLEY, and Mr. WILLIAM H. GEST, for the appellants.

Mr. CHARLES M. OSBORN, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

A number of cases have been submitted at the present term for our decision, in which substantially the same questions arise as in the present case. Inasmuch as the opinion in this case must be conclusive in those, we have, in considering the various questions involved, examined all the arguments filed by the distinguished and eminent counsel engaged in the several cases, with all the care and deliberation we could bestow, in view of the limited time within our control.

The bill filed by the appellee alleges that the Board of Equalization assessed against it, for the purpose of taxation for the year 1873, its property denominated "railroad track" and "rolling stock," at the sum of $2,146,932, and its capital stock at the sum of $1,004,480, upon all which taxes are levied, the collection of which is sought to be enforced against appellee.

The present suit relates only to so much of these taxes as is claimed to be due in Rock Island county.

The first objection urged is, that appellee owns no property upon which it can be held liable for the payment of taxes, which is described by the words "capital stock," because, it is insisted, its capital stock has been sold to, and was, at the date of this assessment, the property of the shareholders and not of the corporation.

The legal property of the shareholder is quite distinct from that of the corporation, although the shares of stock have no value save that which they derive from the corporate property and franchise, and a tax levied upon the property of the one is not, in a legal sense, levied upon the property of the other. In *Van Allen* v. *The Assessors*, 3 Wallace, 583, Mr. Justice NELSON, in delivering the opinion of the court, said: "The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and, within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *The Queen* v. *Arnaud*. The question related to the registry of a ship owned by a corporation. Lord DENMAN observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested, in one sense, in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease, but in no legal sense are the individual members the owners.'

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares, and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation, after the payment of its debts. This is a

distinct, independent interest or property, held by the shareholder like any other property that may belong to him."

"There can be no question," says Redfield, in his work on Railways, (vol. 2, 3d ed. 453,) "that the capital stock of corporations, or their property, both real and personal, is taxable to the corporation itself."

After quoting from the opinion of Mr. Justice Wayne, in *Gordon* v. *The Appeal Tax Court*, 3 Howard, 133, he adds: "We here find the clear recognition of three kinds of corporate property taxable to the corporation, and the shares in the hands of the corporators distinctly defined as a fourth species of corporate property, which is taxable only to the owners or holders: 1. The capital stock. 2. The corporate property. 3. The franchise of the corporation—all of which is taxable to the corporation; and the shares in the capital stock, which is taxable only to the shareholders." And again, at page 460, sec. 2, he says: "The interest or right of a shareholder in a corporation is well defined by SHAW, C. J.: 'The right is, strictly speaking, the right to participate, in a certain proportion, in the immunities and benefits of the corporation.' This is a right or property as distinct from the capital stock of the company, or property of the company, as a debt is distinct from the debtor, or the mortgage debt from the mortgaged premises." The distinction, as thus stated, between "capital stock," which is liable to taxation against the corporation, and "shares of stock," which can only be taxed against the shareholders, is also fully recognized in *Oswego Starch Factory* v. *Dolloway*, 21 N. Y. 449; *The People* v. *Com'r of Taxes*, 23 id. 217–18; *Minot* v. *The P. W. and B. R. R. Co. et al.* (Supreme Court U. S.) 18 Wallace, 205. See also *People* v. *Bradley*, 39 Ill. 144; *Bank of Republic* v. *County of Hamilton*, 21 id. 54.

We are satisfied, from a careful examination of the Revenue act, that the legislature did not, by the use therein of the words "capital stock," mean "shares of stock," either separately or in the aggregate, but that they intended to designate

thereby the property of the corporation. In the second clause of the first section, in declaring what shall be taxed, is included the "shares of stock of incorporated companies and associations;" and the fourth clause includes "the capital stock of all companies and associations now or hereafter created under the laws of this State."

The third section prescribes the mode of valuation, and in the fourth clause it is required that "the capital stock of all companies and associations now or hereafter created under the laws of this State, shall be so valued by the State Board of Equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association." And the section concludes with the proviso, that "in all cases where the tangible property or capital stock of any company or association is assessed under the act, the shares of capital stock of any such company or association shall not be assessed or taxed in this State." Section six requires every person to "list his shares of stock, of joint stock or other companies (when the capital stock of such company is not assessed in this State)," and that "the property of a body politic or corporate shall be listed by the president or proper agent or officer thereof."

By the 29th clause of the 25th section, it is made the duty of the person whose property is being assessed to state, in the schedule, to be by him delivered to the assessor, "the amount and value of shares of capital stock of companies and associations not incorporated by the laws of this State." The capital stock or property of national banks is not to be assessed or taxed, but by the 35th section it is provided that "the stock holders in every bank located within this State, whether such bank has been organized under the banking laws of this State or of the United States, shall be assessed and taxed on the value of their shares of stock therein," etc.

By the 40th section, "every person, company or corporation owning, operating or constructing a railroad in this State,

shall return sworn lists or schedules of the taxable property of such railroad," as is thereinafter provided.

The 48th section requires that, "at the same time the lists or schedules are required to be returned to the county clerks, the person, company or corporation running, operating or constructing any railroad in this State, shall return to the Auditor of Public Accounts sworn statements or schedules, as follows:

First. Of the property denominated railroad track, giving the length of the main and side or second tracks and turn outs, and showing the proportions in each county, and the total in the State.

Second. The rolling stock, giving the length of the main track in each county, the total in this State, and the entire length of the road.

Third. Showing the number of ties in track per mile, the weight of iron or steel per yard, used in the main and side tracks; what joints or chairs are used in track, the ballasting of the road, whether graveled or dirt, the number and quality of buildings or other structures on "railroad track," the length of time iron in track has been used, and the length of time the road has been built.

Fourth. A statement or schedule showing: 1. The amount of capital stock authorized, and the number of shares into which such capital stock is divided. 2. The amount of capital stock paid up. 3. The market value, or if no market value, then the actual value of the shares of stock. 4. The total amount of all indebtedness, except for current expenses for operating the road. 5. The total listed valuation of all its tangible property in this State. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Auditor of Public Accounts."

The 50th section makes it the duty of the Auditor, annually, on the meeting of the State Board of Equalization, to lay such schedules before the board, and requires the board to assess the property, as in the act is afterwards provided.

The 108th section provides that "the State Board of Equalization shall assess the capital stock of each company or association respectively, now or hereafter incorporated under the laws of this State, in the manner hereinbefore in this act provided."

The 109th section requires the State Board of Equalization to assess the railroad property denominated in the act "railroad track" and "rolling stock," and directs how the assessment shall be certified and distributed.

The 110th section is as follows: "The aggregate amount of capital stock of railroad or telegraph companies, assessed by said board, shall be distributed proportionately by said board to the several counties in like manner that the property of railroads denominated "railroad track" is distributed. The amount so determined shall be certified by the Auditor to the county clerks of the proper counties. The county clerk shall, in like manner, distribute the value, so certified to him by the Auditor, to the county, and to the several towns, districts, villages and cities in his county entitled to a proportionate value of such capital stock. And said clerk shall extend taxes against such values, the same as against other property in such towns, districts, villages and cities."

It is thus seen that the property directed to be taxed is described as the property of the corporation, and where it is designed that the property of share holders shall be taxed, it is correctly described as "shares of stock," or "shares of capital stock," and we have been unable to find a single instance in which the words "capital stock," as used in the act, are not used to convey a meaning other and different from that conveyed by the words "shares of stock," or "shares of capital stock."

It is contended, however, that nothwithstanding the professed exemption of shares from assessment where the capital stock is assessed, inasmuch as the shares of stock are required to be assessed by the local assessors before the capital stock can be assessed by the Board of Equalization, both must neces-

sarily be assessed. We can not concur in this construction. The statute is imperative that "the capital stock" of all companies and associations now or hereafter created under the laws of this State, shall be taxed; the mode of valuation is prescribed, and the language is equally imperative that when the capital stock or franchise is assessed, the shares of stock shall not be. When, therefore, the corporation is created by the laws of this State, its capital stock must be taxed, and the shares of stock are exempt, but when a resident of this State owns shares of stock in a corporation created by the laws of another State, his shares of stock therein must be taxed. That such is the fair construction of the statute would seem to be conclusive, both from the impossibility to otherwise preserve and give force to all the words used, and the fact that the shareholder is only required to list the shares of stock of companies and associations not incorporated by the laws of this State.

It is next argued that it clearly appears that the words "capital stock," as used, were intended to describe the property of the shareholders, because:

First. The shares of stock are exempt from taxation where the capital stock or tangible property is taxed.

Second. The facts required to be given in the schedule to be returned by the corporation to the Auditor, and by him to be laid before the Board of Equalization, tend to show the value of the shares of stock, and do not tend to show the value of the capital or property of the corporation.

Whether taxation shall be laid upon the property of the corporation or upon the shares of stock, the ultimate effect must be the same to the shareholder, for, practically, taxation upon everything, tangible and intangible, belonging to the corporation, is upon the same actual values which the aggregate shares represent. It is not necessary to assert that the legislature is prohibited from taxing both the corporation and the shareholders; it is sufficient that it is competent for the legislature to exempt shares of stock from taxation where all

the values they represent are taxed in the hands of the corporation, and that such exemption is commended by principles of justice and equality.

But it is obvious that the mode of valuation enjoined can not be applied to ascertain the value of that which belongs to the shareholder, as such. When the shares are assessed, all the interest that the shareholders have in the franchise or property of the corporation is included. The franchise and tangible property belong, unquestionably, to the corporation, and, if liable to be taxed, must be assessed for that purpose against it. If to the value of the shares of stock be added the value of the franchise, the franchise will be twice assessed. This we can not presume the legislature intended should be done.

In determining, however, the value of the capital or property of the corporation, including the franchise, the value of the aggregate shares of stock representing, as they do, all the actual values belonging to the corporation, might be regarded as a mode of measuring their value, and from such valuation the tangible property should be deducted, to avoid double assessment. It is not, as we conceive, unreasonable to assume that the debts owed by the corporation proportionally reduced the actual value of the shares of stock, for the amount thus consumed would otherwise, as in the payment of taxes, ultimately belong to the shareholders. For the purpose, then, of determining how far the value of the shares of stock fails to fully represent the entire value of the corporate property and franchise, it would be necessary to ascertain the amount and value of the corporate indebtedness. In this view, we think, all the information required to be furnished by the schedule might subserve an important purpose in ascertaining the value of the corporate property, including the franchise; and this mode of valuation, at least, seems to be plausible. Any other construction would lead to such absurdities and contradictions in the act as would necessarily prevent its practical execution. The rule of construction by which we must

be governed in such cases is, to so construe the statute that the whole shall, if possible, stand. Potter's Dwarris on Statutes, 189. And whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give it the force of law, such construction must be adopted. *Newland* v. *Marsh*, 19 Ill. 384.

This brings us to the question, was it competent for the legislature, under the constitution, to require the "capital stock," as thus construed, including the franchise, to be assessed for the purpose of taxation?

