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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

NORMAN L. FREEMAN,
REPORTER.

VOLUME 82.

CONTAINING THE REMAINING CASES SUBMITTED AT THE JANUARY TERM, 1876, THE CASES SUBMITTED AT THE JUNE TERM, 1876, AND A PORTION OF THE CASES SUBMITTED AT THE SEPTEMBER TERM, 1876.

PRINTED FOR THE REPORTER.

SPRINGFIELD:
1878.

JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

JOHN M. SCOTT,* Chief Justice.

BENJAMIN R. SHELDON,* Chief Justice.

SIDNEY BREESE,
BENJAMIN R. SHELDON,*
JOHN SCHOLFIELD,
ALFRED M. CRAIG,
T. LYLE DICKEY,
JOHN M. SCOTT,*
PINKNEY H. WALKER.† } Justices.

ATTORNEY GENERAL,

JAMES K. EDSALL.

REPORTER,

NORMAN L. FREEMAN.

CLERK IN THE SOUTHERN GRAND DIVISION,

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

CLERK IN THE CENTRAL GRAND DIVISION,

E. C. HAMBURGHER, Springfield.

CLERK IN THE NORTHERN GRAND DIVISION,

CAIRO D. TRIMBLE, Ottawa.

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*Mr. Justice Sheldon became Chief Justice at the June term, 1876, for one year.

†At an election held in the Fourth District on the first Monday in June, 1876, Mr. Justice Walker was re-elected for the full term of nine years.

TABLE OF CASES

REPORTED IN THIS VOLUME.

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RULES OF PRACTICE IN THE SUPREME COURT.

IN RESPECT TO APPEALS FROM, OR WRITS OF ERROR TO, THE APPELLATE COURTS.

(Adopted at the September Term, 1877.)

Pursuant to section 91 of an act in regard to practice in courts of record, approved June 2, 1877, (Laws of 1877, page 154,) it is

Ordered by the Court, That in all cases removed from the Appellate Courts, to this Court, by appeal or writ of error, only so much of the record shall be made up and certified as shall be necessary to clearly and fully present the question upon which the decision of this Court shall be sought, and the same shall be directed by at least two of the judges of the court from which the record is brought, and their order to that effect shall be certified as a part of the record.

LICENSE TO ATTORNEYS—EXAMINATION BY THE APPELLATE COURTS.

(Adopted at the January Term, 1878.)

Ordered, That the Appellate Courts in the several appellate districts be authorized to examine applicants for admission to the bar, in open court, subject to the same rules for admission to examination and in regard to qualifications as are applicable to like admissions and examinations in this Court, and that licenses hereafter will be issued by the Judges of this Court, in term time, on certificates from such courts, under the seal thereof, showing that the applicants have been admitted to and passed such examinations and been found entitled to be admitted to the bar: *Provided*, that such certificates shall be accompanied with the affidavit of the applicant, or some other credible person, that he is of the age of twenty-one years, or over, and a citizen of the State, and also a certified transcript from a court of record in this State, showing that he is a man of good, moral character.

APPELLATE COURTS.

At the September term, 1877, of the Supreme Court, at Ottawa, it was

Ordered by the Court, That Judges of the Circuit Courts be assigned to duty in the several Appellate Courts established by the act entitled "An act to establish Appellate Courts," in force July 1, 1877, as follows:

To the First District—Chicago:

WILLIAM W. HEATON,*
THEODORE D. MURPHY,
GEORGE W. PLEASANTS.

To the Second District—Ottawa:

EDWIN S. LELAND,
NATHANIEL J. PILLSBURY
JOSEPH SIBLEY.

To the Third District—Springfield:

OLIVER L. DAVIS,
CHAUNCEY L. HIGBEE,
LYMAN LACEY.

To the Fourth District—Mt. Vernon:

JAMES C. ALLEN,
DAVID J. BAKER,
TAZEWELL B. TANNER.

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*The following order was entered in the Supreme Court, at the January term, 1878, at Springfield:

Notice having been received by this court of the death of the Hon. W. W. HEATON, late one of the Judges of the Appellate Court, in and for the first district created for such courts, it is hereby ordered by this court that, to fill the vacancy caused thereby in said Appellate Court, the Hon. JOSEPH M. BAILEY, of Freeport, one of the Circuit Judges of this State, be and he is hereby assigned to duty as one of the Judges of the Appellate Court for said first district.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION.

JANUARY TERM, 1876.

Otto Brauns, use, etc.

v.

The Town of Peoria.

1. Commissioners of highways—*power to bind town.* The commissioners of highways can not bind their towns by any contract, or exercise any other powers not conferred on them by statute.

2. Same—*sources of revenue.* The moneys paid for fines and commutation of road labor, a poll tax of not exceeding $2, and the road tax authorized, are all the sources of revenue to which the commissioners of highways can resort for means to keep roads and bridges in repair.

3. Same—*limit in expenditures.* Under the road law of 1872, the commissioners of highways have no authority conferred upon them to expend money on roads and bridges, in their towns or districts, which is not in the treasury to be expended, or which is not actually provided for by a levy. They can not anticipate a tax to be afterwards levied, and the annual revenue of each year must be devoted to the wants of that year.

4. Same—*contracts with themselves.* It seems a contract made by two highway commissioners with themselves for repairing roads and bridges, where the cost exceeds $25, is illegal, and in violation of the statute. Where the cost exceeds that sum, the law requires the contract to be let to the lowest responsible bidder, after public notice.

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

Messrs. SLOAN, LYDECKER & COCHRAN, for the appellant.

Mr. L. HARMON, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was *assumpsit*, in the Peoria circuit court, by Otto Brauns, plaintiff, against the town of Peoria, for work, labor and services performed and bestowed; for materials provided; for money lent and advanced; for money paid, laid out and expended; for money had and received; for money due for interest on divers sums of money; for money due on an account stated, and for money found due by the board of town auditors to the plaintiff, on settlement.

Issues were made up on the pleas of *non assumpsit* and payment, and tried by a jury, who returned a verdict for the defendant, on which the court rendered judgment, after denying a motion for a new trial. Plaintiff appeals.

There are some points of practice raised on the record, which it is not necessary to notice, as they were of a character addressing themselves to the discretion of the court, under the then circumstances.

It appears appellant was a highway commissioner of the town of Peoria, elected on November 2, 1870. His associates were Thomas Honnihan and Peter Reed. They, with appellant, composed the board of highway commissioners for Peoria township. This board, at a meeting held in April, 1871, elected appellant treasurer, who continued to act as such until April, 1873.

Previous to this last date, and during the years 1871 and 1872, it would appear that appellant, with the concurrence of his co-commissioner, Honnihan, made contracts for work to be done on the roads in Peoria township, and appellant did work upon them himself, or by means employed by him. In his judgment, such work was deemed necessary, there having been

heavy rains, seriously injuring the roads and bridges. There being no money in the treasury, appellant furnished a team and hired a man to do the work, and his account was allowed by the town auditors, to the extent of seventeen hundred dollars.

The controversy brings before us the question as to the extent of the powers of highway commissioners, and when and how to be exercised. The statute must answer the question.

It will be conceded it was not in the power of appellant to bind the town outside of any authority conferred upon him to bind it.

The question then arises, was the work done by appellant, and for which this action was brought, within any authority conferred on him by law.

Under our system, in counties under township organization, as is Peoria county, the whole subject of roads and bridges is committed to the towns, and to officers elected by the voters of the several towns. Their guide, and their only guide, in the performance of their duties, is the statute, and the only powers they can exercise must be conferred by law.

Before citing the portions of the statute applicable to this investigation, it will be stated that, for the purpose of doing the work on the roads and bridges, and to pay for the same, appellant borrowed the money of one Davis and Hoyne, for whose use this action is brought, and to whom, when the board of town auditors made the above allowance, appellant gave an order for the amount.

To state briefly the claim of appellant, it is, that, having expended money in repairing the roads and bridges in the town of Peoria, and the amount thereof having been allowed by the board of town auditors, the town is not at liberty to plead a want of power on the part of the board of highway commissioners to create a debt by doing work and spending money in excess of the road fund then in the treasury, but the same must be paid as a lawful town charge.

Against this claim, the town of Peoria insists that, by unlawful proceedings, the highway commissioners had used all the revenue which came to their hands, for road and bridge purposes, designed to be used during the year beginning April, 1872, and ending April, 1873, and finding, early in August, 1872, no money was on hand, they commenced to draw on the revenue to be collected as a road and bridge fund for 1873, and undertook work, which they let to themselves, with no money to pay for it, and that this action by appellant is an attempt to collect from the town payment for this work, or, rather, to reimburse him for moneys he claims to have advanced therefor.

As we have said, this claim of appellant must be tested by the statute creating the office of highway commissioners and conferring their power.

The act in force at the time of these transactions was the act entitled "An act in regard to roads and bridges," approved April 10, 1872. Sess. Laws 1872, p. 675.

We have carefully examined that act, and find ample provision made for carrying out its objects.

By section 27 each commissioner is required, before he enters upon the duties of his office, to take and subscribe, before some justice of the peace, the official oath prescribed by the constitution of the State, to be filed with the town clerk.

By section 29 they have power to enter into contracts in all matters within their jurisdiction, but all suits concerning highways shall be in the name of the town.

By section 31 they shall choose one of their number treasurer, who shall receive and have charge of all moneys raised in the town or road district for the support and maintenance of roads and bridges; shall hold such moneys at all times subject to the order of the commissioners of highways, and shall pay them over upon their order, or on the order of a majority of the commissioners, and not otherwise; shall execute bond conditioned for the faithful discharge of his duties as such treasurer, etc., and for his services is allowed to retain two per

centum on all moneys he shall receive and pay out, except such moneys as are paid over by him to his successor in office.

Section 32 contains twelve specifications of their duties, after entering upon them, the care and superintendence of the highways and bridges in their towns and road districts, among which duties is that to collect all fines and commutation money, to assess and collect the poll tax, to assess annually upon the real and personal property in their respective towns and road districts a tax not exceeding fifty cents on a hundred dollars assessed valuation by the last county assessment.

Section 33 provides for rendering their account, in writing, to the board of town auditors, at the annual meeting for auditing the accounts of town officers, stating the amount of real and personal property tax received by them; the sums received on account of poll tax; all sums received for fines and commutations, and the amount received by them from all other sources; the amount expended by them for all purposes, specifying by items the date, purpose and amount of such expenditure, and to whom paid; the names of all persons assessed for poll tax; the names of all persons who have paid or worked out their poll tax; the names of all persons who have been fined, and the sums, and what fines remain unpaid.

These are all the sources of revenue to which the highway commissioners can resort for means to keep the roads and bridges in their several districts in repair. Section 42 provides, that the highway commissioners of each town and road district shall, annually, ascertain, as near as practicable, how much money must be raised by tax on real and personal property for highway purposes during the ensuing year; and they shall, in counties under township organization, give to the supervisor of the township * * * a statement of the amount necessary to be raised, signed by a majority of the commissioners, on or before the Tuesday next preceding the annual September meeting of the board of supervisors, who shall cause the same to be submitted to the board for their action, at the September meeting. Section 43 provides, that, in pursuance of the amount so certified, the county clerk, when

making out the tax books of State and county taxes for the collector, shall extend the necessary tax in a separate column against each tax-payer's name, or taxable property, as other taxes are extended, which shall be collected the same as State and county taxes. And it is made the duty, by section 44, of the county clerk, to make out and deliver, on demand, to the treasurer of the commissioners of highways, a certificate of the aggregate amount of tax so levied and placed on the tax books, which tax, when collected, shall be paid to the treasurer of the highway commissioners by the collector or sheriff, as fast as the same is collected. Section 46 provides for levying a poll tax of two dollars for highway purposes.

There is ample provision made, by section 41, for raising a larger sum of money than can be produced by the poll tax and the tax to be assessed on real and personal property, and that is, by the commissioners of highways, or any three legal voters, giving notice by posting notices in three of the most public places in the town or road district at least ten days before the annual meeting, that a larger amount of money will be required for the purpose of constructing or repairing roads and bridges; the legal voters present at such meeting may authorize an additional amount to be raised by tax, not exceeding sixty cents on each one hundred dollars' valuation. This vote, or the result of it, is to be certified and returned to the proper authorities.

The repair of roads and bridges being committed to the highway commissioners, ample means are provided to enable them to discharge all their duties.

We do not find, in the very many provisions of the statute respecting roads and bridges, any authority conferred upon the highway commissioners to expend money on the roads and bridges within their respective districts which is not in their treasury to be expended, and which had not been actually levied, nor is there any authority conferred upon them to anticipate revenue and expend it, unless the same be actually levied *Highway Com'rs* v. *Newell*, 80 Ill. 587. It seems to be the policy of the law, and a very just one, that the accruing reve-

nues of the year shall be appropriated to the wants of the year, and that no expenses should be incurred in the absence of money already levied to meet them. The practice, we know, is different, tending to much confusion and embarrassment. The true principle is, and should be, to deny to public functionaries the power to expend money in anticipation of receipts, except in cases where an actual levy has been made.

It would appear, in this case, that appellant and his co-commissioner Honnihan, without consultation with Mr. Reed, the other commissioner, were in the constant practice, when they deemed the roads and bridges out of repair in their quite limited district, to employ themselves, at their own prices, to make the repairs, and allow their charges. It is stated, and not controverted, that their road district embraced but five roads outside of the limits of the city of Peoria—the combined length of them not exceeding five miles. For the ordinary annual repair of these roads and bridges there came to their hands, from the proper public sources, the sum of four thousand and eighty dollars. Their account, as presented to the town auditors for adjustment, shows a total expenditure for one year on these roads of eight thousand and eighty dollars, a part of which is the claim now in suit, the money constituting it having been borrowed by appellant of the bankers, Davis and Hoyne.

We find no authority in the law to justify this, and can not understand the principle on which the claim is sought to be sustained.

Appellant has failed to convince us of the legality of the claim advanced, but insists, the town auditors having adjusted the claim, that adjustment is conclusive, and constitutes it a town charge.

We presume the adjustment insisted upon by appellant is that of May 3, 1873. That record shows, a member of the board, Mr. Sweet, moved "that the board recommends that the amount shown to be due to the treasurer of the highway commissioners (appellant) on April 16, to-wit: one thousand seven hundred dollars and ninety-seven cents, be paid to Davis

and Hoyne, as per order of the late treasurer, Otto Brauns. Motion prevailed."