No question is raised as to the right to tax the tangible property of the corporation, when it is properly assessed, so that, like other property, it shall be taxed in proportion to its value. But it is contended that the intangible values required to be assessed, under the construction we have given to the revenue act, can not be made the basis of taxation.

That the right to tax rests upon necessity, is inherent in every government, and, with us, is vested in the legislative department, which possesses plenary power over the subject, except so for as it may be restricted by the constitution of the State or of the United States, and that it rests with those who allege the unconstitutionality of an act of the legislature to show, clearly and palpably, wherein it violates the constitution, are fundamental principles that can not be controverted. *Sawyer* v. *The City of Alton*, 3 Scam. 130; *People* v. *Worthington*, 21 Ill. 174; *People* v. *Salomon*, 51 ib. 49; *McVeigh* v. *Chicago*, 49 ib. 318; *McCulloch* v. *Maryland*, 4 Wheaton, 428; *Providence Bank* v. *Billings*, 4 Peters, 561; *People* v. *Mayor, etc.*, 4 Comstock, 425.

It is clear, upon authority, that the franchise of a corporation is property, and as such, it may be a proper object of taxation.

"A corporation," says Chancellor KENT, "is a franchise possessed by one or more individuals who subsist as a body politic, under a special denomination, and are vested by the policy of the law with the capacity of perpetual succession,

and of acting in several respects, however numerous the association may be, as a single individual." 2 Comms. (8th Ed.) 295. It is said, in 2 Redfield on Railways, (3d Ed.) 452, "Corporations, like natural persons, are liable to taxation, both upon their property and income, and also upon their faculty. The faculty of a corporation is its organic life—its corporate existence, by which it is enabled to carry on business; that which it derives from its charter of incorporation, its corporate franchise."

In *West River Bridge Co.* v. *Dix et al.* 6 Howard, 529, the franchise of the corporation was held to be property, and, as such, liable to be condemned for public use under the right of eminent domain, upon due compensation being made. Mr. Justice DANIELS, who delivered the opinion of the court, said: "We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property. A franchise is property, and nothing more. * * * It is its character of property only which imparts to it its value, and alone authorizes in individuals a right of action for invasion or disturbance of its enjoyment."

In *Veazie Bank* v. *Fenno*, 8 Wallace, 547, Mr. Chief Justice CHASE said: "Franchises are property, often very valuable and productive property, and seem to be as properly objects of taxation as any other property."

In *Wilmington R. R. Co.* v. *Reid*, 13 Wallace, 264, the statute of North Carolina, incorporating the railroad company, contained this clause: "And the property of said company, and the shares therein, shall be exempt from any public charge or tax whatever." It was held that this exempted from taxation the franchise as well as the other property of the company. Mr. Justice DAVIS, in delivering the opinion of the court, used this language. "Nothing is better settled than that the franchise of a private corporation—which, in its application to a railroad, is the privilege of running it and taking fare and freight—is property, and of the most valuable kind. It is true it is not the same sort of property as the roll-

ing stock, road-bed and depot grounds, but it is equally with them covered by the general term 'the property of the company,' and therefore equally within the protection of the charter." Again, in a more recent case, in the same tribunal, (*State Tax* v. *Railway Gross Receipts*, 15 Wallace, 296,) the question under consideration was the constitutionality of a law of Pennsylvania, levying a tax on railroad companies, based on their gross receipts. Mr. Justice STRONG observed: "There is another view of this case to which brief reference may be made. It is not questioned that the States may tax the franchises of companies created by them, that the tax may be proportioned, either to the value of the franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment."

In the *Monroe Savings Bank* v. *The City of Rochester*, 37 N. Y. 367, a statute of New York provided that, "The privileges and franchises granted by the legislature of this State to savings banks or institutions for savings are hereby declared to be personal property, and liable to taxation as such, in the town or ward where they are located, to an amount not exceeding the gross sum of their surplus earnings, and in the possession of said banks or institutions," etc. FULLERTON, J., who delivered the opinion of the court, in speaking of this provision said: "In declaring the privileges and franchises of a bank to be personal property, the legislature has adopted no novel principle of taxation. The powers and privileges which constitute the franchise of a corporation are in a just sense property and quite distinct and separate from the property which, by the use of such franchise, the corporation may acquire. They are so regarded by the law, and so regarded by common acceptation. And, although it has not heretofore been customary, in this State at least, to subject them to taxation, yet it must be conceded that it may be done if the legislature see fit so to enact."

It may be conceded that, owing to the peculiar nature of such property, there is more difficulty in ascertaining its value than that of many other kinds of property, and that there is, therefore, great danger of doing injustice in attempting thus to tax it, yet this can not be claimed to prove that the legislature is prohibited from imposing such taxation. Many of the undoubted powers of the legislature may be so exercised as to work injustice to persons and corporations, and still contravene no provision of the constitution. A law can not be held to be unconstitutional merely because its provisions are unjust. Cooley's Const. Lim. 72.

Although substantially the same language as is in sec. 1, art. 9, of the present constitution, requiring taxes to be levied on property by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, was in the constitutions of 1818 and 1848, it was never held or supposed that absolute accuracy in this respect was required, or that any species of property could escape taxation on account of the difficulty in ascertaining its real value.

Much property will, under any system, necessarily elude all taxation, while other, by reason of peculiar circumstances, will be compelled to sustain what practically amounts to double taxation.

Entire accuracy is difficult in valuing any kind of property; and, in many cases, even in valuing tangible property, it is morally impossible. Where property has no fixed market value, and, by reason of its location or peculiar condition, is in very slight or comparatively no demand, it is obviously impossible for the average mind to fix its actual, intrinsic value to a demonstration. The opinions of different men in regard to the value of such property are liable to vary quite as much as they do upon any other fanciful or theoretical question; and yet such property, no less than coin or currency, is required to be assessed and taxed in proportion to its value.

The utmost, therefore, that is practically attainable in any case is, that the property shall be assessed at its approximate value, as it may be determined by the judgments of those upon whom the law devolves the duty of valuing it, and this has always been held to be sufficient.

Notwithstanding franchises and credits are in their nature, in most respects, widely different, yet they are equally intangible and insusceptible of furnishing aids to determine their value by inspection, as is the case with tangible property, and the value of each depends upon a combination of circumstances, some of which may prove deceptive; still it has been the policy of this State for many years, to assess credits and tax them in proportion to their value. The constitutionality of such taxation was upheld in *The People* v. *Worthington*, 21 Ill. 172, in which case it was remarked by the then able and distinguished Chief Justice of this court: "The convention must have known that a requirement of the legislature to enumerate, as the subject of taxation, everything and every right and every claim which might properly be termed property, and to enforce from it a direct revenue in proportion to its actual, intrinsic value, could never be complied with, and the utmost that could have been intended was, it should approach as nearly to it as was practicable. To require it absolutely is Utopian, and not to be attained by mortals. The more, however, it is found practicable to subject all to this direct tax, the nearer is this constitutional requirement approached, and consequently *it is impossible to conceive of a constitutional objection, that it has embraced any species of property which it is practicable to assess by fixing a determinate value upon it.*"

That every corporation possesses a franchise of some value, can admit of no doubt. Even where it is created for the purpose of pursuing a business that may be lawfully pursued by any individual in the State, the privilege of the combination of capital by many persons, with the capacity to hold and manage it under one direction, in perpetual succession,

like a single individual, free from competition among those interested, and from change or disturbance by the changes of individual life, and without incurring any personal hazard or responsibility or exposing any other property than what belongs to the corporation in its legal capacity, must necessarily have a value beyond and distinct from the mere value of the money or property which the corporation is created to hold and use in its business. 2 Kent's Com. (8th Ed.) 296; *Cone* v. *Cary*, 98 Mass. 19.

We have never known it to be asserted that the value of a franchise is so indefinite and uncertain that it can not be made the measure of a recovery when it is wrongfully invaded, or that when it is taken and condemned for public use, it can not be ascertained what compensation shall be made to its owner. It is recognized in these respects as being capable of a definite valuation; and, in the case before us, it appears, by the allegations in the bill, that the franchise is mortgaged, in connection with the other property of the corporation, to secure the payment of its debts. If its value may be ascertained for these purposes, it may as readily be ascertained for the purpose of taxation.

But it is again insisted that, even conceding that it is competent for the legislature to provide that the franchise shall be taxed, its value should be determined by itself, as that of other property is determined, and not in connection with the value of other property, in the manner required by the act.

It is not perceived that this is enjoined by the constitution.

It is provided by sec. 1, art. 9, (Const. of 1870,) that "the General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission mer-

chants, showmen, jugglers, inn keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

It surely can not be doubted that the requirement that the Board of Equalization shall ascertain and determine the fair cash value of the capital stock, including the franchise, of all companies and associations now or hereafter created under the laws of this State, over and above the assessed value of the tangible property of such company or association, is a general law, or that it is uniform as to the class upon which it operates. It is not restricted to any particular part of the State, nor is it limited to a special tax; it extends to the entire State for the purpose of general taxation, and it applies the same rule to all within the class upon which it operates, namely: the corporations now or hereafter created under the laws of this State. It is not required, as seems to be thought by some of the counsel with whose arguments we have been favored, that the legislature shall, in providing for the taxation of corporations, under the last clause of the section referred to, designate the precise amount which the corporation shall pay, and that this shall be the same on each corporation without regard to the value of the franchise or privileges enjoyed, nor that such taxation shall be of like character with that which may be imposed on inn keepers and others pursuing the particular vocations named. It is only required that *they shall be taxed in such manner as the General Assembly shall from time to time direct by general law*, and the only *uniformity required is as to the class* upon which such general law shall operate. It is, therefore, left entirely to the legislature to determine whether corporations shall be taxed only on their tangible property, on the amount of their capital paid in, on the amount of their gross receipts, or, as in the present instance, on the value of their tangible property, and on the fair cash

value of their capital stock, including their franchises, over and above the assessed value of their tangible property, subject merely to the limitation that it shall be directed by general law, uniform as to the class upon which it operates.

Nor is the legislature restricted to the subjects and objects of taxation specified in section 1, for, by section 2 it is declared: "The specification of the subjects and objects of taxation shall not deprive the General Assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution." In the *Ill. Cen. R. R. Co.* v. *McLean Co.* 17 Ill. 291, it was said, that the whole design of the provisions to which we have referred, as they existed in the constitution of 1848, was to enable the legislature to make the burthen of taxation proportionate, by applying a different rule to corporations, and the particular vocations embraced in the last clause of section 1, from that applied to individuals, and the decision of the majority of the court in that case, sustaining the commutation of the taxes of the Illinois Central Railroad Company, is expressly declared to be based upon the power possessed by the legislature to apply a different rule to corporations from that applied to individuals in levying taxes.

It is again insisted that, if the capital stock, including the franchise, can be assessed against the corporation, as its property, it must be upon the basis of a valuation to be made by the same officers to whom the law confides the duty of assessing other persons and other kinds of property.