Although this record was excluded as evidence, on defendant's motion, yet the witness Forsythe, the town clerk, verified it by his testimony, and it fails to show any allowance in favor of this appellant. It simply recommends that payment be made to Davis and Hoyne of seventeen hundred dollars and ninety-seven cents. If it amounts to anything, it might, with more propriety, be claimed as an allowance in favor of these persons, to recover which, of the town, they should be plaintiffs in the action.

It is said by appellant, he had the right, with the concurrence of his co-commissioner Honnihan, without consultation with Reed, to make contracts for repairs between themselves, and audit their own accounts, and appellant, as treasurer, pay them. The abuses to which such a practice might lead are hardly conceivable, and the practice itself is unwarrantable. Certainly the statute gives no countenance to it.

Section 84 of the statute points out the mode by which contracts shall be made for the repairs on roads and bridges, which is, by public letting, to the lowest responsible bidder, upon proper notice given ten days before the time of letting; if the probable cost will not exceed twenty-five dollars, they may privately contract with persons, as they shall deem best. This statute was wholly disregarded, appellant, with his colleague, preferring to contract privately with themselves beyond the limit of twenty-five dollars, and without the knowledge of their fellow-commissioner Reed, and without authority of law.

It is unnecessary, with the views here expressed, to enter into a critical examination of the instructions. In any view which can be taken of the testimony in this record, appellant could not recover, and though some of the instructions may be faulty, yet, believing justice has been done, we will not disturb the judgment. This is the doctrine of this court, frequently announced. *Peoria Marine and Fire Insurance Co.* v. *Frost*, 37 Ill. 333.

We are satisfied appellant has no right to recover of the town on the claim presented, and affirm the judgment of the circuit court.

Judgment affirmed.

VICTORIA BONGARD

v.

HENRY C. CORE.

1. MARRIED WOMEN—*husband may act as wife's agent.* A married woman may own real and personal property under the statute, and have her husband act as her agent in transacting the business growing out of such property, such as preserving and transferring the same, without subjecting it to the payment of his debts.

2. SAME—*increase and profits.* The products of the lands of a married woman, the rents of her real estate, the increase from her stock, the interest on her money, etc., are all hers as absolutely as the capital or things from which they arise.

3. SAME—*land paid for with products.* If a married woman buys land and pays for the same from the products when sold, even though her husband acts as her agent in its control and management, bestowing a portion of his time, the land will not become his, and the products thereof will not be liable for his debts.

4. SAME—*earnings.* It would be an unreasonable and forced construction of the statute to hold that the rents of a wife's property or the products of her farm, or the increase of her stock, were her earnings, and became the property of her husband.

5. SAME—*crops, when husband contributes his labor.* The fact that a crop is raised on the land of a wife under the supervision of her husband, he contributing some personal labor in controling and managing the business, will not make the crop his and subject it to the payment of his debts.

6. SAME—*agency of husband should be left to the jury.* Where a crop raised upon the land of a married woman is taken in execution as the property of the husband, and the proof tends to show that she employed and paid for the labor that produced the same, through her husband, the fact whether he was her agent in the matter should be submitted to the jury, and it is error to refuse an instruction upon the hypothesis of his agency.

APPEAL from the Circuit Court of Champaign county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was an action of replevin, brought by the appellant against the appellee, to recover the possession of 2500 bushels of corn. The defendant justified the taking, as sheriff, under an execution against Joseph Bongard, the husband of the plaintiff, alleging ownership in the husband. The jury found for the defendant, and judgment was rendered accordingly.

Mr. THOMAS J. SMITH, Mr. Z. S. SWAN, and Mr. GEORGE W. GERE, for the appellant.

Mr. J. S. WOLFE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

There was manifest error in the refusal of the court to give the second of appellant's instructions. It asserts that a married woman may own real and personal property, and may have her husband to act as her agent in transacting her business in reference to such property, and that if they believed from the evidence that appellant was the owner of the property in controversy, they should find for her, notwithstanding they believed the husband acted as agent for her in the sale and transfer of the same.

Since the adoption of the act of 1861, authorizing married women to hold real and personal property, free from the control of the husband, this court has repeatedly held that the wife may employ the husband as her agent in its management and control. The rule is well established in this court, and we presume the decisions announcing it are familiar to the entire profession, and, hence, we shall not stop to cite them.

There was an abundance of evidence to justify, and, in fact, to require that this instruction should have been given. As appellee pleaded property in the husband, it was important to determine in what capacity he was acting with reference to the property. It appears the title to the land upon which the corn was raised belonged to appellant, and that her money had paid for it; and that she received the money from the estate of her father, or from sources other than from her husband. She and her husband were living upon the land, and the evi-

dence tends to prove that she employed and paid for the labor that cultivated and produced the corn. If this is true, she should not be deprived of the property, simply because she may have employed her husband as her agent in preserving and selling it. And whether or not he was her agent, should have been left to the jury, under the evidence in the case.

The first of appellee's instructions is vicious, in announcing as a rule, that if appellant bought the farm and paid for it out of money raised from the sale of articles sold from the farm, and she was a married woman, living with her husband, then such earnings belonged to the husband, and the land belonged to the husband, unless she proved that such earnings were acquired from some other person than her husband. It would be a forced and unreasonable construction of the statute to hold that the rents of a wife's property, or the products of her farm, or the increase of her stock, were her earnings, and became the property of her husband. They are not embraced in the definition of the word "earnings," and it would violate the intention of the law-makers to so hold.

The products of her lands, the rents from her real estate, the increase from her stock, the interest on her money, etc., are all as much and as absolutely hers as the capital or things from which they arise. It would be but a mockery to say that a married woman might own and control her property, but all the increase or products arising from it should belong to her husband. To so hold would be to render her ownership useless, and to defeat the very purpose of ownership of property. If appellant purchased the land and held and cultivated it, and the products thus acquired went to the payment of the purchase money, it was rightful, as the products were hers, and she could so apply them. It was error to give this instruction.

Nor is the proposition contained in the third of appellee's instructions correct. It asserts that although the land may have belonged to appellant, if the corn was raised under the supervision of the husband, he contributing his personal labor thereto, then the corn would be his property. We have

seen that the husband may be the agent of the wife, and if he was, and had supervision of the crop and its cultivation, that could not affect the title of the wife. Nor could the fact that the husband contributed a small portion of the labor change the result, whatever might be held had he contributed all of the labor. But that question is not before us, and we will not discuss or decide it. This instruction should not have been given.

The other objections urged may not arise on another trial, and we therefore deem it unnecessary to discuss or decide them.

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

Judgment reversed.

THOMAS G. KESSINGER

v.

LEWIS WHITTAKER *et al.*

1. WRIT OF POSSESSION—*want of proper parties to bill.* A writ of possession may properly be ordered against a party entering into possession of mortgaged premises under the mortgagor after bill to foreclose, notwithstanding others having an interest are not made parties, where the entire interest is sold under the decree. Such party not claiming under them, can not object that they were not made parties to the bill.

2. SAME—*remedy concurrent with forcible detainer.* The remedies given a purchaser of land under a decree of foreclosure, by writ of possession and by forcible detainer, are concurrent, and both may be pursued until a satisfaction is had. The pendency of proceedings by forcible detainer for possession, on appeal, can not be set up in abatement of a motion for a writ of possession in the original cause.

3. SAME—*nature of proceeding.* A proceeding by a purchaser on foreclosure to obtain a writ of possession by motion, is not the institution of a new suit, but is only another step in the foreclosure suit, and for this purpose the purchaser, and he who meddles with the property after bill filed, becomes a party to the decree of foreclosure.

4. SAME—*judge may order in vacation.* A judge of the circuit court, under our statute, has the power, in vacation, to order the issuing of a writ of possession, to carry into effect a decree of the court.

5. SAME—*when order to deliver possession is necessary.* It is only where a decree of foreclosure contains no order for the surrender of possession that such order to deliver possession is necessary before a writ of possession can be issued. If the decree contains such an order, no further order is required.

APPEAL from the Circuit Court of Montgomery county; the Hon. HORATIO M. VANDEVEER, Judge, presiding.

Messrs. J. R. BLACKWELL, for the appellant.

Messrs. SOUTHWORTH & TRUITT, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

There had been here a foreclosure of a mortgage given by Peter Boxburger and wife to the appellees; a decree of sale at the November term of court, 1873; a sale thereunder, February 13, 1874; and the master's deed of the mortgaged premises to the appellees, made May 14, 1875.

July 10, 1874, Boxburger and wife, who were defendants in the suit for foreclosure, executed a quitclaim deed of the mortgaged premises to Lorenzo D. Hicks. Kessinger, the appellant, afterward went into possession of the premises under Hicks. On the 5th day of June, 1875, in vacation, the judge of the circuit court, on application to him, the parties appearing before him, made an order that Kessinger deliver up possession of the premises to appellees, and that a writ of possession issue to put them in possession. This is an appeal by Kessinger from that order.

It is objected to the order—

1. That the unknown heirs of Josiah H. Sandoe were not brought into court; that the sale and deed by the master was not of their interest, and that appellees took by the foreclosure only the Boxburger interest, which does not justify procedure to recover possession of the whole premises.

The bill for foreclosure alleges that, subsequent to the making of the mortgage, Boxburger and wife executed a warranty

deed to one Josiah H. Sandoe, of one undivided half of the mortgaged premises, subject to the mortgage; that Sandoe had since died, leaving unknown heirs, and that they have some claim or interest in the premises, subject to the mortgage.

This is all that appears in regard to any interest of said heirs. It does not show a right of possession in them as against the mortgagees. But it is sufficient that the decree directs a sale of the whole mortgaged premises, and they were accordingly sold; and the decree orders that the parties in the cause who may be in possession of the premises, and any person who, since the commencement of the suit, has come into possession under them, shall surrender possession of the mortgaged premises to the purchaser; and the unknown heirs of Josiah Sandoe are not complaining of the decree, nor is appellant making any claim under them.

2. It is next objected, that appellees brought a suit of forcible entry and detainer before a justice of the peace against appellant for possession of the premises, and on the 21st of May, 1875, obtained a judgment for possession against appellant, and that thereby appellees are barred of this proceeding; but appellant took an appeal from that judgment, and the suit is now pending, undetermined.

The remedies are concurrent, either or both of which might be pursued until a satisfaction was had, which would then bar further proceedings. See *Vansant* v. *Allmon*, 23 Ill. 30. Were a bar or abatement to apply to either proceeding, it would rather be to the suit at law. The court of chancery has had jurisdiction of this whole subject since 1873, and it should not be ousted of its jurisdiction by the mere pending of the forcible entry and detainer suit.

This proceeding to obtain an order for a writ of assistance is not the institution of a new suit. It is simply another step in the foreclosure suit.

"*Pro hac vice*, the purchaser is a party to the decree. * * * He, then, who meddles with the property which is the subject of the decree, becomes, by that act, a party to the decree. It

can not be objected that the case is no longer *lis pendens* after a decree and sale and a conveyance executed, because the court of chancery is not *functus officio* until the decree is executed by delivery of possession." *Jackson* v. *Warren*, 32 Ill. 340; and see *Aldrich* v. *Sharp*, 3 Scam. 261.

3. It is lastly objected, that a judge of the circuit court has no power to make such order in vacation—that it can only be made in term time; and then, that this order must be preceded by an injunction to deliver possession.

The first branch of the objection is answered by the statute, which gives to the judges of the circuit court power, in vacation, "to hear and determine motions, * * * to make all necessary orders to carry into effect any decree previously entered, including the issuance of necessary writs therefor." Rev. Stat. 1874, 332, § 49.

As to the other part of the objection, it is only in the case where the decree of foreclosure contains no order for the surrender of the possession that it is required there should have been an injunction to deliver possession, before the issuing of a writ of assistance to put the purchaser in possession. But when the decree of foreclosure, as it did in this case, directs the mortgagor, or the party in possession of the mortgaged premises, to surrender up the possession to the purchaser, the court, upon the proper showing by affidavit being made, will issue a writ of execution of the order to put the purchaser in possession, without there having been a precedent injunction to deliver possession. *Aldrich* v. *Sharp*, *supra*.

Appellant came into the possession of the premises under Boxburger, the mortgagor, and one of the defendants in the suit, subsequent to its commencement and after the sale under the decree. All the requisite preliminary steps appear to have been taken, and the order was rightly made, and it is affirmed.

Order affirmed.

WILLIAM P. ANDRUS

v.

MARTHA J. COLEMAN.

1. VENDOR'S LIEN—*what is a waiver.* Where the vendor of land conveys the same to a married woman, and takes a deed from her husband for other land, with covenants of warranty, in part payment, and the husband's promissory note for the balance of the purchase money, this will be a waiver of his lien as vendor, and he must look to the husband alone for payment.

2. ESTOPPEL—*by deed.* Where a party conveys land to the wife of another, he will be estopped from questioning her title, and claiming that the husband is the owner. This will be ample recognition that the husband, in procuring the deed, was acting as his wife's agent.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was a bill, filed by Andrus, against Martha J. Coleman, to enforce a vendor's lien. The cause was heard upon bill, answer, replication and proof, resulting in a dismissal of the bill, and complainant appealed.

Mr. B. D. LUCAS, for the appellant.

Mr. O. T. REEVES, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The question is, whether appellant waived his right of lien as vendor when he conveyed the land to the appellee, Martha J. Coleman, having taken her husband's warranty deed for certain lands in Kansas in part payment, and his individual note to secure the payment of the residue of the purchase money.

We consider that appellant, having conveyed to appellee, is estopped from questioning her title. He did this knowingly and voluntarily, and it is too late now to say that the title, in fact, belonged to the husband, with whom he contracted. This is ample recognition of his knowledge of the husband being

the agent for the wife in the transaction, as she swears he was, and, therefore, when he accepted his covenants of warranty for the Kansas lands, and his individual note for the residue of the purchase money, he knew that he was relying on the obligations of a person other than his grantee for payment of the purchase money. *Cowl et al.* v. *Varnum*, 37 Ill. 184, settles the question that the taking of the note of the husband to secure the payment of the purchase money for land bought by the wife, through the husband, acting as her agent, is a waiver of the lien; and the same principle must apply where the vendor accepts the deed of the husband for real estate, with covenants of warranty, in payment. It is, strictly, the taking of an independent security, and is within the well recognized rule announced in *Conover* v. *Warren et al.* 1 Gilm. 498, that the lien is discharged by the taking of any independent security. See, also, *Boynton* v. *Champlin*, 42 Ill. 57.

Duke v. *Balme*, 16 Minn. 307, cited by counsel for appellant, is materially different, in its facts, from the present case; and, whether we shall hold the law to be as there laid down, it will be time enough to determine when the same state of facts shall be presented in a case requiring our determination. *Willard* v. *Reas*, 26 Wis. 540, is analogous to the present case, and is in harmony with our views.

The charge that appellee had notice, when she received her deed, that the purchase money was unpaid, is disproved, and the case is entirely free from every element of fraud. There is no reason to question the good faith of appellee's husband when he made the conveyance of the Kansas lands, and the subsequent development of a superior title was, evidently, as unexpected to him as it was to appellant. As against such a contingency, appellant took covenants of warranty, and with these he must be satisfied.

The decree is affirmed.

Decree affirmed.

PERRY HYATT *et al.*

v.

GILBERT H. BROWN *et al.*

BILL OF EXCEPTIONS—*when necessary.* The ruling of the court upon motions to dismiss for want of a bond for costs, and to dismiss an appeal for want of a sufficient appeal bond, must be preserved in a bill of exceptions, if its propriety is sought to be questioned in this court.

WRIT OF ERROR to the Circuit Court of Cumberland county.

This was an action of forcible entry and detainer, originating before a justice of the peace, and taken, by appeal of the defendants, to the circuit court. The court overruled defendants' motion to dismiss the suit for want of a bond for costs, and, on motion of the plaintiffs, dismissed the appeal for want of a sufficient appeal bond. No bill of exceptions was taken in the case.

Mr. F. A. ALLISON, for the plaintiffs in error.

Messrs. D. T. & D. S. MCINTYRE, for the defendants in error.

Per CURIAM: The questions attempted to be raised upon this record can not be considered, for the reason that there is no bill of exceptions preserving the rulings of the court below.

The judgment must be affirmed.

Judgment affirmed.

NATHANIEL S. HIGGINS

v.

MARY CURTISS *et al.*

1. TRUSTEE—*can not purchase at his own sale.* If a trustee in a deed of trust, in disregard of his duty, becomes the purchaser of the property, through another, at his own sale, the *cestui que trust* may, within a reasonable time after discovering the fraud, repudiate the sale and have the same

set aside; and, if he has disposed of it to innocent purchasers, and thus placed it beyond his power to reconvey, he may be required to account for its value.

2. PLEADING—*admission from pleadings in chancery.* Where a bill in chancery charged that the defendant, as trustee, having become the owner of the debt secured, became the purchaser at his own sale, through a relative, and the answer, after denying any collusion, generally, between the defendant and the immediate purchaser at the sale, admitted that such purchaser, soon after the sale, conveyed the property to the defendant, and did not set forth that the purchaser actually paid for the property at, or subsequently to, the sale, or that defendant paid him anything for the conveyance: *Held*, that the answer was a virtual admission that the defendant was, in fact, a purchaser at his own sale.

3. CREDITOR'S BILL—*judgment may be attacked for fraud.* On creditor's bill to enforce payment of a judgment of the county court allowing a claim against an estate, the administratrix, who is sole devisee, may show that the judgment is fraudulent and inequitable, if she was ignorant of the facts when the claim was allowed. She may contest the judgment the same as an heir on application to sell real estate.

4. JUDGMENT—*equity will set it aside when fraudulent and there is no laches.* Where a claim is allowed against an estate, which is, in fact, paid, but of which fact the administrator is ignorant at the time, he may, on discovering the facts, have the same set aside, in equity.

5. CROSS-BILL—*right of defendant to file.* On bill by a creditor whose claim is allowed against an estate, to subject certain lands alleged to have been fraudulently conveyed, to its payment, the widow of the deceased, who is administratrix and sole legatee, being a necessary party to the bill and having an interest, has the right to file a cross-bill, to have the judgment allowing the claim set aside as fraudulent.

6. AMENDMENT—*of answer to cross-bill, discretionary.* It is a matter of discretion with the court, whether it will allow an amendment of an answer to a cross-bill; and there is no error in refusing it, where no excuse is shown for not putting its matter in the original, and its truth is not shown by affidavit or deposition.

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

Mr. ARTHUR W. WINDETT, for the appellant.

Mr. JAMES K. EDSALL, and Mr. WILLIAM LATHROP, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Bill was filed by the appellant, Nathaniel S. Higgins, who claimed to have a judgment rendered in his favor by the county court of Champaign county, against the estate of James Curtiss, deceased, for $5421.25, and other creditors of said Curtiss, to subject lands, alleged to have been conveyed in fraud of their rights, to the payment of their claims. All, except Higgins, have released their claims in favor of the appellee Mary Curtiss, and it will therefore be necessary to allude only to the case as it affects Higgins. Numerous amendments were made, from time to time, to the bill, answers, cross-bill, etc., and, in this way, the facts have been unnecessarily complicated. We find it necessary, however, but to allude to the substance of the issues as presented on the final hearing, without regard to the order of time when they appear in the record.

The substance of the defense set up by Mary Curtiss to the relief sought by Higgins is this: On and prior to April 14, 1859, she was the owner, in her own right, as of her sole and separate property, of certain city lots in the city of Chicago, which had been conveyed to, and were held by, one Brown, in trust for her; that on that day her husband, James Curtiss, made his promissory note, payable to Phineas Mayhew, for $5000, payable in one year, with interest at ten per cent; that at the same time she, her husband and her trustee united in making a deed of trust to appellant, Higgins, on her property, to secure the payment of the note; that Higgins became the owner of the note, before maturity, and, shortly after its maturity, pretended to sell the property pursuant to the terms of the deed, to Mayhew, for the nominal sum of $1000, although it was, in fact, then worth $8500; that Mayhew purchased for Higgins, and that the pretended sale was, in fact, by Higgins to himself; that Mayhew, shortly afterwards, conveyed to Higgins, and Higgins has since sold and conveyed the property to Lester H. Robinson, who was a purchaser in good faith without notice, for $6000, or $6300; that the notice given of the pretended sale was insufficient in point of time, and only pub-

lished in a local campaign newspaper published in Chicago, of limited circulation; that Mayhew and Higgins are brothers-in-law, and they acted in conjunction to defraud the estate of Curtiss, and appellee in particular; that Higgins only credited on the note, as the proceeds of the sale, $394; that appellee Mary Curtiss resided in Champaign county, and had no notice, in fact, of the pretended sale by Higgins at the time he presented his claim against the estate of Curtiss in the county court of Champaign county, and she did not learn that the sale was made to Higgins himself until since she filed her first answer to his bill in the present case. She alleges that she was ignorant and unacquainted with business matters, and that, by reason of her poverty and that of the estate of James Curtiss, she was unable to bear the expenses incident to looking after the matters connected with the trust deed. From all which, it is insisted, the judgment in favor of Higgins is fraudulent and its payment should not be enforced.

Substantially the same facts are set up by the appellee Mary Curtiss, in a cross-bill filed by her against Higgins. In that she prays that Higgins' judgment be declared void, and set aside; that he be decreed to have taken and held the title to the property obtained by him through Mayhew, in trust for her; and that, after deducting the amount due as secured by the deed of trust executed to him by herself, her husband and trustee, he be required to account to her for the residue of the value of the property, etc.

The court, on hearing, dismissed the original and amended bills of Higgins, and decreed that the judgment obtained by Higgins in the county court against the estate of James Curtiss was fraudulent and that the same be set aside, and that he was indebted to appellee Mary Curtiss, by reason of his conduct as trustee, in the sum of $1606.45, with six per cent interest from December 31, 1861, with annual rests to September 21, 1874, amounting, in all, to $3372.43.

The objection that the record fails to show the decree was entered or made by the court, judicially, etc., is obviated by the amended record.

The second and third objections are, that the court erred in dismissing the original and amended bills, and in setting aside the judgment in favor of Higgins, against the estate of Curtiss, and they will be considered together.

While Higgins, in his answer to appellees' cross-bill, denies that there was any collusion between himself and Mayhew in regard to the property sold at the trustee's sale, he admits that Mayhew conveyed the lots to him after the sale, and he does not claim either that Mayhew actually paid for the lots at or subsequent to the sale, or that he paid Mayhew anything for them. He admits that he was, himself, the owner of the note at the time of the sale, and says that he credited the amount of the sale, less the costs thereof and amount paid for taxes and other liens as provided in the trust deed, on the note.

This we can but consider a virtual admission that he was, in fact, a purchaser at his own sale. The general denial of collusion is rebutted by the facts conceded. If the purchase by himself from Mayhew was in good faith, he should have alleged, distinctly and positively, facts from which the court could clearly see that it was in good faith.

Were the statements of this answer matter of proof as to the *bona fide* character of the sale to Mayhew, and by Mayhew, no court could for a moment hesitate to hold that the transaction was colorable merely, and voidable.

The evidence is clear, that when the note was presented to Mary Curtiss, as administratrix, for allowance in the county court, she was ignorant of the fact of the sale; and, as Higgins' attorney, who presented the claim, says, did not appear to comprehend the transaction; and there is no pretense that she was informed of Higgins' interest in the sale, until long since the commencement of the present suit.

We regard the evidence as sufficiently explaining her conduct, and relieving her from the charge of *laches* in defending in the county court against the claim; and from taking steps to disaffirm the course pursued by Higgins as trustee.

The trustee, having become the owner of the indebtedness secured by the deed making him trustee, and having, in viola-

tion of his duty, and in fraud of his *cestui que trust*, taken title to the property himself, through pretense of his own sale, and subsequently conveyed it for a valuable consideration to an innocent purchaser, was in no condition to insist that he should be paid from the estate of Curtiss the balance he pretended was due on the indebtedness.

There is much proof tending to show actual fraud in the sale; but, aside from this, public policy forbids that a trustee shall purchase at, or be personally interested in, a sale to be made by himself in the performance of his duties as trustee. When, in disregard of his duty, he becomes a purchaser of property at his own sale, the *cestui que trust* may, within a reasonable time, repudiate and disaffirm the sale, and have a conveyance of the property; or, if he has disposed of it to innocent purchasers, and thus placed it beyond his power to convey it to the *cestui que trust*, he may be required to account for its value. These principles are well settled and familiar, and need no citation of authorities to vindicate their correctness.

By the will of James Curtiss, appellee Mary Curtiss was his sole legatee. Any judgment, therefore, in favor of Higgins, in the county court, against the estate, if satisfied, must be satisfied by the payment of money which would otherwise belong to her, for the property was hers, though charged with the payment of the debts. Where the proceeding is by the administrator, to obtain a decree to sell lands for the payment of debts, it has been repeatedly held, the heir may appear and contest, notwithstanding the claims for which payment is sought have been adjudged against the administrator by the county court, and we are of opinion the same principle is applicable here. *Stone et al.* v. *Wood*, 16 Ill. 177; *Hopkins* v. *McCann*, 19 id. 113; *Moline Water Power and Manufacturing Co.* v. *Webster*, 26 id. 233.

If the right to contest be established, it is clear the defense to the original bill was complete. Appellee had the right to have the note treated as paid by his conversion of the trust property, and having elected to do so, he had no claim to enforce.

But even if we are incorrect in assuming that, occupying the position she does in this suit, a judgment of the county court would, ordinarily, be conclusive against her, we think this judgment could not be so regarded, because it was fraudulent, and obtained by reason of the ignorance of the administratrix of the defense which existed against it.

It was not equitable that the trustee, having converted the trust property, should enforce payment of the debt to himself, which it was given to secure. This would have been a good defense to the claim presented in the county court, and it was not through the fault of Mary Curtiss that knowledge of it was withheld from her.

The objection that Mary Curtiss having been made defendant to the original bill as administratrix, and having subsequently ceased to be administratrix, she could not, afterwards, have relief on a cross-bill filed by her individually, has no support in the record. The record shows she was made a party and summoned as an individual simply.

Mary Curtiss was a necessary party to the original suit, and she had an equity arising out of the claim there attempted to be enforced, and had a right to file a cross-bill to enforce it. *Jones* v. *Smith*, 14 Ill. 229.

The objections to the ruling, on account of the introduction of evidence, are unimportant. They do not at all affect the question whether Higgins was a purchaser at his own sale, and it is upon this ground solely that we have placed our condemnation of it.

Appellant waived his demurrer to the cross-bill by answering, and it is now too late to consider whether the court erred in overruling it.

It was discretionary with the court to allow or refuse the offered amendment to the answer to the cross-bill, and since no excuse was offered for not having put the matter of it in the answer filed, and its truthfulness was not shown by affidavit or deposition, there was no abuse of discretion in refusing it.

The decree is affirmed.

Decree affirmed.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

SOUTHERN GRAND DIVISION.

JUNE TERM, 1876.

ALEXANDER MCCLELLAND *et al.*

v.

ABRAM MITCHELL.

NEW TRIAL—*on finding from evidence.* Where the evidence as to a particular issue is conflicting, a new trial will not be granted unless the finding of the court, where the trial is without a jury, is palpably against the weight of the evidence.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. CASEY & DWIGHT, for the plaintiffs in error.

Mr. GEO. W. WALL, for the defendant in error.

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

This was a suit brought by Mitchell against six makers of a promissory note for $3000, given December 20, 1869, and payable on or before December 20, 1870, with ten per cent per annum interest, upon which were indorsed sundry credits.

The defendants pleaded usury, setting up that the note in suit was given in place of a previous note given to Mitchell by three of the defendants on the 1st of September, 1868; that in the first note there was reserved interest at the rate of fifteen per cent per annum, and that the second note was a mere continuation of that original transaction.

The case was before this court at a former term, and is reported in 77 Ill. 525, where, without expressing any opinion as to the sufficiency of the evidence as showing usury in the first note, it was held that, admitting to be true all that the defendant's testimony tended to prove, the facts would not show that the second note, the one now in suit, was tainted with usury, and the only effect would be, if there had been usury in the first note, to subject the second note to a deduction of the amount of interest which had been paid on the first note. The case, having been remanded, came on to be tried again before the circuit court of Marion county, at the February term, 1876.

By agreement of parties, the cause was submitted to the court for trial without a jury, the issues were found for the plaintiff, and the damages assessed at $2593.85, which was the sum appearing to be due upon the note, supposing there was no deduction to be made on account of usury. The defendants took this appeal from the judgment.

The error assigned is, that the finding of the court was contrary to the evidence.

The court below must have found there was no usury in the first note. The evidence upon that subject was contradictory. Without reviewing it, we will say that, after a careful examination of the whole testimony, we can not say that the finding of the court was so palpably against the weight of evidence as to require that it should be disturbed.

The judgment must be affirmed.

Judgment affirmed.

W. A. LOCKHART

v.

THOMAS M. WOLF.

1. CONTINUANCE—*party's attorney may make affidavit.* It is no valid objection to an affidavit for a continuance, that it is made by the defendant's attorney, where the defendant is a non-resident, and there is no personal service on him.