It is not claimed that there is any substantial difference between the present constitution and that of 1848 in this respect, but it is argued that there was no intention by the framers of the present constitution to change the system, and that therefore, when they used the words "some person or persons" to be elected or appointed for the purpose of valuation, they had reference to the same class of local assessors who have exercised that function from the organization of the State.

If by this it is intended to be asserted that corporate property has, from the organization of the State government, been assessed by the same class of local assessors who have assessed other property, and thereby invoke the aid of legislative construction in behalf of the objection urged, it is believed that a brief examination of some of the legislation upon the subject will show that the assertion is based upon a misapprehension, and that whatever inferences may be drawn from legislative construction must be in the opposite direction.

An act approved Feb. 12, 1849, authorized such counties as should, by a majority of the votes cast at a general election, express a desire so to do, to adopt the township organization, and contained provisions directing the election of the necessary officers, and prescribing their duties—among which were town assessors, whose duty it was to assess, for the purpose of taxation, the property within their respective towns.

In counties not adopting township organization, the county treasurer was, by the law then and long after in force, *ex officio* assessor of the county, and upon him was enjoined the duty of assessing, for the purpose of taxation, the property in his county.

By the 30th section of the act providing for the incorporation of railroad companies, and defining their powers and prescribing their duties, approved Nov. 4, 1849, it was declared: "The property belonging to any company organized under the provisions of this act, shall be listed by the resident secretary, or other proper officer, with the *Auditor of State,*" etc.

The 22d section of the act incorporating the Illinois Central Railroad Company, approved February 10, 1851, after exempting the stock, property and effects of the company from taxation for the term of six years from the passage of the act, contains this language: "After the expiration of six years, the stock, property and assets belonging to said company shall be listed by the secretary, or other officer, *with the Auditor of State, and an annual tax for State purposes shall be*

assessed by the Auditor upon all the property and assets of every name, kind and description belonging to said corporation," etc.

An act for the assessment of property and the collection of taxes in counties adopting the township organization law, approved Feb. 12, 1853, requires, by the 22d section, that: "The president, secretary, or principal accounting officer of every railroad company, turnpike or plank-road company, insurance company, telegraph company, or other joint stock company, except corporations whose taxation is specifically provided for by law, shall list for taxation, at its actual value, its real and personal property," etc.; "that return shall be made *to the assessor of each of the respective counties* where such property may be," etc., "and if the assessor to whom returns are made is of opinion that false or incorrect valuations have been made," * * * he is thereby required "to proceed to have the same valued and assessed," etc.

An act approved Feb. 14, 1855, to amend the act last referred to, directs, in section 2, that "the return of the schedule or list of taxable property belonging to any railroad company or companies, required to be made by this act, shall be made to the county clerk, instead of the assessor, and the clerk shall *lay the same before the board of supervisors*, when they meet to equalize the assessment of property. If a majority of said board are satisfied that such return is correct, they shall assess it accordingly; but if they believe that such schedule or list does not contain a full and fair statement of the property of such company, subject to taxation in said county, made out and valued in accordance with the requirements of law, *said board* shall assess such property," etc. This mode of assessing the property of railroad companies remained in force, with some modifications unimportant to the question now before us, until the revenue act, in force July 1, 1872, became the law.

So far as we are now advised, no question was ever raised as to the constitutionality of these provisions of the statutes

referred to, but all the departments of the State government, without exception, acquiesced in their validity.

In *Bureau County* v. *C., etc., R. R. Co.* 44 Ill. 229, it was held that the act of 1861, allowing an appeal to be taken by railroad companies from the assessment of their property by the board of supervisors of a county to the circuit court, was constitutional; and this must have necessarily been upon the assumption that the board were, in the first instance, properly empowered to make the assessment. And in the case of *People* v. *Salomon,* 46 Ill. 334, it was held that the act to amend the revenue laws, and establish a State Board of Equalization, approved March 8, 1867, was constitutional.

That decision is based upon the principle distinctly enunciated in the opinion, that no provision of the constitution, either expressly or by necessary implication, denies to the legislature power to commit the valuation of property for taxation to such person or persons as it may in its wisdom select.

It is thus seen that neither the previous enactments of the legislature, nor decisions of this court, can be appealed to in support of the objection urged.

It is unreasonable to suppose that, if the convention which framed the present constitution had designed that all assessments should thereafter be made by the same class of assessors, they would have adopted the precise phraseology of the constitution of 1848, relating to that subject, under which it was known that a different practice had obtained.

Whether property is assessed by local assessors or by the State Board of Equalization, it is, in the language of the constitution, "assessed by some person or persons" elected or appointed in the manner the General Assembly has directed, "and not otherwise." No attempt is made by this clause of the constitution to limit the number of those who shall be elected or appointed for this purpose, or to prohibit their classification in accordance with the duties imposed, or in any manner to prescribe how the value of property shall be ascertained by them. Admitting that the chief end had in view

was to secure uniformity in valuation, it would seem that the present system by which some property is assessed by local assessors, and other property is assessed by the Board of Equalization, would tend as much towards accomplishing that result as would a system by which all the property in the State should be assessed in the town in which it is located by the local assessor. Such officers are selected by popular favor, and it can not be presumed that they are better qualified for the discharge of their duties than are those who are selected in the same manner, as members of the Board of Equalization. That the intelligence and judgment of all local assessors in regard to property should be precisely equal, can not be expected; and in proportion as their numbers are increased, so is the probability of inequality in their valuations.

We can not believe that a Board of Equalization, having the assessed values of all other taxable property in the State before them, for the purpose of equalization, has less facility for fixing a fair, proportionate value upon corporate property than the local assessors have.

There is, moreover, an almost insuperable difficulty which must attend all attempts by local assessors to assess the capital stock, franchise, roadway and rolling stock of most railroad companies. Such roads are usually located through several counties. The cost of construction in a particular town or county affords no criterion of the value of that portion of the road, for every mile of the road is equally indispensable to its existence as a whole, and contributes, proportionally, to its principal earnings. Local improvements may, indeed, vary, and they are required to be assessed by the local assessors; but the road and its equipment constitute a single, entire property. In determining the value of such property, the question is neither one of original cost nor of the intrinsic value of the various items of which the road and its equipment are composed, taken separately, but what is it worth with all its capabilities and facilities as a railroad? The franchise extends to the entire corporate property, and it is not possible

that it can be divided. It must, if assessed at all, be assessed as an entirety, and this, as we have already shown, may be in connection with the property to which it is attached.

An additional objection urged upon this point is, that to require the stock or property of a corporation to be assessed by the Board of Equalization is in conflict with the 22d section of the legislative article of the constitution. This objection is, doubtless, urged inadvertently, as that section relates exclusively to "local" or "special laws," and it is not claimed that the revenue act belongs to that class.

By the 4th clause of the 4th section of the Revenue act, the Board of Equalization is authorized to "adopt such rules and principles for ascertaining the fair cash value of the capital stock of corporations, as to it may seem equitable and just; and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject, however, to such change, alteration or amendment as may be found, from time to time, to be necessary by said board," etc.

This, it is argued, is the delegation of legislative power, and unauthorized by the constitution.

It can not be denied that, if such is its effect, the objection is well taken. But is it a delegation of legislative, or, indeed, of any other power not necessarily implied from the nature of the duty enjoined, and absolutely essential to its performance?

The board is directed to ascertain the fair cash value of the capital stock, including the franchise, over and above the assessed value of the tangible property. No discretion is left to the board as to what shall be assessed, or what degree of value shall be ascertained. It is merely empowered to adopt such rules and principles for ascertaining that value as to it shall seem equitable and just. The objection implies that valuations, to be constitutional, must be made without regard to any rules or principles. It would be very difficult to prove, it is believed, that the great principle of uniformity in valua-

tion, so earnestly and so properly insisted upon by the counsel, can be preserved without some rules or principles in valuation, even by local assessors. If each distinct valuation is made with reference to other valuations of the same or different kinds of property, it is made upon a rule or principle. If its value is fixed by its market value, or by what is supposed to be its actual value—if deductions are made, on account of imperfections or inferiority, from what the article would otherwise be deemed worth, there is a rule or principle by which the judgment is guided in determining the valuation. But the Board of Equalization is composed of the Auditor of State and one member elected from each of the congressional districts, and that they shall act at all, it is necessary that at least a majority shall agree. It must be apparent to every one that some rule or principle necessarily has to be adopted by which the aggregate judgment shall be ascertained.

We are unable to perceive that any power is, in this respect, conferred upon the board which it would not equally have possessed had the statute been silent upon the subject, or that the power given is more than is, by fair implication, conferred upon local assessors, and exercised by them in all cases where they make rational and just assessments of the property within their respective districts.

The bill refers to and makes an exhibit of a copy of the published proceedings of the Board of Equalization, by which it is shown that the board adopted and acted upon the following resolutions, for the purpose of determining the value of the capital stock and franchises of corporations:

"WHEREAS, the 4th clause of section 3 of an act for the assessment of property and for the levy and collection of taxes, approved March 13, 1872, and in force July 1, 1872, provides as follows: 'The capital stock of all companies now or hereafter created under the laws of this State shall be so valued by the State Board of Equalization, as to ascertain and determine respectively the fair cash value of such capital

stock, including the franchise, over and above the assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just, and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject, however, to such changes, alterations or amendments as may be found, from time to time, to be necessary by said board, provided that in all cases where the tangible property or capital stock of any such company or association is assessed under this act, the shares of capital stock of any such company or association shall not be assessed or taxed in this State. This clause shall not apply to the capital stock or shares of capital stock of banks organized under the general banking laws of this State;' therefore, be it

"*Resolved*, That, for the purpose of ascertaining the fair cash value of the capital stock, including the franchises, of all companies and associations now or hereafter created under the laws of this State, and for the assessment of the same or so much thereof as may be found to be in excess of the assessed or equalized value of the tangible property of such companies and associations respectively, we, the State Board of Equalization, hereby adopt the following rules and principles, viz:

"1st. The market or fair cash value of the shares of capital stock and the market or fair cash value of the debt, excluding such indebtedness for current expenses, shall be combined or added together, and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchises respectively of such companies and associations.

"2d. From the aggregate amount ascertained as aforesaid there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property respectively of such companies and associations, such equalized or

assessed valuation being taken in each case, as the same may be determined by the equalization or assessment of property by this board, and the amount remaining in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess respectively against companies and corporations now or hereafter created under the laws of this State."

It is argued that, by adopting this mode of valuation, the board assessed the corporation upon the value of the debts which it owes, and which are not, in any sense, its property.

We are not to assume that this was done, as it is not enjoined by the revenue act, and would be in clear violation of the duty imposed on the board. It appears from the resolutions that the object was to assess the capital stock and franchises of corporations as is directed by the 4th clause of the 3d section of the Revenue act, and the assessment is, in fact, on the capital stock, including the franchise. The averment in the bill, in this respect, is contradicted by the exhibit.

There is a seeming injustice in taxing corporations which are largely indebted, and whose earnings are insufficient to pay the accruing interest, as is alleged to be the fact in the present case, to the full extent of the value of all their property and privileges, without regard to their indebtedness, yet it has never been the policy of the legislature to make any discrimination in favor of individuals on this account, and corporations can not claim an exemption from taxation when, under like circumstances, an individual would not also be exempt to the same extent.