2. SAME—*less diligence required when there is no actual service.* Where there is no personal service of process on the defendant in attachment, and a copy of the notice is not mailed to him, and he learns of the pendency of the suit too late to take depositions to prove facts material on the defense, the court should grant him a continuance. The same degree of diligence will not be required as in case of personal service.

3. SET-OFF — *of executions.* If one party assigns a judgment in his favor to a third person, who has no notice of the defendant's equities and rights, the assignee will be protected, and, in such case, the defendant can not set-off any subsequent recovery by him, against the same.

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

Messrs. WILDERMAN & HAMILL, for the appellant.

Mr. JAMES M. DILL, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the St. Clair circuit court, by Thomas M. Wolf, plaintiff, and against W. A. Lockhart, defendant, commenced on the second day of November, 1874, counting on services for feeding cattle of defendant, and claiming two hundred and ninety dollars and fifty cents therefor. On the seventh day of January, 1875, the plaintiff sued out an attachment in aid of his suit, alleging that defendant was a resident of the county of Bexar, in the State Texas; that his post office address was unknown; and that the firm of Buchanan & Co., of St. Clair county, Illinois, were indebted to the defendant. One of the firm of Buchanan & Co. was served as garnishee.

Notice of the pendency of these proceedings was published

in the proper newspaper, the first insertion of which was on the tenth day of March, 1875, and the last on the eighth day of April thereafter. The term of the court to which the summons in the action of assumpsit was made returnable, was the January term, 1875. The attachment proceedings were set for the April term, which commenced on the third Monday of that month, being the nineteenth day thereof. Under the rules of the court, as we must infer, and in apt time, D. W. Sadler, an attorney of the court, acting on behalf of the defendant, and as his attorney, on the fourth day of May, filed a plea to the action, and gave notice of a set-off, and issues were made up. On May 14, the cause was called for trial, whereupon the attorney of the defendant presented an affidavit of his own, and moved for a continuance thereon, which motion the court denied. By consent, the cause was tried by the court, and judgment rendered, on the plaintiff's testimony alone, for the amount claimed, and defendant appeals.

It is urged, by appellee, as a grave objection to the affidavit for a continuance, that it was made by the attorney of the defendant, and *McCreary* v. *Newberry*, 25 Ill. 496, is cited. As we read that case, it does not appear the affidavit was held objectionable, because made by the attorney. The ground was, that the matter of the affidavit did not fit any of the pleas filed. We can conceive of many cases, in which, from necessity, an attorney of a party may be called upon to make such an affidavit, and the court, in deciding upon it, must consider all the circumstances. Had the defendant been personally served with summons, or had the clerk notified him of the pendency of the suit, by sending to him a copy of the notice as published, all the diligence necessary and required in any case where there has been personal service, or notice, would be required of the defendant, before he should be allowed a continuance; but he had no knowledge of the suit, and in apt time, after the issues were made up, his attorney makes an application for a continuance, showing, in his affidavit, the impossibility of obtaining a deposition, for want of time, and showing the materiality of the testimony. The claim was sustained by the plaintiff's

unsupported testimony. The affidavit states most positively that defendant is not indebted to the plaintiff, but, on the contrary, the plaintiff is indebted to him.

We fail to see in what particular the affidavit is deficient. As much diligence is shown as could be expected under the circumstances, and that the absent testimony was material, can not be questioned. We are of opinion a continuance should have been allowed; that the defendant, not being in default, should have an opportunity to make his defense.

The action was brought on a contract for the agistment of cattle of the defendant, in which he claims damages for losses occasioned by bad treatment of plaintiff. If this judgment stands, defendant is precluded from any recovery against the plaintiff in a subsequent action; and it is stated, in the affidavit, that plaintiff is insolvent, and unable to respond in damages.

It is said, by appellee, in this connection, that appellant can avail of sections 58 and 59 of chapter 77, R. S. 1874, relating to a set-off of executions. But suppose the plaintiff shall assign this judgment, for a valuable consideration, to a third party, without notice of any equity on the part of defendant, what then? Equity would protect the assignee of the judgment, and the defendant's claim be irrecoverably lost.

We are of opinion the cause should have been continued. It was error to refuse a continuance, and, for the error, the judgment is reversed, and the cause remanded for a new trial.

Judgment reversed.

MATTHEW E. HAMILTON *et al.*

v.

SYLVANUS JOHNSTON.

1. GUARANTY—*presumption from position of name.* Where a person's name appears on the back of a note, and is signed before delivery, the presumption is that he is a guarantor and not a maker; but this is liable to be rebutted by proof that the parties intended otherwise.

2. SAME—*liability of surety to guarantor who pays debt.* There being no relation of co-surety between a guarantor and the sureties of the principal maker, he may recover of all the makers of the note any sum of money he is compelled to pay as guarantor, even though he knew that part of them were only sureties. As to the guarantor, all the makers are to be treated as principals.

3. SAME—*request of one maker of note to one to become guarantor is act of all.* Where the principal maker in a promissory note, after others who in fact are sureties for him have signed the same, procures another person, in their absence and without their knowledge, to indorse the same as guarantor, who is compelled to pay the same, the fact that the guarantor became liable without the request of the sureties is no defense in a suit against them by the guarantor. They all being primarily liable, a request of any one of them to guaranty payment is the act of all.

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

This was an action of assumpsit, by the appellee against the appellants, Matthew Hamilton, Charles Dombach, and P. Bauman & Bros., to recover back money paid for their use as guarantor of their promissory note. The plaintiff had judgment, from which Hamilton and Dombach appealed.

Mr. WM. H. UNDERWOOD, for the appellants.

Messrs. E. L. & C. W. THOMAS, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Samuel Stookey held a promissory note executed by the defendants and one Schneider, which had been given to secure indebtedness from the Baumans alone. Not being satisfied with the security, Stookey required that a new note should be executed, which was done, and delivered to and accepted by him in lieu of the first note. This was signed, on its face, by the defendants alone, and the names of the plaintiff and Peter Deitchman, John N. Moore, Robert H. Hamilton and John C. Hamilton, were written on its back.

Separate judgments were obtained by Stookey on this note, against the defendants, as makers, and against the plaintiff and

the others whose names were written on its back, as guarantors. Plaintiff paid something over $1000 on the last named judgment, and brings this action to recover the amount thus paid.

The question is, was the plaintiff a guarantor or only a co-surety?

The presumption, though the fact is susceptible of being proved that the party intended otherwise, from his name being on the back of the note, is, that he was a guarantor and not a maker. *Camden et al.* v. *McKoy et al.* 3 Scam. 437.

The plaintiff testified, that his intention in indorsing the note was not to become a surety; that, when requested by Bauman to sign the note, "he refused to sign the face of it," for the reason, as he says he stated to Bauman, that he "would not go security for as big a note as that for anybody;" that Bauman then requested him to sign the back of the note, adding this language: "You are perfectly safe. The note is good. I just want you to sign the back of the note, merely to have your name;" and that he thereupon wrote his name on the back, and did not intend or understand he was thereby becoming surety on the note.

We have found no evidence in the record tending to contradict this. The evidence of the defendants is, simply, that the plaintiff's signature was placed on the note when they were not present, and that they did not request him to guaranty or become surety for them.

The reasonable conclusion, from the evidence, is, that, as between the payee of the note and the plaintiff, he was a guarantor, and properly sued as such. And this was certainly the position in which he stood towards the principals in the note.

There is evidence, however, that he knew, when he signed the note, that Hamilton and Dombach were not principals, but sureties, merely, for the Baumans, and it, therefore, becomes necessary to inquire whether, for the purposes of this case, he sustains the same relation towards them that he does towards the Baumans.

We held in *Paul* v. *Berry*, 78 Ill. 158, that parties signing a promissory note may, by agreement among themselves, determine what relation they occupy towards each other; and that parties signing with the understanding that they are sureties for and not co-sureties with certain parties, can not be made liable for contribution to them. See, also, Decolyar on Guaranties, 345.

Here, Hamilton and Dombach were jointly and severally liable with the Baumans for the payment of the note when the plaintiff was requested to indorse it. His undertaking was not that he would, individually, or jointly with them, pay the note, but that they should pay it. His undertaking did not increase their liability, and whether he did or did not guaranty the payment of the note, was, therefore, of no consequence to them. They had no legal claim that he should become liable in any way, nor did the fact of his becoming thus liable prevent others that may have so desired, from becoming liable with them, so as to divide the burthen resting upon them.

There being no relation of co-suretyship between the plaintiff and Hamilton and Dombach, it follows, that, notwithstanding the plaintiff knew they were, as between themselves and the Baumans, sureties merely, yet, as to him, they were necessarily all principals, and, being such, there is no question that money that he has paid, which it was their duty in the first instance to pay, may be recovered. It can not be said he is a mere volunteer, for his liability is assumed by the request of one of their number, whose act in that regard is the act of all then liable for the payment of the note.

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

Judgment affirmed.

JESSE LAIRD

v.

SAMUEL K. ALLEN.

1. STATUTE OF FRAUDS—*performance to take case out of.* Possession taken of land by a purchaser under a verbal contract, the making of substantial improvements thereon and payment of the purchase money, will take the case out of the Statute of Frauds, and entitles the purchaser to a decree for specific performance.

2. DEFAULT—*admits material facts alleged.* Where a bill for specific performance is taken for confessed as to the original vendor, and it alleges that he is equitably bound to convey one-half of the land sold, the complainant having purchased a half interest from the original vendee, and paid his part of the purchase money, the vendor, by his default, admits the complainant's right to a conveyance, and can not be heard to object that the whole price has not been paid.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. STOKER & SON, for the appellant.

Mr. THOS. S. CASEY, Mr. C. H. PATTON, and Mr. S. L. DWIGHT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that appellant entered into a contract with the executors of S. Williams, deceased, for the purchase of an eighty-acre tract of land for $1000. He was to pay for the same in annual installments. He, afterwards, sold one-half of the tract to appellee, who was to pay therefor one-half of the purchase money, as it should fall due, to the executors, and receive a deed therefor. He made such payments, not strictly as they fell due, but on extension of time given by the agent of the executors. Appellant, it seems, at one time directed the agent to convey the forty acres to appellee when he should pay for the same, but subsequently countermanded the order. Appellee tendered the cost of making a deed to him to the

agent, but he declined to make it, and thereupon he filed this bill, making appellant and the executors parties defendant.

Appellant answered the bill, but, failing to answer on their part, it was taken as confessed against the executors; and on a trial on the bill, answer, replication and proofs, the court below found for complainant, and decreed a specific performance, and that the forty purchased by appellee be conveyed to him by the executors.

The agreement between appellant and appellee was verbal, and never reduced to writing, but the latter was admitted to possession of the forty-acre tract thus contracted for, and he made some substantial improvements by clearing a portion and reducing it to cultivation. The default against the executors admits, and the evidence establishes the fact, that appellee had paid up the purchase money due on his forty-acre tract. This, according to a uniform course of decisions, takes the case out of the Statute of Frauds, and entitles appellee to a conveyance.

But it is urged that, notwithstanding these acts were performed, the executors had not relinquished their lien on the portion sold to appellee, for the payment of the balance of the purchase money for the whole eighty-acre tract. The answer to this is obvious. Appellee, in his bill, alleges that the executors are equitably bound to convey the forty-acre tract to him, and they admit it by their default to answer. They are not here complaining of the decree. They have not joined in the appeal, nor have they empowered appellant to urge any error in this record for them. It does not concern him whether his co-defendants relinquish their lien or not, on the remainder of the land; but, having permitted the bill to be taken as confessed, they could not urge the objection, even if they were here as appellants. Had they desired to preserve a lien on this forty-acre tract, they would, no doubt, have answered, setting up their lien.

The evidence shows that appellant directed Williams, the agent of the vendors, to make a deed to appellee when he should pay the purchase money on his half of the tract—not

that he should convey when he paid on that half, and a certain amount on the other half. This, we think, sheds volumes of light on the question. If that was not the agreement, he surely would never have given such directions; nor does the fact that he subsequently countermanded the order militate against the inference. Before he forbid the conveyance, he and appellee had differed about the application of funds arising from the sale of some corn by appellant to appellee, the former contending that they were to be applied on his part of the land purchase, and the latter that a portion had been so applied, and the balance paid to appellant as for his use. We infer that this dispute led to the countermanding of the direction for the conveyance, and we are also of opinion their dispute about that transaction in nowise impairs or affects appellee's right to have the contract specifically enforced.

We think the evidence shows a clear ground for equitable relief, and that the court below did right in decreeing the relief sought, and the decree must be affirmed.

Decree affirmed.

THE CITY OF ALTON

v.

THE ÆTNA INSURANCE COMPANY.

1. MUNICIPAL CORPORATION—*acts beyond powers conferred are void.* Any acts a city council may assume to perform not fairly within the powers conferred on it by statute, are *ultra vires.*

2. SAME—*charter construed as to taxing insurance companies.* Authority in a city charter to license and tax insurance companies or their agents, to raise a fund with which to procure apparatus for extinguishing fires, and constructing reservoirs, does not justify an ordinance levying a tax upon premiums earned by such companies in the city to constitute a fund to be applied to the support of the fire department generally.

WRIT OF ERROR to the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. C. P. WISE, for the plaintiff in error.

Mr. LEVI DAVIS, and Mr. HENRY S. BAKER, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

We shall not now inquire whether the legislature could rightfully confer upon the common council of the city of Alton power "to license or tax insurance companies, or their agents, and insurance brokers, for the purpose of procuring apparatus for the extinguishment of fires, and procuring and establishing proper reservoirs for the same purpose," nor whether that provision of the city charter has been repealed by the adoption of the constitution of 1870 or by subsequent legislation. Conceding the validity of this clause of the charter, we are of opinion it contains no warrant for levying a tax upon the premiums of insurance companies doing business in the city, for the support of the fire department, and hence the ordinance under which the prosecution was commenced can not be sustained.

The authority given is, to license or tax insurance companies for the purpose of raising a fund with which to procure apparatus for extinguishing fires, and constructing reservoirs for the same purpose; but this ordinance provides for levying a tax upon premiums earned by all insurance companies doing business in the city, "to constitute a fund to be applied exclusively to the support of the fire department," which may be, and doubtless is, in this case, an essentially different purpose from the one indicated in the charter. All the evidence this record contains on this subject is the stipulation, the city has "an organized fire department, and that the money which may be recovered will be applied for the purposes as provided by the said charter and ordinances."

It will be observed the fund to be raised is for the general support of the fire department, without designating, as in the charter, the specific objects. No provision is made in the ordinance for appropriating the fund to be raised by the pro-

posed tax for the purpose of procuring apparatus and constructing reservoirs for extinguishing fires. That is the extent of the authority conferred upon the city council, and we are not at liberty to enlarge its powers in that direction by construction. Any acts the city council may assume to perform not fairly within the powers conferred are *ultra vires.*

The stipulation as to the evidence excludes the idea the fund to be realized from the source indicated in the ordinance, is to be used for procuring fire apparatus and constructing reservoirs for the fire department. We may judicially know, in cities having a system of water works, reservoirs, such as are contemplated by the charter, are no longer used. How it is in the city of Alton, we have no means of knowing, as the evidence is silent in that regard. All we know from the record is, the city has "an organized fire department," to the support of which the fund to be raised by the proposed tax is to be appropriated, but of what it consists, we are not advised by anything in the testimony or the admission of the parties. If we are at liberty to infer anything in regard to it, we would presume it is the usual "fire department," as organized in cities, and consists of engines, hooks and ladders and other apparatus used in extinguishing fires, all of which is under the control and management of men employed and paid for that purpose. The fund to be raised by the tax under this ordinance, it is expressly provided, shall be for the support of the "fire department"—that is, the whole department, and not simply for procuring apparatus and constructing reservoirs for extinguishing fires, as authorized by the charter.

There being a want of authority in the city to enact the ordinance in question, it is for that reason invalid.

The judgment will be affirmed.

Judgment affirmed.

DANIEL F. HARRAH

v.

JOHN CONLEY *et al.*

1. PRACTICE—*establishing disputed corner.* On petition for the appointment of a commission to establish a lost or disputed corner, an answer from the defendants is proper, where they seek to deny that the corner is lost or in dispute.

2. DEFAULT *when answer is filed is error.* Where the defendants in a petition to have a commission of surveyors appointed to establish a corner alleged to be in dispute, answer, denying that it is in dispute, it is error to default the defendants.

3. SAME—*answer allowable.* In a proceeding, under the statute, to permanently locate a disputed line or corner, an answer may be interposed to the petition as in any other case.

WRIT OF ERROR to the Circuit Court of Jasper county; the Hon. JAMES C. ALLEN, Judge, presiding.

Mr. JOHN P. HARRAH, and Mr. JAMES W. GIBSON, for the plaintiff in error.

Mr. JOHN H. HALLEY, for the defendants in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a petition presented at the December term, 1873, of the circuit court of Jasper county, under an act to provide for the permanent survey of lands, approved March 25, 1869, for the purpose of obtaining the appointment of a commission of three surveyors to permanently locate a certain section corner, which was alleged in the petition to be in dispute.

Upon the filing of the petition, three of the defendants, who had been notified, appeared and put in an answer, in which they expressly denied that the section corner was in dispute, but set up that the same had been duly and properly established.

The court, without taking any action in regard to the answer, on motion of the petitioner, allowed the defendants to be called

and defaulted, and appointed three surveyors to survey and establish the section corner, as prayed for in the petition.

The surveyors appointed to make the survey made no change in the location of the section corner, but in their report affirmed the corner as previously surveyed and established. The court confirmed the report, and rendered judgment against the petitioner for all costs of the proceeding.

The rendition of judgment for all costs is assigned as error by the petitioner, and the defendants assign as a cross-error the decision of the court in allowing a default to be entered while their answer was on file.

Whether the court erred in rendering judgment for all the costs against the petitioner, it will not be necessary to inquire, as the disposition of the cross-error will dispose of the case.

In an action at law, where a plea has been filed, unless it has been stricken from the files or otherwise disposed of, the court is powerless to enter the default of the defendant.

The same rule prevails in a proceeding in chancery, where an answer has been put in by the defendant.

Whether this may be regarded as a proceeding at law or in equity, is of no importance. It is enough that each and every material allegation in the petition was met by a square denial by the answer of the defendants.

If the answer was defective, exceptions should have been interposed by the petitioner. If, on the other hand, no answer was authorized in a proceeding of this character, a motion should have been made to have it stricken from the files. No objection, however, appears to have been made to the answer. Under this condition of the record we are aware of no rule of practice which would sanction the action of the court in allowing the defendants to be defaulted.

No reason is perceived that would debar the defendants from answering the petition in this case in like manner as they could interpose an answer in any other case; indeed, had the court regarded the answer, the necessity of appointing the commission would have been obviated, as the report of the surveyors demonstrated that the section corner was not in dis-

pute, but had been previously established as set up in the answer.

For the error indicated, the judgment will be reversed and the cause remanded. The costs of this court will be taxed to the plaintiff in error.

Judgment reversed.

JAMES HARRINGTON *et al.*

v.

MARY STEES *et al.*

1. NUNCUPATIVE WILL—*must be in last illness.* At common law, it was not essential to the validity of a nuncupative will that the testator should have been ill at all. The statute is a limitation of the common law power, and requires that it shall be made in the testator's last illness.

2. SAME—*what is last illness.* If a person, in a sickness, from which he afterwards dies, being impressed with the probability of approaching death, deliberately makes his will in conformity to the statute, it will not be rejected because he may, in fact, have had time to reduce it to writing. It is not necessary that he should have no hope of recovery.

3. SAME—*request to attest.* Under the statute, no formal request of the testator to the attesting witnesses is required. It is sufficient if his desire is clearly manifested that they bear witness to the same.

WRIT OF ERROR to the Circuit Court of Edwards county.

Mr. S. Z. LANDES, Mr. A. B. MATHEWS, and Messrs. CASEY & PATTON, for the plaintiffs in error.

Messrs. BELL & GREEN, for the defendants in error.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This was a bill in equity, by James Harrington and others, the next of kin of Henry H. Harrington, deceased, to contest the validity of a nuncupative will in favor of Mary Stees, alleged to have been made by deceased in his last sickness. The will was reduced to writing, and, together with the attest-

ing oaths, was presented to the county court and admitted to probate, and letters testamentary were issued to Robert Bell, who, with Mary Stees, was made defendant. They both filed answers, and, issues being formed, a jury was waived and the issues tried by the court. On the hearing, the circuit court found for the defendants, and dismissed the bill. The complainants bring the record here by writ of error for review.

At the first hearing here, a judgment was rendered reversing the decree of the circuit court, ordering a decree to be entered in this court declaring the nuncupation invalid as a will. On petition of defendants in error, a rehearing was granted, and, upon further consideration, a majority of the court have arrived at a different conclusion, and are of opinion the decree of the circuit court should be affirmed.

The bill alleges that Henry H. Harrington died on the 13th of November, 1869, and that, on the 16th of the same month, an instrument of writing, purporting to be his last will, was filed in the county court, as follows:

"Be it known that we, the undersigned, were present on the 11th day of November, 1869, at the residence of Henry H. Harrington, deceased, in the city of Mount Carmel, county of Wabash, and State of Illinois, who was then in his last sickness. One of us, George W. Hughey, said to Mr. Harrington: 'Do you know what you said to me, in the afternoon, in regard to your temporal affairs?' Mr. Harrington said: 'I do.' Mr. Hughey then said to Mr. Harrington that the time was passed for having his temporal matters settled in that way (meaning that it was too late for him to get married), and that he would better make a will.

"Then the other of us, William B. Ridgway, said to Mr. Harrington that if he would tell us, as witnesses, what disposition he wanted to make of his property, we could testify to the fact in the probate court, and that it would answer as well as a written will.

"Then Mr. Harrington said: 'I intended to marry Mary Stees. This arrangement was made before I was taken sick, and we were prevented from consummating it by my sickness.

It has been my intention, all the while, that she should have everything I have, real and personal, and that is my will now.'

"Mr. Hughey then said to Mr. Harrington (referring to what Mr. Harrington had just said): 'This is your last will and testament, made in our presence, as witnesses.'

"Mr. Harrington said: 'Yes.' Mr. Harrington then paused a minute, seeming to be in a study, and then said: 'My life insurance policy (five thousand dollars) I want to go direct to her, without going through a course of administration.'

"We declare that we were present and heard the above words spoken by the said Henry H. Harrington, during his last sickness, and that, at the time of pronouncing the same, we believed him to be of sound mind and memory, and that he did, at the same time, desire us to bear witness that such words were his will, and that the speaking of said words was not procured by fraud, compulsion or other improper conduct, and that the said Henry H. Harrington departed this life on the 13th of November, 1869.

GEORGE W. HUGHEY.
WILLIAM B. RIDGWAY."

The bill charges that the supposed will was not made "in time of his last sickness," as contemplated by the statute; that the making of the same was procured by Hughey and Ridgway, in behalf of Mary Stees, by fraudulent acts, and they exercised undue influence over the mind of Harrington, so that the making thereof was not an act of his own free agency; that, at the time, Harrington was feeble in body and mind, laboring under a disease commonly called "quick consumption," so that he was incapable of making a will, and was not of sound mind and memory. These allegations are denied by defendants.

Deceased had been ill for some months before his death, and had been under the care of Dr. Lesher for two months before his death. He was able to be at his store about two weeks before he died. but for the last week or ten days was so ill that his physician visited him daily, and sometimes twice or three times a day, and during this time he was unable to rise from

his bed without assistance. On Wednesday night, November 10, 1869, he seemed much prostrated from too copious evacuations from the bowels, caused by repeated doses of oil and salts prescribed by his physician. This prostration continued until Thursday forenoon. He then rallied somewhat, but grew gradually weaker until death, which occurred Saturday morning, November 13, 1869.

On Wednesday night, sometime before midnight, Mr. Stein (a merchant, who had come to sit up with him that night) was sent by Mr. Harrington for Mr. Ridgway, Mr. Hughey and Mrs. Taylor, Harrington saying to Stein that he wished to see and speak with them. Shortly before this, Harrington, in Stein's presence, said to Mary Stees, when speaking of his temporal affairs, that they had done much for him, and that he would pay them well for it. To which Mary Stees replied: "Harry, attend to your spiritual matters, and let your temporal matters go." Harrington then said that was right; he would like to have everything in order, or something to that effect. Harrington told Mary Stees that he wanted Ridgway, Hughey and Mrs. Taylor sent for, saying he would like to have them sing and pray with him, and he wished to talk to them, anyway. After their arrival, a prayer meeting was held in the room of the invalid, Mr. Ridgway, Mr. Hughey, Mrs. Taylor, Mary Stees and her brother, R. K. Stees, being present. After these religious exercises, Mrs. Taylor, Mary Stees and R. K. Stees retired into an adjoining room, and Mr. Hughey and Mr. Ridgway were left alone at Harrington's bedside, and soon after this the conversation occurred which is set up as a will.

It is contended, first, that this will was not made "in the time of the last sickness" of deceased, in the sense in which the words are used in the statute. It is strenuously insisted that such a will, to be valid, must have been made *in extremis*, or when the testator is overtaken by sudden and violent sickness, and has not time or opportunity to make a written will. This rule was laid down by Chancellor KENT in the case of *Prince* v. *Hazelton*, 20 Johns. 501. That case was decided by a mere

majority of the court, and Mr. Justice WOODWORTH dissented, in a very elaborate opinion. This question received a very able and critical review in the case of *Johnson* v. *Glasscock et al.* 2 Ala. (N. S.) 242, where the case of *Prince* v. *Hazelton* and the authorities relied upon by Chancellor KENT are very fully considered. In the latter case, the court deduce the following rule: "If a person, in the sickness of which he subsequently dies, *impressed with the probability of approaching death*, deliberately makes his will in conformity to the statute, we do not feel authorized to say that it will be invalid because, in point of fact, he had time and opportunity to reduce it to writing."

This rule seems to go as far as the statute permits the courts to go. At common law, it was not essential to the validity of a nuncupative will that the testator should have been ill at all. The statute is, in this regard, a limitation of the common law powers. The words, "in the time of the last sickness," had no technical signification at the time of the passage of the statute. These words must be taken in their ordinary signification. The courts have no power to take from or add to the statute. It is their duty to carry out the will of the legislature as found in the words of the statute, and the necessary and reasonable implications arising from these words. The statute requires it to be proven that the will was made "in the last sickness." It is a reasonable and necessary implication that it must also appear that the testator, at the time of making the will, supposed that his then sickness would prove his last sickness—in other words, that he should be impressed with the probability that he would never recover.

Tested by this rule, it seems plain that this will was made "in the time of the last sickness," within the meaning of these words as used in the statute.

Dr. Lesher, in speaking of the mental characteristics of the deceased, as observed by him, mentioned his "feeling of resignation to his probable dissolution." The mere fact that he sent out in the night time for his friends and members of his church to pray with him, strongly tends to show that he was

impressed with the probability of approaching death. Persons, having no impression that they are probably approaching the end of life, do not usually send out in the night time for the clergy and others to hold religious services. His conversation with Mary Stees, in the presence of Mr. Stein, just before he sent out for his neighbors, necessarily implies the idea of the probable approach of death. He is telling her that they had done much for him, and that he would pay them well for it, when she interposes, saying: "Harry, attend to your spiritual matters, and let your temporal matters go." He replies: "That is right; I would like everything in order." What does all this mean, if it does not necessarily imply the idea that it was probable that he would not recover?

Again, when the Reverend Mr. Hughey suggested that it was too late to adjust his temporal matters in the manner he had intended, and Mr. Ridgway suggested that his temporal matters might be adjusted by an oral will, instead of replying that he had no idea that death was approaching, or saying that there was time enough left, he accepts the suggestion, and deliberately and distinctly declared what was then his will, and particularly expresses his wish that he wanted his life insurance to go direct to Mary Stees, without going through a *course of administration.* A "course of administration" comes only after death. Men do not usually talk and act thus unless they are impressed with the probability of approaching death. It is plain that he was then and there so impressed. It is not necessary that the testator should have been without hope of recovery. It is an adage, "So long as there is life there is hope." There may well be hope while the mind is impressed with the probability of death.

There is nothing in the record tending, in any degree, to repel this idea, except the impression of Mr. Ridgway. He gives the grounds of his impressions, and, on examination, it is apparent that his inferences had no foundation in fact.

It is next insisted, that the making of the will was procured by improper and undue influence of others. The proofs nowhere develop anything tending to support this charge.

Henry H. Harrington, at the time of his death, was a merchant, living in the city of Mount Carmel, and for near three years had been and then was doing business with Thomas J. Shannon and Charles H. Russell, his partners. He left him surviving a father, three sisters and two brothers, but neither wife nor child. He had lived in Mount Carmel about thirteen years. Some ten years before his death he was married to Elizabeth Stees. They had five children. His wife died nearly two years before his death. Four of their children died during the life of their mother, and the fifth, a son, died about six months after her death. After the death of his wife, and before the death of his last child, Harrington made a written will, giving to each of two of his sisters $1000, and to Mary Stees, the sister of his deceased wife, $2000, and the residue of his estate to his then only child, and leaving the charge of this child to Mary Stees. This child died in July, 1868.