The mode of valuation adopted by the Board of Equalization assumes: 1st. That the value of the aggregate shares of capital stock is equal to the value of all the property, including the franchise, belonging to the corporation, when it is not indebted. 2d. That when the corporation is indebted, the indebtedness proportionally reduces the value of the shares of capital stock. 3d. That the value of the debt is

determined by the value of that belonging to the corporation from which its payment can be enforced, so that however great the nominal amount of the debt, its actual value can never exceed that sum.

To illustrate: where a corporation is free from debt, and the aggregate value of its shares of stock is, say $150,000, it is assumed that the value of its capital stock, including its franchise, is $150,000. If the same corporation, still retaining the same property, is, however, indebted $50,000, this will reduce the aggregate value of its shares of stock to $100,000; but, as the law does not exempt corporations or individuals from the payment of taxes on account of indebtedness, it would not be accurate to tax the corporation at this amount, because to do so would be to exempt it to the extent of its indebtedness. To ascertain, therefore, what would be the aggregate value of its shares of stock, if the corporation were free from debt, it is necessary to add the value of the debt to the value of the shares of stock. If the corporation is, in the given case, indebted $150,000, the shares of stock will be worth nothing, but the value of the debt will be $150,000, which is the value of that from which its payment can be enforced, and so, if the corporation is indebted in any greater sum, the value of the debt will still be only $150,000.

If these assumptions were entirely accurate, there could be no question as to the accuracy of the valuations determined by the board. But it is insisted that the market values of shares of stock are sometimes based upon artificial and fictitious valuations, produced by stock gambling and dishonest speculations. This may be conceded to be true, and still it will not follow that they, therefore, can not be valued for taxation, or that their market value may not be taken as a sufficiently accurate approximate value for that purpose. It has always been supposed that a fair test of the value of an article is what it will sell for, and we are unable to perceive how a more accurate test of value can be ascertained. The fact that the market value is fluctuating, makes such a test less accurate

than it would otherwise be, still it must, of necessity, be deemed a sufficient approximation of actual value for all practical purposes. So far as we are advised, it has never been questioned but that shares of stock may be assessed and taxed on the basis of their market values. It is difficult to conceive why, if this may be done, as against the shareholders, the aggregate market values of the shares of stock may not be assumed as an equally fair expression of all the taxable values, tangible and intangible, belonging to the corporation, since it is not claimed that the shares have any value independent of the interest they represent in the franchise and other property of the corporation. Live stock, grain, etc., may be assessed for taxation on a valuation based on their market values, yet it is as well known that such values are frequently affected by gambling speculations, as it is that shares of stock are thus affected. It is obvious that if no property can be assessed for taxation except where it has a permanent market value, based upon an infallible standard of actual intrinsic value, the sooner the present system for raising revenue is abandoned the better will it be for the State, for it is scarcely possible that any considerable part of the property in the State can be so valued.

It is also objected that other elements enter into the present value of debts, payable in the future, than the value of the property from which their payment can be made. There is, evidently, much more of truth in this, when applied to individuals, than to private corporations. The age, habits, prospect of longevity, business qualifications, etc., of the individual would, doubtless, to some extent, affect the value of his debt. But, in the case of a corporation, the corporate powers, capacity, and the length of time which its business may be prosecuted, etc., are defined by its charter—they are its franchise, and, as has been seen, its property.

We are unable to say that the conclusion, that the present value of the debts of a private corporation is determined by the value of its property, tangible and intangible, and that

such value may, therefore, be taken as the representative of an equal amount of property, tangible and intangible, is so unreasonable and extravagant as not to amount to a reasonably fair approximation.

We have been referred to the *Commonwealth* v. *Hamilton Manufacturing Co.* 12 Allen, 300, as an authority showing that the mode of valuation adopted by the Board of Equalization can not be sustained as an assessment upon the property of the corporation. A careful examination of that case, as well as a number of other cases decided by the same court, presenting like questions, fails to satisfy us that it sustains the objection urged, but we think, on the contrary, it may be regarded as an authority to sustain the action of the board. It will be observed that the word "assess," as used in our revenue act, applies to the listing and valuation of property for taxation, and has no reference to the rate of taxation imposed, after the valuation is made, while in the case referred to it is used in the sense of what we ordinarily express by the word "levy." It would seem too evident to justify argument, that to "assess property for taxation," and to "assess a tax upon property," describe different processes, both, however, relating to the same general subject. In the case referred to, BIGELOW, C. J., who delivered the opinion of the court, says: "It is too clear to admit of discussion, that, according to recent adjudications of this court, the assessment which is the subject of controversy in these actions must be supported, if sustained at all, as an exercise by the legislature of the authority conferred by that clause of the constitution * * which gives the power of imposing reasonable duties and excises. * * The decisive reason why it can not be supported as a tax on property, in the sense in which that phrase is used in the constitution in the article cited is, that it is not proportional; that is, it is not laid according to any rule of proportion whatever, but is imposed only on the corporations designated in the act, without any reference to the amount required to be raised by taxation for public purposes, or to the actual

property held by such corporations subject to taxation, or to the whole amount of property in the commonwealth liable to be assessed for the public service."

In the present case the tax levied is the same on the property of all, without regard to its ownership, or whether it is tangible or intangible; and the intangible property of the corporation is only required to bear its proportional part of taxation, as determined by its value, in common with the other property of the corporation and the property of individuals.

In that case the method adopted to ascertain the value of the capital stock was substantially the same as that observed by the Board of Equalization in the present case, and it is thus vindicated by the Chief Justice at page 230: "It is the capital stock considered as a franchise, embracing the whole corporate organization, with all its rights and privileges, of which the shares are constituent fractional parts, that forms the subject matter on which the tax or assessment is imposed. Nor are we able to see any reason why the aggregate market value of all the shares of a corporation, representing as it does the estimate put, not merely on the property of the corporation, but also on the rights, privileges, capacities and present and prospective results of the corporate organization and business—in other words, on its franchise—is not a legitimate and just method of arriving at a basis on which to calculate an excise or tax. Inasmuch as the market value of the shares is generally a sure indication of the value of all that appertains or belongs to the corporation, corporeal and incorporeal, the aggregate market value of all the shares of stock affords a reasonable and equitable mode of measuring the value of the franchise. It certainly furnishes a more accurate standard than the capital of a corporation actually paid in, (*Portland Bank* v. *Apthorp,* 12 Mass. 252,) or than the amount of corporate business transacted during a specific period. *Commonwealth* v. *People's Five Cent Savings Bank, ubi supra.* A tax graduated by the amount of capital paid in

may operate unequally and inequitably, because the capital may be impaired by losses or greatly increased by profits. The amount of business done in a given period may not always furnish a true standard of the value of corporate privileges, because it may sometimes be carried on disadvantageously and without gain, and at other times with great success and profit. But the market value of the shares, taken in the aggregate, at the time of assessing the tax would be likely to show, with approximate accuracy, the actual existing value of the rights, privileges and benefits conferred by the franchise."

We are unable to perceive how the facts that the rate per cent levied in the present case is different from what it was in that, and that here the same rate is levied on the capital stock, including the franchise, as assessed, that is levied on all other property, while there the levy was only on the capital stock of certain corporations, can change the accuracy of the mode of valuation. It would seem to be pretty certain that if the valuation, when ascertained, was approximate in the one case, it would still be approximate if applied to the other.

It is further argued that, by this mode of assessing the capital stock, including the franchise, a different rule is adopted from that applied to other property.

The direction to the Board of Equalization is the same as that given to the local assessors. It is, to assess all property which it is required to assess, at its fair cash value. By the published proceedings of the Board of Equalization, which are brought before us by the bill, it appears that this was done, and when the property was so assessed, its value was equalized upon a basis of valuation applied to all the property in the State. In these respects it does not appear that any difference was made between capital stock, including the franchise, and other property. In determining the value of a particular kind of property, the assessor must necessarily seek information and exercise his judgment with reference to

the peculiar character of that property. It hence must follow that the process by which the judgment of value is formed must vary in proportion to the dissimilarity of the property assessed. The value of a dollar in coin, for instance, is determined by ascertaining that it is what it purports to be. But no one would pretend that the value of all other property can be thus determined. We can not conceive that it ever was contemplated, by the adoption of the clause in the constitution requiring every person or corporation to pay a tax "in proportion to the value of his, her, or its property," that, however dissimilar the property may be in its nature, its value must be determined by precisely the same process; and we must suppose that, when the legislature enjoined the duty of making this assessment, it was intended that the value of the property to be assessed should be "ascertained and determined" by the Board of Equalization in that mode which to the judgment of its members seemed best adapted to the purpose.

The local assessor, in making valuations, declares results only. The process whereby his judgment is convinced is unknown to the public, but the Board of Equalization, in assessing the value of this particular class of property, has gone further, and declared not merely the results of its judgment, but the process also by which those results were produced.

If the objection urged can be sustained, it is not perceived why every assessment of tangible property may not be assailed upon like principle, where the information possessed, and the reasoning thereon, by the local assessor, shall not be the same with regard to each distinct item of property he assesses for taxation.

The duty enjoined upon the board, was attended with many and serious difficulties. The valuation, as made, is, obviously, not perfect. But in the many able and ingenious arguments which have been filed in the several cases where the question is discussed, we fail to find any mode of valuation pointed

out which is less liable to objection. The most strenuous objection urged, is on account of taking the debts of the corporation into consideration; yet it seems to us as impossible, in determining the value of the capital stock, including the franchise, upon the basis of the value of the aggregate shares of stock, to make a fair approximation to accuracy, without taking the indebtedness of the corporation into consideration, as it would be to ascertain the price to be paid for property which is purchased subject to a mortgage, without taking the amount of the mortgage into consideration.

But it does not devolve upon us to justify the accuracy of the assessment, as made. In the view we have taken of the case, the Board of Equalization assessed the value of the capital stock, including the franchise, over and above the assessed value of the tangible property, and did not assess the shares of stock belonging to the shareholders, or debts of the corporation. The property assessed was the property of the corporation, upon which it was liable to be assessed for the payment of taxes. The constitution, as has been seen, requires that the value of property assessed for taxation shall be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise. The General Assembly has directed that the Board of Equalization and not the courts shall exercise this function. However much, therefore, we may think the board erred in its valuation, no power is given to us to arrest the collection of the tax, merely on that account. The board was fully empowered by law to make this particular assessment, and had jurisdiction over the property and the corporation for that purpose.

The law is well settled that assessors, in judging of the value of property, act judicially; and although they may err and assess it too high, this, of itself, will give a court of equity no jurisdiction to interfere and restrain the collection of the tax. In *Weaver* v. *Devendorf*, 3 Denio 119, BEARDSLEY, J., in delivering the opinion of the court, said: "In some

particulars the duty of assessors is undoubtedly ministerial; but, in fixing the value of taxable property, the power exercised is, in its nature, purely judicial. * * * * * The writ of *certiorari*, at common law, lies only to officers exercising judicial powers, and to remove proceedings of that character. (*The People* v. *The Mayor, etc.*, 2 Hill, 9–11. In the matter of *Mount Morris Square*, etc., id. 14, 21, 22.) Yet all the authorities agree that this writ lies to remove an assessment." To the same effect are also *Barlyte* v. *Shepherd*, 35 N. Y. 238; *Swift* v. *City of Poughkeepsie*, 37 id. 511; *B. and St. L. R. R. Co.* v. *Sup'rs Erie Co.* 48 id. 105. And the same doctrine was recognized by this court in *Spencer et al.* v. *The People*, 68 Ill. 510.

In *Cook County* v. *C. B. and Q. R. R. Co.* 35 Ill. 466, the previous decisions of this court relating to enjoining the collection of taxes were reviewed, and it was there announced as the settled law of the court, that a court of equity will never entertain a bill to restrain the collection of a tax, excepting in cases where the tax is unauthorized by law, or where it is assessed upon property not subject to taxation. To this exception should properly be added cases in which property has been fraudulently assessed at too high a rate. *City of Chicago* v. *Beatrice et al.* 24 Ill. 489; *Elliott* v. *Chicago*, 48 id. 294; *Town of Ottawa* v. *Walker et al.* 21 id. 608; *Metz* v. *Anderson*, 23 id. 467.

In no event will an injunction lie, unless it is clearly made to appear that the party has been wrongfully assessed, and will sustain irreparable injury unless the collection of the tax be enjoined.

Even from appellee's own showing it is difficult to conceive that this assessment does it injustice.

An exhibit filed with the bill is Schedule No. 4, being a copy of one filed by appellee with the Auditor, and by him laid before the Board of Equalization. It states the amount of appellee's capital stock, actually paid in, to be $6,490,579.41,

and that the amount of its debts, other than for current expenses, is $9,098,156.39.

The capital stock paid in is presumed to have been used in the corporate business, and this indebtedness could have been lawfully created for no other than corporate purposes. The two combined amount to $15,588,735.80. After making the most liberal deduction from this amount, on account of the depreciated value of its bonds when they were sold, for reckless management of the corporate business and property, and for loss and depreciation in the value of property, it would still seem almost incredible how the amount could, in the limited time this corporation has been in existence, be reduced far below the valuation assessed by the Board of Equalization, which was only, in the aggregate, $3,151,412. It would seem that $12,437,323.80 ought to cover the various items of depreciation and loss.

But, be this as it may, we are not convinced, from the allegations in the bill, taken in connection with the accompanying exhibits, that the valuation of appellee's property, as made by the Board of Equalization, is so unjust or oppressive, as to be sufficient evidence of fraud on the part of the board to justify us in restraining the collection of the tax imposed upon it.

It is also objected, that the valuations were first determined by a committee of the board, and not by the board. The assessment, as made, is the act of the board, and not of a committee. The report of the committee was acted upon by the board, and the fact that the mode of valuation adopted was the same as that recommended by the committee, no more impairs its validity than does the fact that a particular bill is recommended by a legislative committee, impair its validity when enacted into a law by the General Assembly. The report of the committee was suggestive only, and the members of the board can not be presumed to have been affected by it any further than it met the approval of their judgments.

Some further objections are urged, on the ground that the corporations were not notified of the meeting of the Board of Equalization, or of its intention to adopt the rule by which the assessments were made, and that no right of appeal was allowed.

The constitution does not provide that the legislature shall require that persons or corporations whose property shall be assessed for taxation shall be notified of the assessment, or the rules adopted whereby to determine the value of the property, or that there shall be allowed the right of appeal in such cases.

These matters address themselves purely to the discretion of the legislature. The law, as it is made, is, in this respect, conclusive.

We are, for the reasons given, of the opinion that the circuit court erred in overruling the demurrer to the bill, and enjoining the collection of all the taxes levied on the capital stock, including the franchise, of the corporation.

But it is alleged in the bill, and admitted by the demurrer, that taxes have been levied upon the property of appellee in excess of the proportional amount necessary to be levied on it to produce the $3,500,000, levied for State purposes by the act in force May 1, 1873. This excess, for the reasons given in *Ramsey* v. *Hœger*, *ante*, 432, is unauthorized by law, and its collection must be enjoined.

The decree of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

Syllabus.

FRANCIS G. LOMBARD

v.

FRANCIS H. JOHNSON *et al.*

1. PARTIES—*mechanic's lien.* Where a contract for the building of a house and the furnishing of the materials therefor was made in the name of one partner, but for the benefit of both, and both performed the labor and furnished materials, it was *held*, that a petition to enforce a mechanic's lien was properly brought in the name of both partners, notwithstanding the written contract was made with one only, the rules of equity governing in such a case.

2. EVIDENCE—*secondary.* Where the copy of a written contract is offered in evidence, the law does not require that the person who made the copy should be produced and sworn before it can be read. It is sufficient if any witness testifies that it is a copy, to admit it in evidence.

3. SAME—*on question of when an alteration was made in a contract.* Where a written contract, when produced, appears to have been changed, a copy taken of the same is admissible in evidence for the purpose of showing that the change was made before its execution.

4. MECHANIC'S LIEN—*proof as to the lots on which the lien is given.* Where a petition for a mechanic's lien showed that the defendant, at the time of making the contract, was the owner of certain described lots, and the contract, which was made a part of the petition, showed that the plaintiff was to furnish the materials, and put up a house for the defendant on his lots in the same town, without describing them, and the petition claimed a lien upon the lots described: *Held*, that these averments were sufficient to authorize a decree for a lien on the lots named; and the answer not denying such ownership, and the proof showing the completion of the building upon the lots of defendant, it was further *held*, that, in the absence of proof that the defendant owned any other lots in the town, the proof was sufficient to authorize the decree giving a lien thereon, especially where the question was not raised in the court below.

5. SAME—*instruction as to performance.* In a proceeding to enforce a mechanic's lien, the court instructed the jury that if they found, from the evidence, that the plaintiffs had done the work, etc., substantially as required by the contract, they should find for the plaintiffs: *Held*, that there was no error in the instruction, and that, as the contract was made a part of the petition, the instruction was not in violation of the rule that a party must recover according to the allegations in his bill.

APPEAL from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. DUMMER & BROWN, for the appellant.

Messrs. MORRISON, WHITLOCK & LIPPINCOTT, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in the circuit court of Morgan county, exhibited by Francis H. Johnson and Floyd Epling against Francis G. Lombard, to enforce a mechanic's lien upon lots 11 and 12, in block 7, in the town of Waverly.

The defendant answered the bill, replication was filed, and a trial was had before a jury, which resulted in a verdict for appellees for $314.91. The court rendered a decree upon the verdict, establishing the lien, and directed the money to be paid within twenty days, and in default of payment, the master in chancery was ordered to sell the premises.

The first question raised by appellant is, upon the decision of the court in admitting in evidence the contract for the erection of the house.

The contract was in writing, and was between Francis H. Johnson of the one part and F. G. Lombard of the other.

The bill having been filed by Johnson and Epling, it is insisted the contract could not properly be admitted in evidence under the averments.

The evidence, however, shows that, at the time the contract was made, Johnson and Epling were partners, and as such they furnished the materials and erected the house to recover pay for which the bill was filed.

A proceeding to enforce a mechanic's lien is, in effect, a suit in chancery, and the rules that govern causes in equity usually control cases instituted under the statute to enforce a mechanic's lien.

The general rule in courts of equity, as to parties, is, that all persons materially interested in the subject matter ought to be made parties to the suit, either as plaintiffs or defendants. Story's Equity Pleading, sec. 76.

In this case, while the contract was made in the name of one of the appellees, yet it was made for the benefit of both. One was as much interested therein as the other, and, under the chancery practice, it was proper to file the bill in the name of both, and the contract was properly admitted in evidence.

From this it follows that the proof admitted by the court that the work was done by Johnson & Epling was proper, and the second position relied upon is not well taken.

The next question presented by appellant is, that the court erred in admitting in evidence a copy of the contract.

The contract was read in evidence. It appeared, however, to have been changed in regard to the size of certain windows in the building. Appellant claimed the alteration had occurred after the contract had been executed. Appellees insisted that the alteration had been made before it was signed.

For the purpose of showing what the real contract was on the question in dispute, appellant read in evidence a copy of the contract. Appellees also read in evidence what one of them testified was a true copy. It is claimed it should not have gone to the jury without producing the party who copied it from the original, and proving by him that it was a true copy.

This position is not well taken. On a question of this character, we are aware of no rule of law that required the party who made the copy to be produced and sworn before it could be read to the jury. Johnson testified that the paper he produced was a copy of the contract. This was sufficient to permit it to be read in evidence.

It is insisted by appellant that the court erroneously decreed appellees a lien upon lots 11 and 12, block 7, in the town of Waverly, when the bill contained no allegation, and the proof failed to show, the building was erected on these lots. The bill does allege that appellant was, at the time of

making the contract, the owner of lots 11 and 12, block 7, in the town of Waverly, Morgan county, Illinois.

The contract is made a part of the bill, and, among other things, it contains the following: "I, F. H. Johnson, agree to furnish and properly put up and complete, from foundation up, a dwelling house, in the town of Waverly, and on lots belonging to and for F. G. Lombard."

The bill also contains this allegation. "Immediately on the making of said contract, your petitioners commenced the work on said building, furnishing for that purpose the character, quality and kind of material provided for in said contract, and have built, and furnished the material for the same, and completed the said building according to the said contract."

In the concluding part of the bill will be found the following: "Your petitioners state and charge that they have a lien upon the said two lots, and all the improvements on the same, to secure the payment of said debt."

Here are direct averments that the house was to be built on lots in Waverly belonging to appellant; that appellant owned lots 11 and 12 in block 7, in Waverly; that the house was built according to contract, and that appellees had a lien on said two lots. We regard these averments as sufficient to authorize the decree.

It only remains to be seen whether the evidence was sufficient to justify the court in decreeing the lien on the lots.

The answer nowhere denies that appellant was the owner of lots 11 and 12, block 7, as alleged in the bill, hence that fact will be deemed admitted; neither is it denied that the house was erected.

The answer contains the following admission: He, appellant, entered into a contract with Francis H. Johnson, for the erection of a house for the defendant, and, by the terms of the contract, the said Francis H. Johnson was to commence work immediately, and furnish all material, and properly put up, build, and fully complete, from foundation up, in all and

every respect, a dwelling house on the lots of defendant in Waverly, Illinois.

In the absence of proof that appellant owned other lots in Waverly, and in view of the fact that the bill avers that appellant owned lots 11 and 12, block 7, and this is admitted by the answer, and in view of the admitted fact that the house was built on lots in Waverly owned by appellant, we are of opinion the facts were sufficient upon which to base the decree.

We are unwilling to adopt a different view, from the fact that the particular lots upon which the house was erected was not a controverted question in the circuit court; that the contest was, whether the house had been built in the manner required by the terms of the contract, and whether a recovery could be had by appellees, the contract having been made with only one of them.