Soon after this, Harrington destroyed this will, and in the autumn of that year he and Mary Stees were engaged to be married, and the engagement continued until his death. Some months before his death he said to his partner Shannon (in presence of several other persons), that "if he died in his right mind no one of his father's family would get one dollar of his estate."

On Thursday morning, some hours after making his will, he said to Mr. Russell, his other partner, that he had made his will to Hughey and Ridgway, as witnesses, and had given all his property to Mary Stees. At the time these declarations were made, neither Hughey, nor Ridgway, nor Mary Stees was present. He was, surely, under no improper influence at these times. In fact, there is no proof whatever that any persuasion or suggestion was ever brought to bear upon his mind, from any source whatever, tending to give his mind any direction or bias as to what disposition he should make of his property. The fact that Hughey called his attention to his temporal affairs, and suggested that it was too late to think of marriage, does not militate, in the slightest degree, against the idea of a perfect free agency on the part of Harrington.

It was but proper that his attention should be called to the probability of approaching death, and the necessity of his taking action at once if he had any arrangements he wished to make as to his temporal affairs. The persons about him seem, from the evidence, to have been none other than respectable and worthy people, nor is there any evidence of improper motives or improper conduct on the part of any of them, nor is the disposition which he did make of his property so unnatural or extraordinary as to militate, in any degree, against the idea that it was the result of his own uninfluenced line of thought.

Mary Stees had evidently been his chief support during his past afflictions. She had, no doubt, nursed with tenderness and affection by the bedside of his dying wife. After her death she had gently and kindly cared for his motherless child, until the grave had claimed its remains. He had been engaged to be married to her for about a year. She had been his close attendant in this his last illness. In fact, at the moment of making this will, Mr. Harrington himself declared: "It has been my intention all the while that she should have everything I have." This act was not the result of the thought of the moment, brought about by the influence of others. This disposition of his property seems to have been well considered by him, and determined upon long before the declaration of the will as such, and "no proof of fraud, compulsion, or other improper conduct is exhibited, which tends, in any way, to invalidate or destroy the same."

It is charged in the bill, that the witnesses were not disinterested, and that deceased was not of sound mind and memory; but the proof shows, satisfactorily, that the deceased was mentally capable, and that the witnesses were wholly disinterested.

It is insisted in argument, though not charged in the bill, that the witnesses were not, at the time, called upon by Harrington to bear witness, but that they were mere volunteers. The language of our statute seems to have been framed especially to exclude just such an objection. The statute requires

that it be shown "that he [the testator] did, at the same time, [at the time of declaring his will] desire the persons present, or some of them, to bear witness that such was his will, or words to that effect." The last phrase of this statute was evidently intended to do away with all formal objections as to the mode of manifesting a desire that the persons should be witnesses. That desire is as unequivocally made manifest by the response "yes," to the direct question put to deceased, as if he had declared his wish never so formally.

We find no just ground of complaint against the decree of the circuit court. The decree is affirmed.

Decree affirmed.

Mr. JUSTICE BREESE: I do not concur in this opinion. As this court said in *Morgan et al.* v. *Stevens*, 78 Ill. 287, the provisions of the statute as to nuncupative wills must receive a rigid and strict construction. Such wills are allowed only on the ground that the party being *in extremis*, had not time and opportunity to make a more deliberate will. The *animus testandi* must appear by the clearest and most incontestible proof, embodying the real testatory intentions of the declarant. I think there is a failure in these respects in this case.

ISAAC W. ROBINSON *et al.*

v.

ELIJAH HARVEY.

WARRANTY—*by representations.* No particular words or form of expression is necessary to create a warranty, but there is a distinction as to the legal effect of expressions, when used in reference to a matter of fact, and when used to express an impression or opinion. Where the representation is positive, and relates to a matter of fact, it constitutes a warranty.

APPEAL from the Circuit Court of Jefferson county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Mr. C. H. PATTON, for the appellants.

Mr. THOS. S. CASEY, for the appellee.

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

This was an action upon a promissory note, for $1575, bearing date December 12, 1873, payable sixty days after date, upon which were indorsed several payments. The plaintiff below recovered, and defendants appealed.

The defense set up was, that the note was given for the purchase money of one horse and sixteen mules; that there was a warranty by the plaintiff that the animals were sound, that eight of the mules were broke mules, and that none of them were less than three years old in the spring of 1874.

Two of the defendants testified on the trial that, on the 12th of December, 1873, they were buying mules for the southern market; that on that day, which was a very rainy, bad day, they went to see plaintiff's mules; that they found the stock running loose in a lot nearly knee deep in mud. It was raining, and they could not well examine them; that they told plaintiff, if they traded, they would have to take his word for the description of the stock. They asked plaintiff all about the mules and a horse they saw in the lot. Plaintiff said the horse was a good, sound horse; that plaintiff represented all the mules were two years old past; that they were all sound as a dollar, and all right, so far as he knew; that six or eight (witness thought it was eight,) of the mules were broke mules; that they might rely upon this; that the stock was exactly as he had told them; that witnesses told plaintiff that if they bought the stock at all, they would have to buy it upon his representations of the quality; that he replied, "all right, you can do so. I am a man of my word, and you will find it so." Whereupon they took the stock, drew up the note sued on, and drove the stock away.

The witnesses were then asked whether the horse and mules proved to have been sound or not, at the time of the purchase;

and if any of the plaintiff's representations as to the character of the stock were untrue, to state in what particular, and what damages, if any, resulted therefrom. The questions were objected to, and the objections sustained by the court, and the questions excluded on the ground that the contract of sale did not amount to a warranty of the quality or condition of the stock. And thereupon the jury were discharged by agreement, and the court rendered a judgment for plaintiff for the sum of $453.34, the balance appearing to be due upon the note after deducting the credits indorsed.

No particular words or form of expression is necessary to create a warranty, but there is a distinction as to the legal effect of expressions when used in reference to a matter of fact, and when used to express an impression or opinion. Where the representation is positive, and relates to a matter of fact, it constitutes a warranty, as, that a ship is an American or French ship, or that the crew consists of so many hands. 3 Mann. & Ryland, 2.

In *Hawkins* v. *Berry*, 5 Gilm. 36, it was laid down that, to constitute a warranty, the term "warrant" need not be used, nor is any precise form of expression required; but there must be an affirmation as to the quality or condition of the thing sold, (not asserted as a matter of opinion or belief,) made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, which is so received and relied on by the purchaser. And see *Reed* v. *Hastings*, 61 Ill. 266; *McClure* v. *Williams*, 65 id. 390.

The evidence here certainly tended to prove a warranty as above defined, and presented a fair question for the jury, and the court below assumed too much, and trenched upon the province of the jury in deciding there was no warranty proved, and excluding evidence of any breach of the alleged warranty.

The judgment will be reversed and the cause remanded.

Judgment reversed.

ELIAS S. GIBSON *et al.*

v.

ASENATH GIBSON *et al.*

1. JUDGMENT—*against administrator not conclusive on heir.* On creditor's bill to subject land conveyed by a deceased person to his son, the judgment of the county court allowing the claim is only *prima facie* evidence, and is not conclusive on the heir. He has the right to contest the indebtedness, even though the conveyance to him may have been colorable only.

2. WIDOW—*claim against husband's estate—proof required.* Where land conveyed by a father to his son is sought to be subjected to the payment of a claim in favor of the grantor's widow, by bill in chancery, clear proof will be required to show her claim to be *bona fide.* It seems its allowance by the county court, without other proof, is not sufficient.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. HENRY C. GOODNOW, for the plaintiffs in error.

Messrs. SMITH & HUBBARD, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

Persons styling themselves creditors of one John Gibson, deceased, exhibited their bill on the equity side of the Marion circuit court, making Elias Gibson and one Enoch Sceife defendants, the scope of which was to subject the lands of deceased to sale for the payment of their debts, on the allegation that the debts were due by Gibson at the time of his death, and some of them had been allowed by the administrator of the intestate, and others, specifying them, by the probate court and the circuit court.

The material allegation in the bill is, that the debts claimed are due, and that the deceased conveyed the land in question to his son, Elias Gibson, a short time before his death, in fraud of complainants, they then being creditors of the deceased grantor.

The answers deny the material allegations of the bill.

The cause was heard on bill, answers of defendants, replication and proofs, and a decree passed as prayed.

To reverse this decree, this writ of error is prosecuted, and various points made. In the view we have taken of the case, it will not be necessary to consider all of them.

The record does not show that any of these claims had been allowed by the judgment of any court of competent jurisdiction. No exhibits showing this were referred to in the bill of complaint, and none produced on the hearing.

The defendant Elias Gibson was the son and only heir at law of John Gibson, deceased, to whom this land descended, and who became, by the descent cast, possessed of the legal title, which could not be divested by any proceeding to which he was not a party, as held by this court in *Stone et al.* v. *Wood, Admr.* 16 Ill. 177.

A judgment in any court against the administrator was not a judgment against this land, or a lien upon it. The heir has a right to contest the claims. This he was precluded from, in effect, by the ruling of the court, as the court excluded his inquiry as to the question whether there was any proof of the justice of these claims when the administrator and court allowed them. The judgments against the administrator being only *prima facie* evidence against the heir, they were open to investigation, on this bill to subject the land of the heir to their payment.

The principal complainant was the widow of the deceased, claiming to be a creditor to a large amount. How she became such, is nowhere shown. As widow, her dower had been set off in this tract of land, and before the balance could be made subject to her claim, there should be clear proof she was a *bona fide* creditor.

But it may be urged, Elias Gibson did not claim the land as heir at law of his father, but as a purchaser from him, and that purchase colorable and fraudulent. This may be admitted, but still the fact remains, the descent was cast upon him, and he had the legal title to the land as heir at law. No matter, then, how vulnerable his title as purchaser may be, that of

heir at law is invulnerable, of which he can not be divested, save by proceedings to which he was a party, or by proof of judgments lawfully obtained against the administrator, the validity of which he has a right to contest. This doctrine is reiterated in *Hopkins et al.* v. *McCann, Admr.* 19 Ill. 113.

For the reasons given, the decree is reversed and the cause remanded.

Decree reversed.

FRANK VAN ARSDALE

v.

HENRY RUNDEL.

MEASURE OF DAMAGES—*breach of contract to deliver goods.* On breach of contract to manufacture and deliver goods, the measure of damages is the loss sustained by reason of the non-delivery.

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

This was an action brought by the appellee against the appellant, to recover damages for the breach of a contract to sell and deliver certain pottery ware. The plaintiff recovered judgment for $61.66, and costs.

Messrs. GILLESPIE & HAPPY, for the appellant.

Mr. E. BREESE GLASS, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This action was originally brought before a justice of the peace of Madison county, upon an account, claiming damages for the non-delivery of some pottery ware, which appellant, it was claimed, had contracted to deliver to appellee on a certain day; and at the price of seven cents per gallon. The contract is not disputed by appellant.

The only reason we can perceive, from the testimony, why the ware was not delivered as promised, seems to have been that appellant was apprehensive one Butterfield was to handle the ware for appellant, and to this person appellant had objections, on account of his failure to comply with contracts of a like nature made with appellant. But the proof shows this man Butterfield had no pecuniary interest in this contract whatever, and no personal connection with it.

The evidence shows that ware of the description specified in this contract, could not be purchased in market for less than ten cents per gallon. Appellee was, himself, a potter, and had orders for five thousand gallons, a part of which, about two thousand five hundred gallons, he was himself able to furnish, hence his contract with appellant to furnish the balance, to be delivered, at a specified time, on a car on the railroad track. Payment was to be made when appellee received the returns of the sale.

It is urged by appellant, that appellee is only entitled to nominal damages, by reason of his failure to comply with his contract.

We have examined the cases cited by appellant to sustain his view of this case, and do not think they conflict with the finding and judgment of the court. None of them conflict with the proposition on which this recovery is based, that on a breach of contract to deliver goods the measure of damages is the loss sustained by reason of the failure. In this case it is proved this ware was contracted to parties in Belleville and St. Louis, at ten and one-half cents per gallon. Here, appellee shows substantial damages, consisting in the difference between seven cents per gallon, which he was to pay appellant, and ten and one-half cents per gallon, which he was to receive from the parties to whom he had sold, and which was the market price.

The jury have found no more than this difference, and their verdict should not be disturbed. The judgment is affirmed.

Judgment affirmed.

BOYD EMERY

v.

JOSEPH W. COCHRAN *et al.*

1. CHANCERY—*bill to remove cloud on title.* Notwithstanding the statute allowing a party to file a bill to remove a cloud upon his title whether the land is occupied or not, it must appear that the complainant is either legally or equitably seized, and if not in the possession of the property, that he is legally entitled to be.

2. Where a bill to set aside conveyances as a cloud on title shows a mortgage which is a prior lien to the deed of trust under which the complainant derives his deed, and there is no allegation of the discharge or release of the mortgage, so that complainant at most had only the equity of redemption, without any right of possession against the mortgagee, the bill will show no right to the relief sought.

3. SAME—*charge of fraud in bill.* To invoke the aid of a court of equity to set aside a deed, it is not enough merely to charge, in general terms, that it was obtained by fraud, circumvention and deception, but the facts constituting the fraud, etc., must be specifically stated.

APPEAL from the Circuit Court of Ford county; the Hon. THOMAS F. TIPTON, Judge, presiding.

Mr. CALVIN H. FREW, for the appellant.

Messrs. POLLOCK & SAMPLE, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellant exhibited his bill in equity in the court below against appellees, to remove a cloud cast upon his title to certain real estate situated in Ford county. Demurrer was sustained, *pro forma*, to the bill of complainant, and the only question to be determined is, can that ruling be sustained?

Appellant derives his title by purchase at a sale by a trustee, under a deed of trust executed by Harrison Tyner, the original owner of the property, on the 27th day of July, 1858, to secure a promissory note to James C. McCulloch, payable in six months, for $431.75. The bill shows, however, that prior to the execution of this deed of trust, and on the 12th day of

February, 1857, Harrison Tyner and wife had mortgaged the same property to one Harvey Truesdale, to secure the payment of a promissory note for $580, and this mortgage was recorded on the 5th of May, 1857, so that the deed of trust under which appellant claims was junior and subject to this mortgage. The mortgagee is not made a party to the bill. There is no allegation that the mortgage has been discharged or released, or that appellant has become owner of it. For aught that appears, there may be an outstanding perfect title, derived under this mortgage. Appellant, at most, has but the equity of redemption, and is not entitled to the possession as against this mortgagee.