Exceptions were taken to the instructions given on behalf of appellees.

The first in the series, in substance, tells the jury that if, from the evidence, they find that appellees had done the work and furnished the materials substantially as required by the contract, they should find for plaintiffs. It is urged that the jury should have been instructed to find for appellees, if they found from the evidence the house was erected as alleged in the petition.

We see no substantial objection to the instruction. While it is true, a party must recover according to the allegations of the bill, yet the instruction in no manner ignores that principle.

If the evidence varied from the allegations, appellant might have availed of the variance by motion to exclude the testimony.

Appellees' right of recovery rested upon a faithful performance of their contract, and it was not error for the court to so instruct the jury.

We perceive no substantial objection to the other instructions of appellees. We see nothing in them calculated to mislead the jury.

As the record discloses no substantial error, the decree will be affirmed.

Decree affirmed.

HIRAM F. STEVENS

v.

BENJAMIN F. IRWIN *et al.*

1. REDEMPTION—*evidence of agreement to extend time of.* Where a judgment debtor, whose land had been sold on execution, before the expiration of twelve months from the date of the sale paid the holder of the certificate of purchase a small portion of the money necessary to redeem, the latter giving a receipt for the same, to apply on redemption of the land: *Held*, that this afforded no evidence of an agreement to extend the statutory period of redemption, but the fair intendment was, that it was paid on a redemption to be made within the time allowed by law.

2. But the receipt of money by the holder of the certificate of purchase after the twelve months had expired, but before the expiration of fifteen months, the time for taking out a deed, to apply on the redemption, would seem to imply that further time was given. But in the absence of proof, the debtor would be required to complete the redemption before the fifteen months expired, or within a reasonable time from the payment.

3. SAME—*as against an innocent purchaser.* Notwithstanding there may be an agreement to extend the time for redemption of land sold on execution, beyond fifteen months from the day of sale, which would be enforced as between the parties to the agreement, yet, if the certificate of purchase is sold and assigned to an innocent purchaser, who has no notice of the agreement, and who pays its value, he will take the same discharged from all equities in favor of the debtor as against the assignor.

APPEAL from the Circuit Court of Sangamon county; the Hon. CHARLES S. ZANE, Judge, presiding.

This was a bill in chancery, by Hiram F. Stevens against Benjamin F. Irwin, Philip K. Dedrick, James Emery and

Charles R. Post, to enforce an alleged verbal agreement to extend the period fixed by law for redeeming a tract of land, etc.

It appeared that Dedrick and Emery, having recovered judgment against Stevens for $253, had an execution issued on the same, levied upon the undivided half of the east half of the east half of the south-east quarter of sec. 17, town. 16 north, range 7 west, as the property of Stevens, and the same was sold to Dedrick & Co., for the sum of $294.70, on July 5, 1870. On June 2, 1871, Charles R. Post, as agent for Dedrick & Co., receipted to Stevens for the sum of $175, to apply towards the redemption of the land, and on August 24, 1871, receipted for the further sum of $25, "to apply on account." October 14, 1871, Dedrick & Co. assigned their certificate of purchase to Post, and he, on Nov. 3, 1871, sold and assigned it to Irwin, for the consideration of $1500, who obtained a sheriff's deed thereon.

The bill charged that Irwin was the agent of the complainant in procuring an extension of the time for redemption, and prayed that Irwin might be decreed as holding the land in trust for the complainant. Irwin denied any agency or knowledge of any agreement to give time to redeem. Stevens brought into court $125, and offered the same as a tender to whomsoever the court might find entitled to the same. The court, on the hearing, dismissed the bill, and Stevens appealed.

Messrs. MCCLERNAND & KEYES, for the appellant.

Messrs. STUART, EDWARDS & BROWN, for appellee Irwin.

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

It appears, from the record, that appellee Irwin purchased the land in dispute of appellee Post. The land had been sold on an execution against appellant and in favor of Dedrick &

Co., and the time for redemption by either appellant or his creditors had expired, and Post, who held the certificate by assignment from Dedrick & Co., assigned it to Irwin, who procured a sheriff's deed. In payment of his purchase, Irwin assigned to Post a note on one Connor, for $1000, and gave a lease for a house in Pleasant Plains, for five years, to the family of appellant, which was estimated at $500, and the family have since occupied the house.

It also appears that, after the sale and before the expiration of twelve months, appellant sent, by Irwin, $175, which was paid by him to Post, who gave a receipt for the same, to apply on the redemption of the land, and appellant, after the twelve months for his redemption had expired, paid to Post $25, for which he receipted, to be applied on account. When these receipts were given, Post was the agent of Dedrick & Co., but he subsequently purchased the certificate of purchase.

Appellant claims the right to complete the redemption, under an agreement by Post to extend the time, and that Irwin was his agent in procuring the extension. On the other hand, it is denied that the time was extended or that Irwin was ever appellant's agent, as claimed.

It is first urged, that the receipts evidence an agreement to extend the time for redemption. Such an effect can not, by any fair or reasonable intendment, be inferred from the first receipt. It does not say so in terms, nor can such an implication be drawn. The fair intendment would be, that it was paid on a redemption in the time allowed by the statute. There is no language or circumstance in the record to raise any other inference. Such would be the course we would expect the debtor to pursue, if intending to redeem, not having the requisite amount of money, and desiring to stop interest.

As to the $25 receipt, given after the time for redemption had expired but within the fifteen months, if paid towards the redemption, as we are inclined to think it was, it seems to imply that further time was given, but what length of time

does not appear; but the natural inference would be, that the balance should be paid within the fifteen months, or, at all events, within a reasonable time, and it may be that, as between appellant and Post, the court would have compelled the acceptance of the balance of the money, had it been tendered by the end of the fifteen months, or in a reasonable time. But unless a time had been agreed upon, and appellant does not claim there was, he had no right to expect any but a short period within which to complete the redemption. He had been notified by Irwin that Post had said he would extend him no favors. Knowing this, he had every reason to believe that Post would require him to act promptly, and that if the time was extended indefinitely the period would be short. And appellant seems to have understood that it would not extend beyond the fifteen months, as he, on the last day of that time, went, with Irwin, to have him pay the balance, and have the certificate assigned to him, but, finding Post absent, he went to the sheriff to get him to receive the money, but he declined, because the time for a redemption had expired.

But in the view we take of the case, it does not matter what implied understanding may have existed between appellant and Post, as Irwin has become the owner for value, and, we think, without notice of appellant's rights, if any he has. He purchased the certificate of purchase from the holder, apparently a *bona fide* purchaser, after the time for all redemptions under the statute had expired. He paid $37.50 per acre, and, for anything we can see, its value. There was nothing of record or in the papers which gave or charged him with notice that appellant claimed any rights in the property. And Post denies that time was ever extended, and Irwin denies, if there was such an agreement, that he had any knowledge of its existence.

It is true that he, at the request of appellant, who was sick, carried the $175 to Post, and paid it, and took his receipt therefor. He also went with appellant to see Post on the

last day of redemption, with the agreement that he would pay the balance, and take an assignment of the certificate as security for the money; but Post was absent, and the sheriff properly refused to receive the money and give a certificate of redemption. On the 8th of October, three days after the expiration of fifteen months, appellant took the receipts from Irwin, and said he would get Wilson to attend to the matter for him, and Irwin denies that he was an agent for appellant. These circumstances are too slight to prove an agency.

The fact that he went with appellant on the last day of the fifteen months to pay the balance, and receive an assignment, looks more like he was a money lender than an agent. Whether or not he was actuated by feelings of friendship or otherwise, his proposition was to loan appellant the money, if he should receive the proposed security. But if it could, by possibility, be held that Irwin had been appellant's agent, he was not after the 8th of October. He was then informed that Wilson would attend to the business, and he was given to understand that his services would not be required in the future. Hence no fiduciary relation existed when Irwin purchased, in November. There is no evidence that he knew, when he purchased, that appellant still claimed the right to complete the redemption, or that he had not received back the money he had paid.

The evidence fails to show that Irwin was not a *bona fide* purchaser, and the decree must be affirmed.

Decree affirmed.

WESLEY BEST

v.

THE NOKOMIS NATIONAL BANK.

1. PROMISSORY NOTE—*payee in possession may sue notwithstanding indorsement.* The payee of a promissory note may, although he has written an assignment on the back of it, maintain an action thereon in his own

name. The possession of the note in such case is *prima facie* evidence that he is the *bona fide* holder of it, and he may strike out any assignment written upon it by him.

2. SAME—*assignment for collection does not pass the legal title.* Where an assignment by the payee upon a bill or draft is shown to have been for collection merely, and for no other purpose, it will not transfer the title so as to defeat an action thereon in the name of the payee.

3. BILL—*consideration.* Where a bill is drawn payable to a bank, for the accommodation of a third person, who discounts the same to the bank, in the usual course of trade, the drawer can not defend on the ground that he received no consideration for the same, when sued by the bank.

APPEAL from the Circuit Court of Sangamon county; the Hon. CHARLES S. ZANE, Judge, presiding.

This was an action of assumpsit by the Nokomis National Bank, against Wesley Best. The material facts of the case appear in the opinion of the court.

Mr. B. F. BURNETT, and Mr. A. L. KNAPP, for the appellant.

Messrs. PATTON & LANPHIER, and Mr. E. LANE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the Sangamon circuit court, on the common money counts, accompanied by a notice to defendant that two certain bills of exchange, drawn by defendant in favor of B. F. Culp, cashier, on Whitaker and Gray, of St. Louis, would be offered in evidence.

The pleas were, *non assumpsit* and want of consideration.

There was a verdict for the plaintiff, and a motion for a new trial, which, on a *remittitur* being entered for seventy-nine dollars and seven cents, was denied, and judgment rendered for the balance.

To reverse this judgment, the defendant appeals.

B. F. Culp was the cashier of the Nokomis National Bank, the plaintiff in the action. The bills in question were discounted by this bank in the regular course of business, and drawn by appellant on Whitaker and Gray, of St. Louis. Though the drafts were payable to Culp, cashier, it was a bank transaction, and the drafts belonged to the bank, and it was expected appellant would pay them if the drawees failed to accept them. The drafts were protested for non-payment, and appellant duly notified thereof. It appeared the drawees were insolvent, not able to pay twenty cents on the dollar of their indebtedness. These drafts were really drawn for the benefit of the firm of E. A. Cooley & Co., grain dealers at Nokomis, and the proceeds placed to their credit on the books of the bank, appellant having received no part of the proceeds. These drafts were brought to the bank for discount by E. A. Cooley & Co., and the amount checked out by them at their discretion.

Appellant makes the point that the plaintiff was not the legal holder of the drafts, nor had it any interest therein; that the indorsement to R. A. Betts, cashier, transferred the legal interest to him. The answer to this is, the record does not show any indorsement of the bills when they were offered in evidence. This court held, in *Brinkley* v. *Going*, Breese, 366, 2d ed., that a payee of a note, although he may have written an assignment on the back of it, can maintain an action thereon in his own name. The indorsement is in the power and control of the payee, and he may strike it out or not, as he thinks proper, and the possession of the note by the payee is, unless the contrary appears, evidence that he is the *bona fide* holder of it. And the same doctrine is held in *Parks* v. *Brown*, 16 Ill. 454.