Prior to the enactment of our recent statute, allowing a complainant to file a bill to remove a cloud upon his title whether the lands are occupied or not, such a bill could only be filed by one in the actual possession of the property; and, since then, it must appear that the complainant is either legally or equitably seized, and if not in possession of the property, that he is legally entitled to be.

It is not within the province of a court of equity to settle purely speculative or possible issues, in regard to the merits of different titles, in this form of proceeding.

Nor do we regard the allegations in respect to the quitclaim deed from Tyner and wife to Cochran, sufficient to justify the interposition of a court of equity. To invoke the aid of a court of equity to set aside a deed, it is not enough merely to charge, in general terms, that it was obtained by fraud, circumvention and deception; but the facts constituting the fraud, etc., must be specifically set forth. Besides, Tyner and wife make no complaint, and if they are satisfied, of what concern is it to the complainant whether they were defrauded or not. He is, in no sense, their representative as to any interest in the property they then had.

The demurrer was properly sustained, and the decree is affirmed.

Decree affirmed.

LEWIS M. PHILLIPS

v.

MORRIS MEYERS.

1. CONSIDERATION—*agreement of wife to return to her husband.* Where a wife had separated from her husband for drunkenness and ill-treatment, and brought suit for a divorce, the dismissal of the suit and her agreement to live with him, which is done, is a sufficient consideration for a promissory note given by the husband to a third person for the use of the wife.

2. SAME—*duty of husband to support wife, a good consideration.* A husband being under a legal obligation to support his wife, an agreement on his part to pay money to a trustee for her use, without any promise or agreement on her part, will be binding on him, and is founded on a sufficient consideration.

3. HUSBAND AND WIFE—*settlement on wife binding.* The power of a husband to make a settlement of property or funds on his wife by the intervention of a trustee can not be questioned; and a settlement thus made can be questioned only by existing creditors of the husband. His obligation to support her, and the relation of the parties, furnish a sufficient consideration to support the same.

APPEAL from the Circuit Court of Washington county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. P. E. HOSMER, and Mr. L. M. PHILLIPS, for the appellant.

Mr. JAMES A. WATTS, Mr. GEORGE VERNOR, and Mr. W. S. FORMAN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action in the court below on this promissory note:

"NASHVILLE, ILL., *Sept.* 18, 1872.

For value received, one day after I at any time become intoxicated, or drink, or mistreat or abuse Minnie Meyers, I promise to pay to L. M. Phillips the sum of $600, for the use of Minnie Meyers, with ten per cent interest from maturity until paid.

MORRIS MEYERS."

The declaration contained a number of counts, in each of which it was averred that defendant had done some one of the acts, upon the doing of which the note, by its terms, was to become payable.

Defendant filed a number of pleas. The fifth avers the contract sued on was executed and delivered without a good and valuable consideration, and given by defendant only for a promise of Minnie Meyers that she would live with him as she had done before, she being his wife. The other pleas were traversed, and plaintiff filed to the fifth plea this replication:

"That the consideration of the agreement sued on was not alone that Minnie Meyers, who was the wife of defendant, would live with her husband, the defendant, as she had formerly done, but the consideration of said agreement was this: The said defendant had been and was guilty of habitual drunkenness, and extreme and repeated cruelty towards his wife, Minnie Meyers, during the marriage relation, and a suit was pending for divorce, in favor of said Minnie Meyers, against said defendant, on account of his drunkenness and cruelty, in the circuit court of Washington county, Ill.; and in consideration that the said wife would and did dismiss her said suit for divorce, condone said causes of divorce, and return and live with defendant, and that he (defendant) would not get intoxicated or mistreat her, said wife, any more, he, said defendant, executed said agreement in declaration mentioned; and this plaintiff is ready to verify, wherefore, etc."

To this replication defendant demurred, the court held it bad, and rendered judgment for costs in favor of defendant, and plaintiff brings the record to this court and asks a reversal.

Does the plea present a defense, or, taking the facts as averred in the replication to be true, and their truth is admitted by the demurrer, was there a sufficient consideration to support the note? This is the question raised and discussed by the parties. As a general rule, husband and wife can not contract with each other in such a manner that a court of law will enforce their agreements. But equity has, in many

instances, enforced their agreements when equity and good conscience required it. But, as a general rule, such agreements have been rendered effective by being entered into with a trustee for the wife, who, upon a breach of the agreement by the husband, may sue either at law or in equity, as the nature of the contract may require.

It is believed that the power of a husband to make a settlement of property or funds on his wife by the intervention of a trustee, has never been questioned, and this may be done by a marriage settlement before marriage, or by deed to a trustee afterwards. When the settlement or advancement is thus made, as between the parties, it has always been held binding, and can only be questioned by existing creditors. Such settlements and advances have always been favored by the courts. A husband, being bound for the support of his wife, may undoubtedly make provision therefor by settlement or otherwise, and this obligation, and the relation of the parties, have ever been held to constitute a sufficient consideration to support the transaction, unless creditors are thereby injured or defrauded. The wife is regarded as a meritorious object of the bounty of the husband. Provisions for her support are always upheld, unless wrong or injury results to those holding legal obligations against the husband. In such cases, the duty to support forms a sufficient consideration.

The question of consideration, to support such provisions, has frequently arisen in Great Britain, in numerous cases, in contracts by husband and wife to separate and live apart, and have been sustained by the courts.

In the case of *Lord Rodney*, 2 East, 283, the doctrine was considered, the authorities reviewed, and it was held that the law had been long settled that such contracts were binding. It was held not to be repugnant to public policy, and that such agreements would be enforced. That was a case where a husband covenanted that, in case a separation should occur between him and his wife, a certain annuity and other funds should be paid to his wife. A separation did occur, and suit

was brought on the covenant, and a recovery had. Numerous cases are referred to as sustaining the doctrine.

The case most nearly like this, in its facts, is *Nicholls* v. *Danvers*, 2 Vernon, 671. That was a case of a note given "conditionally to the wife, to let her have 3000*l*, part of her mother's estate, for her separate use, in case he used her ill," and the contract was held binding, and was enforced by decree, on the husband having mistreated his wife.

Whilst our courts probably would not enforce contracts to live separate, still these cases show that the law regards them as being based on a sufficient consideration. But in this case the consideration was not that the parties would live separately, but that they would live together. They had separated; she had filed her bill for a divorce, and he may have supposed that she would obtain a decree of divorce, and for alimony, and to avoid these contingencies this agreement was made, the note given, and the suit was dismissed and the parties again lived together. We do not have the shadow of a doubt that this formed a sufficient consideration to support the note, nor do we see in what manner it is immoral, or can be held to be opposed to sound public policy. It does not provide that the parties shall live separately, but that they shall live together. Nor can he say that he violated any private or public duty in agreeing to remain sober, and to refrain from the abuse and mistreatment of the wife of his bosom, whom he had solemnly vowed he would "love, cherish and protect." This was a moral, a legal and natural duty, that every instinct of a manly nature would prompt him to perform. It was only necessary that he perform his duty as a husband, to have escaped the liability imposed by the note, which was previously binding, in morals, if not in law. We think there can be no doubt that the consideration upon which the note was based was ample.

From what has been said, it will be seen that defendant's fifth plea presented no defense, and the demurrer to the replication should have been carried back and sustained to it.

Where husband and wife do not live together on good terms, and separate, we are clearly of opinion that an agreement on the part of the wife to return and live with the husband, would support an agreement with a trustee to pay money to him for the use of the wife. Or even such an agreement without any promise whatever, the duty of the husband to support the wife, as we have seen, being a sufficient consideration.

A majority of the court hold the court below erred in sustaining the demurrer to the replication to the fifth plea, and in not sustaining it to that plea. The judgment is reversed and the cause remanded.

Judgment reversed.

JOHN C. JONES *et al.*

v.

JOHN W. NEELY.

1. CHANCERY JURISDICTION—*judgment without service or appearance.* Where a bill in chancery shows the taking of judgment against the complainant for a much larger sum than was due, in an action at law, without service of process, or appearance in person, or by attorney, and without any knowledge by the complainant of the suit, a court of equity will grant relief against the judgment, where the rights of innocent purchasers have not intervened.

2. RETURN—*right to contradict return of service.* Where rights of third persons have been acquired in good faith, the return of an officer showing the service of summons can not be contradicted; but as against the judgment creditor, and parties acquiring rights under him with notice of the facts, the return is not conclusive, but may be contradicted.

WRIT OF ERROR to the Circuit Court of Randolph county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. THOMAS G. ALLEN, and Mr. LEVI DAVIS, Jr., for the plaintiffs in error.

Mr. WILLIAM HARTZELL, and Mr. J. PERRY JOHNSON, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

That equity has jurisdiction to administer relief in a case like the one at bar, is settled by the decision in *Owens* v. *Ranstead*, 22 Ill. 161.

It is distinctly averred in the bill, that the judgment against complainant, recovered by defendant Bilderback, at law, was fraudulent, was obtained in a cause in which he was not served with process, nor was there any appearance in person or by attorney; that he was not only not served with process in the action, but he had no knowledge whatever any proceeding was pending against him, and that he was not indebted to plaintiff in anything like the amount of the judgment.

Admitting these allegations to be true, as the demurrer does, they make a clear case for equitable relief. On the authority of *Owens* v. *Ranstead*, there can be no doubt complainant is entitled to relief as against Bilderback. Equity will not permit defendant to have the benefit of a judgment which he himself admits, on the record, was a fraud on the rights of defendant in the action, that was knowingly taken for a sum more than four times greater than any sum due him, and that was recovered in an action in which defendant neither appeared in person or by counsel, nor was he served with process.

This case can not be assimilated to that of *Rivard* v. *Gardner*, 39 Ill. 125. In that case the rights of a third party had intervened, and it was there declared, upon a full discussion of the conflicting decisions, the rule forbidding the return of the officer upon the summons to be contradicted as against third parties rests upon the sounder reason. That case, however, proceeds upon the principle such rights were acquired in good faith, relying upon the conclusiveness of the judicial sentence under which the purchase was made. Not so in this case. At the sale of complainant's property, the execution creditor himself became the purchaser. Jones admits he took an assignment of the sheriff's certificate with the knowledge the judgment was a fraud upon the rights of complainant, and it was recovered in a suit in which he neither appeared in

person or by attorney, nor was he served with process. His position is not better than that of the execution creditor. Like him he stands chargeable with notice of all defects in the record. He is in no sense an innocent purchaser, on the faith of a judicial decree. The judgment was void for want of jurisdiction of the person of defendant, and it is admitted Jones had notice of this fact before he bought the sheriff's certificate of the execution creditor. Occupying the shoes of plaintiff, he is entitled to no other protection than he would be.

The decree is right, and must be affirmed.

Decree affirmed.

THE CAIRO AND ST. LOUIS RAILROAD COMPANY

v.

O. L. MAHONEY.

1. PAROL EVIDENCE—*to prove contents of telegram.* In the absence of proof of the loss or destruction of a telegraphic dispatch, and of notice to produce the same, parol evidence is not admissible to prove its contents.

2. In a suit by a surgeon, against a railway company, for treating an employee injured while in the service of the company, it is proper to prove by parol the fact of the injury to the servant of the company, and that the station agent notified the superintendent of that fact by telegram.

3. AGENCY—*proof of ratification of agent's act.* Where a surgeon has been employed by a station agent of a railway company to attend an employee injured while in the service of the company, although he may not have express authority to do so, yet slight acts of ratification by the company will authorize a jury in finding the employment was the act of the company.

APPEAL from the Circuit Court of Jackson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Messrs. SEARLS & BUTLER, for the appellant.

Mr. J. B. MAYHAM, and Mr. G. W. HILL, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action, brought by O. L. Mahoney, a surgeon, against the Cairo and St. Louis Railroad Company, to recover for professional services rendered an employee of the railroad company, who had been seriously injured while in the discharge of his duties on the road.

A trial of the cause before a jury resulted in a verdict and judgment in favor of the plaintiff, to reverse which the railroad company has taken this appeal, and assign as error the decision of the circuit court in the admission of evidence for appellee.

As appears from the record, J. B. Clark was station agent for appellant at Murphysboro, where the employee had been brought by the company after he was injured. No physician would treat the wounded man unless employed by the company. Hinckley, the general superintendent, was at the time at East St. Louis. The station agent sent the general superintendent a dispatch, saying, "No doctor would treat wounded man unless employed by company." In answer to the telegram, Clark testified that he was authorized to take care of the wounded man. The only qualification was, a reasonable bill. Under this authority, appellee was employed by the station agent, and the services rendered for which the action was brought.

The appellant claims it was error to allow the contents of the dispatch sent, and the answer received, to be proven by parol evidence.

The superintendent was not notified to produce the dispatch sent him, nor was its loss or destruction proven. In the absence of notice to produce the dispatch, or proof of its loss or destruction, we are inclined to the opinion that parol evidence of the contents of the message was improper. But the parol evidence of the contents of the dispatch sent is not a sufficent ground to justify a reversal of the judgment. It would have been proper to prove by parol the fact that an employee of the company was seriously injured, and that the

station agent notified, by telegram, the superintendent of that fact.

The dispatch sent, in substance, amounts to nothing more than such notice; and while the proof, in the form in which it was given, may be regarded as improper, yet it was an error that did appellant no injury, and of which it has no just ground of complaint.

In regard to the answer received from the superintendent, the station agent reduced it to writing as it was received from the wires, and delivered the written message to appellee. The paper containing the message was destroyed, and it does not appear that any paper was in existence at the office where the dispatch was sent, or elsewhere, which contained the message. Under such circumstances, the well settled rule, that the contents of a writing which has been destroyed may be established by parol evidence, must prevail.

But, aside from this evidence, the testimony tended to establish the fact that the act of the station agent was ratified by the superintendent.

The next day after the employee had been injured, the general superintendent of the company came to Murphysboro, and inquired of the station agent how the man was getting along. While he seemed to have had information in regard to the character of the injury and the treatment by the surgeon, yet no objection whatever was interposed or complaint made in reference to the act of the station agent concerning the matter.

Again, a few weeks subsequently, in a conversation with appellee, the superintendent informed him that the pay would be all right.

Under the rule announced in *Toledo, Wabash and Western Railway Co.* v. *Rodrigues*, 47 Ill. 188, and *Toledo, Wabash and Western Railway Co.* v. *Prince*, 50 ib. 26, the jury would have been warranted, from the facts proven, in finding the employment by the station agent was ratified by the conduct of the general superintendent.