But the indorsements, if on the bills, are shown to have been for collection merely, and for no other purpose, and did not transfer the title. Edwards on Bills and Notes, sec. 253. R. A. Betts held the bills as agent, merely, of the Nokomis bank, who might, at their pleasure, annul his agency, and

deprive him of all authority to receive the money due to them. *Barker* v. *Prentiss*, 6 Mass. 430.

The objection that the bills were drawn for the accommodation of Cooley & Co., and, therefore, without consideration, is not tenable—it is no defense to the suit. The bills were not drawn for the accommodation of the bank, but of Cooley & Co., who received the proceeds from the bank. Well might a surety to a note plead he had received no consideration for the note. It is sufficient that his principal had received a consideration.

The instructions of the court are in no particular objectionable. They state fully and clearly the law of the case.

There being no error in the record, the judgment must be affirmed.

Judgment affirmed.

JEREMIAH MARSTON *et al.*

v.

SARAH J. BRITTENHAM.

1. ACKNOWLEDGMENT OF DEED—*impeaching by parol testimony.* The uncorroborated testimony of a wife, that she executed a deed of trust upon her separate property in the presence of her husband, not of her own free will, but in consequence of his threats to leave her if she did not, and that she never acknowledged the same, is not sufficient to overcome the officer's certificate of her acknowledgment, and his testimony of the truth of his certificate.

2. MARRIED WOMAN'S—*when set aside for undue influence of her husband.* Where a married woman executed a deed of trust upon her separate property, to secure a debt of her husband, with great reluctance, and after much importunity from the latter, and many threats on his part to leave her if she did not sign it, and for the purpose of preserving her relations with her husband, it was *held*, that it could not be said to have been freely and voluntarily executed; but where neither the trustee nor the person whose debt was thus secured were parties to such coercion, and had no knowledge whatever of it, and she acknowledged to the officer taking the

acknowledgment, separate and apart from her husband, that she executed the same freely, etc., and it appeared that she was well acquainted with its contents, and never made known the facts until after the property was sold, it was *held*, that it could not be then set aside, as that would be to allow her to perpetrate wrong and injustice to other innocent parties.

3. DEED OF TRUST—*personal notice of sale.* Personal notice of the sale of property under a deed of trust is not necessary where the deed itself does not so require. It is sufficient that notice is given as required by the deed.

4. SAME—*whether trustee is guilty of fraud in making sale under.* Where the owner of land which was advertised for sale, procured a friend to attend on the day appointed, to bid off the same for her, and the land was not sold on such day on account of the absence of the trustee, and such friend procured another person to bid for him, and on a second advertisement, such person, acting in behalf of the owner, bid a sum sufficient to pay the debt, and the law partner of the trustee bid a higher sum for his father-in-law, and the trustee refused to strike off the land to any but the highest bidder, but offered to take payment of the debt and stop the sale, and even waited until the agent so acting could telegraph for instructions, and finally struck the land off on the bid of his partner, there being no reply received to the dispatch, it was *held*, that the sale could not be set aside on the ground of fraud or collusion on the part of the trustee, it appearing that he had no interest whatever in the purchase.

APPEAL from the Circuit Court of DeWitt county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was a bill in chancery, by Sarah J. Brittenham against Jeremiah Marston, Daniel K. Tenney, John J. McClellan, John V. Farwell, Charles B. Farwell, Simon Farwell, Clifton H. Moore and Vespasian Warner. The facts of the case and object of the bill are stated in the opinion of the court.

Messrs. MOORE & WARNER, for the appellants.

Messrs LODGE & HUSTON, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The complainant below, and appellee here, asks that a certain deed of trust, purporting to have been executed by herself and her then husband, John A. Brittenham, on lands in

DeWitt county, which were her separate property, be set aside, or that she be allowed to redeem from the sale had thereunder.

The deed of trust purports, on its face, to have been executed on the 10th day of March, 1870, by complainant and her husband to John J. McClellan, conveying the lands described therein, in trust, to secure the payment of a promissory note of that date for $2407.33, given by them to Farwell & Co., and payable in eight months, with interest at the rate of ten per cent per annum. Power is given the trustee, on non-payment of the note, to sell and convey the lands, after advertising the sale for thirty days in some newspaper published in DeWitt county.

The fact is undisputed, that the original indebtedness for which the note was given was contracted by the husband of complainant, in his own business, and that her lands were not otherwise liable for its payment than by virtue of the deed of trust.

The grounds upon which relief is claimed, as stated in the bill, are three:

1st. That complainant did not acknowledge the deed before an officer authorized by law to take acknowledgments of such instruments.

2d. That McClellan, the trustee, and John A. Brittenham, the husband of complainant, colluded together and induced complainant to sign the deed by fraudulent representations and the undue influence of her said husband.

3d. That McClellan, the trustee, colluded with Marston, the purchaser at the sale, and Tenney, his agent, and fraudulently withheld from complainant knowledge of the time of sale, and sold the lands at a ruinous sacrifice.

The decree of the court below was in favor of the complainant upon the last two grounds. It will, however, be necessary for us, in reviewing the record, to notice separately each of the grounds claimed for relief, for if either of them is well founded the decree must be affirmed.

Complainant swears that she signed the deed in the presence of her husband, in their store, but that no one else was present, and that she never acknowledged it. There is, so far as we have been enabled to discover from the record, no other evidence tending to corroborate her on this point.

Appended to the deed is the certificate of Alonzo T. Pipher, a notary public in Piatt county, showing that complainant and her husband appeared before him and properly acknowledged the deed on the 3d day of May, 1870. In addition to this, his deposition was taken, and he swears to the truth of what is stated in his certificate.

We may, with much propriety, apply here what was said in *Monroe* v. *Poorman et al.* 62 Ill. 526: "If the testimony of a wife, who may or may not become a widow, is to prevail over her own deliberate act, done knowingly, and over the testimony of a disinterested officer taking the acknowledgment, there will be but frail security to titles; for, if such evidence is to prevail in one case, it must prevail in all cases; and whenever a woman can be found, and they are numerous, to swear against her own act, there is really no security in titles derived in whole or in part from them." To impeach such a certificate, the evidence should do more than produce a mere preponderance against its integrity in the balancing of probabilities—it should, by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent. The evidence before us on this point falls short of producing such an effect upon our minds.

Upon the second point, we fail to find sufficient evidence to satisfy us that there was any collusion between the trustee and the husband of complainant, for the purpose of improperly inducing her to sign the deed. McClellan was not present when the deed was signed. According to complainant's own version, the deed was drawn up and ready to be signed, and presented to her two months before she signed it; but, she refusing, it remained in her house until she finally signed

it. It is not shown that McClellan even knew that she was reluctant to sign it, but, on the contrary, the only evidence in this respect is, that he was informed she was willing to sign it. This he swears, and it is not contradicted. She swears, indeed, that McClellan told her "they did not intend to press for payment—it was only security they wanted."

In the view we have taken of the evidence on the point of the acknowledgment of the deed, it follows that her claim that she did not know the contents of the deed when she executed it, is not sustained by the evidence, and we must assume that she acknowledged to the officer that she was acquainted with its contents. Being acquainted with its contents, she knew that the trustee was authorized to sell on the non-payment of the note at its maturity. She knew when it matured, and is legally chargeable with knowledge that the rights of Farwell & Co. and the duties of the trustee were fixed by the terms of the deed; and it is, therefore, impossible that the remark she attributes to McClellan could, in a legal sense, have affected her conduct. Indeed, as a matter of fact, we can scarcely doubt that, when she signed the deed, she fully and correctly realized the jeopardy in which it placed her property. She says she refused, for a couple of months, to sign it, and on several nights she and her husband sat up all night contending about it. That all this could have happened in regard to an instrument about the contents of which she had no knowledge, and which she supposed was to have only such obligatory force as was to be imputed from the remarks attributed to McClellan, is so extraordinary that it fails to enlist our credulity. Moreover, McClellan, who testifies with seeming candor and fairness, and who has much less interest in the event of the suit than has complainant, positively denies that he ever talked with complainant about the deed, or that he made any promise whatever to her.

The evidence is full to the point that complainant signed the deed with great reluctance, and that she did so only after much importunity from her husband, and many threats on his

part to leave her if she did not sign it; and if the evidence connected McClellan and Farwell & Co. with this conduct of his, and she had made application within a reasonable time to have the deed canceled for that cause, we should not hesitate in holding that she was entitled to do so.

A deed executed by a wife for the sole purpose of preserving her marital relations with her husband and peace in her home, can not be said to be freely and voluntarily executed. But the law, in giving the wife the same dominion over her separate property that belongs to a *feme sole*, intends that it shall be used as a means of protection, and not for the purpose of perpetrating wrong and injustice against others. She has within her reach every legal means for protecting her rights which is possessed by all absolute owners of property. When this deed was acknowledged, it was necessary that she should be examined separately and apart from her husband, and if she was then acting under any kind of duress or coercion in signing the deed, it was her duty to state it, and the duty of the officer to refuse to certify to her acknowledgment. If, however, she was under such great and continuing coercion that she still felt compelled to withhold the truth from the officer, and state to him a falsehood, it was certainly her duty to make known the fact that her acknowledgment was involuntary and that she designed repudiating the deed, as soon as she felt relieved from this coercion.

Complainant does not seem to have made any effort to notify either McClellan or Farwell & Co. that she had been coerced into signing the deed, and there is no evidence that they or either of them participated in, or had knowledge of the conduct of her husband previous to the sale under the the deed. She was informed when the sale was first advertised to be made, and at once set about taking such steps as she seems to have thought essential to a protection of her rights. It is not claimed that she was then acting under the controling influence of her husband, and yet, instead of seeking to enjoin the sale and have the deed canceled because it

had not been voluntarily executed, she procured a friend to attend the sale, bid the property off and take a deed to himself from the trustee, with the understanding that he was to hold the title until such time as she could redeem.

The parties in interest and the public, instead of being informed that the deed was void, and, of consequence, that any title derived at the sale under it must be a nullity, were thus notified that she regarded it as obligatory, and that the title to be derived through the trustee would be unobjectionable. If her deed was obtained by coercion, and was void, why did she have her friend attend the sale to obtain title to the property under it? Why not then rely upon the invalidity of the deed?

But it has been held by respectable authority that, although a married woman may be induced to execute a deed to her separate property by the undue influence of her husband, yet, if the grantee did not know of or participate in the fraud practiced upon her, she is bound by the deed. *White* v. *Graves*, 107 Mass. 325; *Somes* v. *Brewer*, 2 Pickering, 184; see, also, *Spurgin* v. *Traub et al.* 65 Ill. 171.

There is much stronger reason that she should be so bound, where not only the grantee is not shown to have known of or participated in the fraud, but she, by her own subsequent voluntary acts, gives the public to understand that the deed is valid, and good title may be derived under it.

The questions decided by the court in *Swift et al.* v. *Castle*, 23 Ill. 209, are not involved in the present case, and the remarks of CATON, C. J., in his separate opinion upon the peculiar facts in that case, however applicable there, can have no bearing here. They commit the court to no legal proposition, and were merely added as make-weight to the opinion previously announced.

The charge that McClellan colluded with Marston to defraud complainant, and that he fraudulently withheld from complainant knowledge of the time of sale, is not sustained by the evidence. The deed did not require that complainant

should be notified personally of the time of sale. It provided simply that notice of the sale should be given by a specified newspaper publication, and no claim is made that such notice was not given; and although complainant, in her direct examination, says that McClellan said he would not advertise the land without giving her notice, and that she relied upon him, still, on cross-examination, she shows that in this she was simply stating what she had been informed by her husband. She says: "Never had a conversation with McClellan or John V. Farwell about this. No one promised to give me notice of the sale, only what my husband said about that." And this is in accord with the evidence of McClellan, who denies that he ever had any conversation with complainant in regard to the deed or sale, or that he ever made her any promises.

As before observed, complainant procured a friend, Mr. Gridley, to attend at the time the sale was first advertised to take place, for the purpose of bidding off the property and holding the title for her until she could redeem. Mr. Gridley attended at Clinton, at the proper time for that purpose, but the sale did not take place, in consequence of the failure of McClellan, the trustee, to be present. Before leaving Clinton, Mr. Gridley made arrangements with Mr. C. H. Moore to bid on the lands, should the trustee arrive and offer the lands for sale after his departure. On his way to his home in Bloomington, Mr. Gridley met McClellan at Wapella, and there informed him that complainant had procured him to bid off the lands, etc.; that he had been to Clinton for that purpose; that he was prepared to bid them off for a sufficient amount to pay the trust deed, and requested McClellan to return to Clinton and sell them, as he desired to avoid two trips. McClellan claimed the hour was past, and the lands could not be properly sold on that day.

When the sale was subsequently made, Gridley had no actual notice thereof and was not present at the sale. Moore, however, was present, and bid $3000, telling McClellan at the

time his bid was for the complainant. Tenney then, as the agent of Marston, bid $3050—some $230 more than the amount due on the deed of trust; and this being the highest bid, the lands were struck off to him. Tenney was the law partner of McClellan and the son-in-law of Marston.

The proof shows that McClellan offered to delay the sale until Moore could telegraph Gridley and ascertain his wishes in regard to the sale, Moore being uncertain how to act in the matter. He says that he had no authority to act for complainant or her husband, and he was not confident that Gridley at that time wished him to bid for him. He accordingly telegraphed Gridley for instructions, but received no reply until in the evening, after the sale was over, when Gridley telegraphed him not to bid for him.

McClellan says he offered to strike the lands off to Moore for the amount due on the trust deed, if Moore would take the responsibility of saying that he was authorized to act for complainant; but Moore could not do so, and he says he was unwilling to risk more than $3000 for the lands, incumbered, as they were, by a prior deed of trust to the extent of some $6000, without an assurance that the property would be taken off his hands. He further says: "McClellan offered to take the amount due on the deed of trust, and stop the sale, but said he could not strike the land off to me unless my bid was the best."

In this there is no evidence of unfairness, or fraud, or violated pledges on the part of the trustee. He was entirely correct in saying, if the lands went to sale they must be sold to the highest bidder. Suppose they had, notwithstanding Tenney's bid, been struck of to Moore for $3000; Gridley's dispatch repudiated Moore's authority to act for him, and he had no authority from any other source to bind the complainant. She might, therefore, have repudiated the entire sale. It was her misfortune not to have made some permanent arrangement by which her rights would have been more certainly

looked after, but this can not affect Marston, in the absence of bad faith on his part.

The fact that Tenney was the law partner of McClellan, did not of itself disqualify him from being a bidder at the sale for his father-in-law. All idea that Tenney's bid was for the benefit of McClellan is completely negatived by the evidence of McClellan, Tenney and Marston. If they are to be believed, and we know of no reason why, standing, as they do, uncontradicted, they shall not be, the purchase by Tenney was for Marston, and was made in good faith, as a speculation, in which no one else had any interest.

The evidence shows that the lands were, in the opinion of some of the witnesses, fairly worth more, by a considerable amount, than that for which they were sold. This discrepancy, however, taking into consideration that the purchaser was bound to redeem from the prior deed of trust—amounting to some $6000—was not so great as, in itself, to justify setting aside the sale.

Complainant has suffered a very serious misfortune in losing her lands, and could we clearly see any reasonable way, consistent with our understanding of the law applicable to the case, by which we could relieve her, we would most cheerfully do so, but we do not, and it is not allowable that our sympathies shall have any consideration in the case.

The decree of the court below will be reversed and the cause remanded.

Decree reversed.

Mr. JUSTICE SCOTT, dissenting.

THE TRUSTEES OF SCHOOLS

v.

THE PEOPLE *ex rel.* ABRAHAM TRAVIS.

SCHOOL DISTRICTS—*forming new ones.* The trustees of schools have no discretion to form, or refuse to form, a new district when it embraces at least five families, and when the law is complied with in applying for the formation of the same, but they are bound to give effect to the will of the voters as expressed in their petition, and if they refuse to grant such petition, when made according to law, the courts will compel them, by *mandamus*, to do so.

APPEAL from the Circuit Court of Macoupin county; the Hon. CHARLES S. ZANE, Judge, presiding.

Mr. WILLIAM H. SNELLING, and Messrs. RINAKER & KEPLINGER, for the appellants.

Mr. F. H. CHAPMAN, and Mr. W. R. FRENCH, for the appellee.

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

Appellee and others, residents of township 10 north, in range 6 west, and in township 9 north, in range 6 west, petitioned for the formation of a new school district. The petition, in every particular, conformed to clause 3, of section 33, of the school law, (R. S. 1874). On the presentation of the petition to the trustees of schools in township 9, they granted the prayer of the petition, but the trustees of township 10 declined to grant the prayer. Thereupon appellee filed his petition for a *mandamus* to compel the trustees to pass an order erecting the district. The trustees first filed a demurrer thereto, but being overruled, they then filed their return, and, amongst other things, deny that the petition was signed by all of the legal voters of the territory proposed to be erected into a new district, and allege that one of the boundary lines thereof would

pass within less than one mile of a school house; that the formation of the new district would not promote the interest of education, would be injurious, and greatly increase the expense of the schools; nor was the district needed by the inhabitants of the portion of territory proposed to be detached from township 10.

A replication was filed to so much of the answer as denied that the petition was signed by the legal voters residing in the territory proposed to be erected into the new district, and that its lines would run within one mile of a school house. A demurrer was sustained to the other portions of the return. A trial was had by the court, a jury having been waived by consent of parties. The issues were found for petitioners, and an order was entered that the trustees grant the relief asked.

The provision of the statute under which this controversy arises, is this: "Upon petition of all the voters in any territory containing not less than five families, representing that they are not properly accommodated with school privileges, but will be by being added to another district, or formed into a new district; and upon petition of a majority of the voters of such other district, if any, it shall be the duty of the trustees of the township or townships in which such territory or territory and district, are situated, to set off such territory: *Provided,* that such change shall not be made, when the district from which the petitioners desire to be severed has a bonded debt, nor when the new district line will be brought nearer than one mile to any school house."

It is contended that the trustees have a discretion to form or refuse to form a new district, and in exercising the power they must be governed by the best interests of the schools of the township. From a careful study of the language of this provision of the law, we fail to find that such was the design of the law makers. On the contrary it is so worded as to exclude all discretion. It seems to give the entire power to the voters of the proposed new district when it embraces at

least five families, and all the voters therein join in the petition. When they comply with the law, the trustees are duly empowered, and they are expressly required to record the will of the voters. Whilst it may be seriously doubted whether the enactment will be productive of the anticipated benefits, still, that is not a question for our consideration. We can only determine the intention of the law giver, and apply it to the facts as they may arise.

If the language was doubtful, then we might construe it, but we see no doubt. It does not, in terms, or by implication, provide that the trustees may hear evidence, or may consider whether it would be proper or expedient. But it is made the duty of the trustees to set off the district. The command is express and peremptory. It is urged that this court has, in former decisions, held that the power is discretionary. But counsel seem to forget that those were decisions under very different laws, and our previous decisions have been wiped away by this enactment; that in this it has designedly, no doubt, changed the entire policy of the system, from discretion to obedience to the requirement of the requisite number of voters, when they comply with the law. The trustees may see, and it is their duty to know before they act, that the petition conforms to the law, and is true.

This petition states all of the requisite facts, and negatives the cases specified in the statute, and it appears that the facts alleged in the petition are true, and the trustees should have passed an order allowing the prayer. The judgment of the court below must be affirmed.

Judgment affirmed.

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MUNICIPAL CORPORATIONS.

FORFEITURE OF CITY CHARTER.

In what proceeding the question may be raised. See FORFEITURE, 1.

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MUNICIPAL INDEBTEDNESS IN AID OF RAILROADS.

APPLICATION OF STATE REVENUE THERETO.

1. *Under the act of* 1869—*the act not a contract between the State and those holding such indebtedness.* The act of April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," does not constitute a contract between the State and the creditors of the counties, townships, cities and towns intended to be aided, for the reason that the constitution of 1848 prohibited the credit of the State from being given to or in aid of any individual, association or corporation. *Ramsey* v. *Hœger*, 432.

2. *Repeal of act of* 1869 *giving State taxes to municipalities owing railroad indebtedness.* Under the provisions of the constitution of 1870, and the revenue law in force July 1, 1873, so much of the act of 1869 to fund and provide for paying railroad debts of counties, townships, cities and towns, as requires the State revenue to be collected on the valuations of the taxable property in the State remaining, after deducting in counties, townships, etc., which have outstanding indebtedness incurred in aid of the construction of railroads, the increased valuation of the taxable property over that of the year 1868, is abrogated, and can not be enforced. Ibid. 432.

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MUNICIPAL SUBSCRIPTION.

OF CONDITIONS IMPOSED.

1. *After a vote without conditions.* Where a proposition for county subscription to a railway company to aid in building a road from Quincy, by way of Payson and in the direction of Pittsfield, in Pike county, without any other conditions, was carried by a vote of the people, and it appeared that the railway company, by its charter, was not bound to locate its road on that route, but had a large discretion as to the route to be selected, it was *held*, that the board of supervisors, in making the subscription, had the right to impose conditions as to the permanent location of the road upon the route contemplated, and to make the delivery of the county bonds to depend upon the same, and that the company, by accepting such conditions, was bound by them, in respect to its rights under the vote and subscription. *Alley et al.* v. *Board of Supervisors of Adams Co.* 101.

2. *Effect of non-observance of condition.* Where, by the terms of a county's subscription in aid of a railway company, the permanent location of the road by a certain route was an indispensable prerequi-

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