While a railroad company is under no legal obligation to

furnish an employee, who may receive injuries while in the service of the company, with medical attendance, yet, where a day laborer has, by an unforeseen accident, been rendered helpless when laboring to advance the prosperity and the success of the company, honesty and fair dealing would seem to demand that it should furnish medical assistance.

Where, therefore, a surgeon has been employed by an agent of the company, although he may not have had express authority, yet slight acts of ratification by the company will, ordinarily, satisfy a jury that the employment was the act of the company.

The verdict of the jury in this case was fully warranted by the evidence, and, as no substantial error appears in the record, the judgment will be affirmed.

Judgment affirmed.

THE CAIRO AND ST. LOUIS RAILROAD COMPANY

v.

JOHN MURRAY.

1. SUMMONS—*form of, in suits before justices of the peace.* The statute does not require a different form of summons, in a suit brought before a justice of the peace to recover penal damages, than in ordinary actions.

2. APPEALS—*from justices, must be tried on the evidence.* On the trial of an appeal from a justice of the peace, the rights of the parties are to be determined on the proofs, unless it appears, from the evidence, that the justice had no jurisdiction of the subject matter.

3. NEGLIGENCE—*liability of railroad company for stock killed from want of fence.* The mere fact that stock is running at large, in violation of statute, does not relieve railroad companies from liability for an injury to them, resulting from a neglect to fence their road, and no other negligence need be shown.

APPEAL from the Circuit Court of Jackson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Messrs. SEARLS & BUTLER, for the appellant.

Mr. J. B. MAYHAM, and Mr. G. W. HILL, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

The horse of appellee, being on the railroad track of appellant, was run upon and killed by an engine of appellant, at a point where the track was not fenced, and where, by the statute, the railroad company was required to have the same fenced. The horse was worth fifty dollars. Appellee recovered one hundred dollars damages, the statute giving, in such case, double the amount of actual damages.

The suit was begun before a justice of the peace. The summons does not indicate the character of the action, further than to say, "for a failure to pay him (appellee) a certain sum, not exceeding two hundred dollars." It is insisted that, under this form of summons, the claim for penal damages can not be allowed.

The statute does not specifically prescribe a different form of summons for such cases, and it is provided that, on trial of appeals from justices of the peace, "no exception shall be taken to the form or service of the summons, * * * but the court shall hear and determine the same * * * according to the justice of the case." (R. S. 1874, sec. 72, chap. 79, p. 648.)

It is also insisted that, by sec. 75 of chap. 114, R. S. 1874, no action can be maintained for a violation of that statute except in the name of the people. That section, by its terms, is confined to actions to recover *fines*, and has no reference to the mode of recovering *damages* under section 37 of the act.

It is also insisted that plaintiff can not recover, because his horse was running at large, when, by the statute, it was unlawful for plaintiff to permit his horse to run at large. It would seem, from the proof, that this horse, at the time, was, in fact, running at large.

The statute in relation to the running at large of horses and other stock was enacted March 30, 1874. The statute in rela-

tion to the liability of railway companies for a failure to fence their roads was enacted March 31, 1874. No exception is made, in the latter act, as to horses running at large. The mere fact that stock is running at large in violation of that statute, does not relieve railroad companies from liability for stock injured, where the company fails to fence as required by statute. *Ewing* v. *Chicago, Alton and St Louis Railroad Co.* 72 Ill. 25. It is difficult to conceive any good to be accomplished by having the railroad fenced, unless it be to prevent roaming domestic animals from receiving injury.

It is also insisted that the proof does not show appellant guilty of negligence. The ground of recovery, under this statute, is, the fault of the railroad company in failing to build the fences required. No other fault, in such case, need be shown.

The judgment must be affirmed.

Judgment affirmed.

JAMES W. HUGHES *et al.*

v.

THE PEOPLE, for use, etc.

1. CONSTITUTION—*construed as to meaning of county board.* The words "county board," as used in the State constitution, and required to fix the compensation of county officers, mean the body of persons to whom is entrusted the transaction of county business, and the term embraces as well county courts, as boards of supervisors and courts of county commissioners.

2. OFFICER—*sheriff and collector but one officer.* The office of sheriff and collector, in counties not under township organization, are not separate and distinct offices, and, therefore, when the county court fixes the compensation of the sheriff, he can not receive more than such sum by virtue of his also being collector.

3. SAME—*perquisite above commission.* If a sheriff receives money as commissions on tax money deposited by him in a bank, it is a perquisite derived from his office, and he can not retain the same in addition to the compensation allowed him by the county board.

4. OFFICIAL BONDS—*as sheriff and collector—upon which liable.* Where a sheriff, in a county not under township organization, becomes liable for money received by him from a bank as compensation for deposits he made therein of moneys which came to his hands as sheriff, it is proper to sue upon his bond given as sheriff—not upon the additional bond the sheriff is required to give as collector of taxes.

5. JUDGMENT—*date, when of no importance.* Where a writ of inquiry on a judgment *nil dicit* is, by consent, executed by the judge, in vacation, without a jury, it is of no importance that the finding and judgment bear no date, where there are no intervening liens claimed.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. WILDERMAN & HAMILL, for the plaintiffs in error.

Messrs. C. W. & E. L. THOMAS, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was debt, in the St. Clair circuit court, on a sheriff's bond, against the principal and his sureties.

The penalty of the bond was ten thousand dollars, and various breaches of the condition thereof assigned in the declaration, to which, and to each of them, there was a demurrer.

On overruling the demurrer, the court rendered judgment for the penalty, and awarded a writ of inquiry to assess the damages in vacation.

After notice to defendants, the judge, in vacation, a jury being waived, assessed the damages at ten thousand dollars, and rendered judgment for ten thousand dollars, the debt in the declaration mentioned, to be discharged on the payment of ten thousand dollars, the damages assessed, and costs of suit.

The most important questions raised by the demurrer have been settled by this court, in *Broadwell et al.* v. *The County of Morgan*, 76 Ill. 554, and in *Kilgore* v. *The People*, ib. 548.

In the first cited case, it was held, in construing the term "county board," as used in section 10 of article 10 of the constitution of 1870, that it was not to be confined to any one particular body of persons. The power given to the county

board to fix the compensation of county officers, belongs to the body to which is entrusted the transaction of the county business, and embraces as well county courts as boards of supervisors and courts of county commissioners.

In the other case, *Kilgore* v. *The People*, the point was settled that in counties under township organization, the offices of treasurer and collector are not distinct and separate offices, by analogy to the case of *Wood et al.* v. *Cook*, 31 Ill. 271, which holds that the office of sheriff and collector, in counties not under township organization, are not separate and distinct offices.

It follows, therefore, when the county court of St. Clair county fixed the compensation of appellant at three thousand dollars per annum, and two thousand five hundred dollars additional for clerk hire, to the total of these amounts was appellant entitled. He could claim nothing beyond them, and all sums beyond that total were payable into the treasury of the county.

It appears, appellant received from a banking institution the sum of twenty-five hundred dollars, as compensation for the deposits he made therein of moneys which came to his hands as sheriff, and it is claimed by him he is not accountable for this sum to the county.

The money was received by him as a perquisite or emolument of his office as sheriff—this is not questioned. The statute on this subject leaves the point free from doubt. Section 52 of the act of 1872, title "Fees and Salaries," provides as follows: "All fees, perquisites and emoluments received by said county officers, above the amount of compensation fixed by the county board, and clerk hire and other necessary expenses, shall be paid into the county treasury." R. S. 1874, p. 522, chap. 53.

This being a perquisite or emolument acquired by official position, should be accounted for to the county.

A point is made by appellant, that the action is not brought on the proper bond—that it should have been brought on the additional bond the sheriff is required to give as collector of

the taxes. Did it appear in this record that these moneys charged against appellants were moneys derived from taxes, the point might be deemed well taken. But there is nothing showing this, *non constat* there were fees for serving process and the performance of other duties, strictly belonging to the office of sheriff.

As to the point that the judgment is wrong, it failing to show on what day it was rendered, it is of no importance, as no question of intervening liens is involved.

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

Judgment affirmed.

JOHN W. PATRICK

v.

ROBERT JACK, Admr.

EVIDENCE—*account books.* Evidence that the account books of a deceased person were the only books kept by him, is equivalent to proof that they are books of original entry; and where it is further proved that settlements had been made by them with others, and they had been found correct, this is a substantial compliance with the statute, and they are admissible in evidence.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. JOHN B. KAGY, for the appellant.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

On the trial before the justice of the peace, plaintiff, as administrator, recovered a judgment for $20, from which defendant prosecuted an appeal to the circuit court. A trial *de novo* was had in the latter court, when defendant recovered a judgment for $1.07 against plaintiff, to be paid in due course of administration.

The controversy has relation to mutual accounts between defendant and plaintiff's intestate. The court before whom the trial was had examined the books kept by defendant and decedent, and found a small balance due defendant, and with that conclusion we see no reason to be dissatisfied.

While the evidence as to the books kept by decedent is not, perhaps, as full as the statute, if construed strictly, would seem to require, we think the proof is sufficient to warrant the action of the court in admitting them in evidence. It is shown they were the books of decedent, and the "*only books*" kept by him. That is equivalent to proof they were books of "original entry." Evidence they were the "only books" kept by deceased in his business, is sufficient proof of that fact. Any other conclusion would be an absurdity. It is also proven settlements had been made by them with numerous persons, and the books had been found correct. That is the substance of what the statute requires to make the books competent evidence.

But, in addition to all this proof, it further appears, when the books were shown to defendant by plaintiff, before any contention arose between the parties, he made no objection to them. When all the testimony is considered together, it is sufficient to justify the action of the court in admitting the books in evidence.

No material error appearing in the record, the judgment will be affirmed.

Judgment affirmed.

ADRIAN W. PAUL *et al.*

v.

THE PEOPLE *ex rel.* JOHN GILLEN.

1. PRACTICE—*judgment without issue of law or fact* Where no issue of law or fact is taken upon pleas, it is error for the court, without any trial, to find the defendants guilty of usurping an office, and render judgment of ouster.

2. TRIAL—*by court.* Where the record fails to show the presence of the defendants or their counsel, at the time of a finding of facts, and the rendition of judgment, by the court, without a jury, it will not be presumed that a trial by jury was waived. If the defendant does not appear after issue formed, the court must order a jury.

WRIT OF ERROR to the Circuit Court of Randolph county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. C. W. & E. L. THOMAS, for the plaintiffs in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This record shows the filing of an affidavit, and a motion for leave to file an information in the nature of a *quo warranto*, against plaintiffs in error, for intruding into and exercising the powers, duties and functions of trustees of the town of Coulterville, without legal right. Leave was granted, and the information was filed, charging that the town was not then nor had it ever been legally incorporated under the laws of this State, and plaintiffs in error had usurped the office of trustees, etc.

To this information, several pleas were filed, setting up the ordering of an election by the trustees of the town; the giving of the notice by their clerk; the holding of the election; the number of votes cast for them; that the vote was canvassed; that they had the highest number of votes, and were declared duly elected trustees of the town. The record also shows that a demurrer was sustained to the first and second counts, and overruled as to the third, and that pleas were filed to this last count.

The record fails to disclose that anything was ever done with reference to these several pleas. The record does not show that they were demurred to or issue in fact was taken on them.

But at the September term, 1874, this order was entered: "And now, on this 23d day of September, A. D. 1874, come the People, by their attorneys, and the court finds that said defendants are guilty of unlawfully intruding into and holding the office of trustees of the village of Coulterville, without

warrant of law. It is, therefore, ordered and adjudged by the court, that defendants be, each and every of them, ousted of the said office, and that they pay the costs of this proceeding, and that execution is awarded therefor." Here seems to be a finding, and there is a judgment rendered, where the record presents no issue, either of law or fact, to be tried by the court or a jury.

Again, it does not appear that the attorneys for plaintiffs in error were present consenting to a trial. But, simply, the court, on the appearance of the attorneys for the People, found in their favor, and rendered a judgment of ouster. The order recites no trial, or that any evidence was heard.

But even if there had been an issue of fact, the court had no power to try it, without it was by consent of the parties. But no such consent appears, or even that plaintiffs in error or their attorney were present. Had there been an issue of fact, and the cause was reached for trial, and plaintiffs in error, or their counsel, had not been there, then the practice requires that a jury should have been impanneled, the evidence adduced, and a finding by the jury. It was manifest error to render this judgment on the record presented to us, and it must be reversed and the cause remanded.

Judgment reversed.

THE PEOPLE, for use of Oliver Miller *et al.*

v.

DEMPSEY HARRISON, Admr.

1. JUDGMENT—*against one obligor, when bar to suit against others.* A recovery against one of several persons who are only jointly liable for the payment of the debt or the discharge of a legal liability, releases the others, and forms a complete bar to a recovery at law against them.

2. JOINT AND SEVERAL OBLIGATION—*remedies afforded.* Where an obligation is joint and several, as, a guardian's bond, the law affords two distinct remedies to the obligee: one by a joint action against all the obligors, and

the other by a several action against each; and a joint action, brought against all, is no bar to a subsequent suit against one alone.

3. Where suit was brought upon a guardian's bond against the sureties and the administrator of the guardian, but no service was had on one surety, and the suit was dismissed as to the administrator, and judgment taken against the defendant served, alone, and afterwards the same demand was filed as a claim against the estate of the deceased guardian: *Held*, that the prior judgment was no bar to the claim in the county court, for the reasons that the obligation was joint and several, and because the county court has jurisdiction to allow an equitable demand.

Appeal from the Circuit Court of Clay county; the Hon. James C. Allen, Judge, presiding.

Mr. Rufus Cope, for the appellant.

Mr. W. B. Cooper, and Messrs. Hitchcock & Finch, for the appellee.

Mr. Justice Craig delivered the opinion of the Court:

Abraham Miller was appointed guardian of certain minors in Clay county, and to secure the faithful discharge of his duties he entered into a joint and several bond, with Joseph Maxwell and Solomon Miller as his sureties.

Subsequent to the execution of the bond, and after a default on the part of the guardian to comply with the terms and conditions thereof, Maxwell died. A suit was instituted upon the bond against the guardian, Solomon Miller, one of the sureties, and the administrator of the estate of Maxwell. Service was had upon Miller and the administrator, but the suit was dismissed as to the latter, and judgment rendered against Solomon Miller.

The judgment not having been paid, a claim was presented in the county court for allowance, against the estate of Maxwell. From the decision of the county court an appeal was taken to the circuit court, where a trial was had, in which the court denied the allowance of the claim, upon the ground that the former action against the guardian and surety upon the bond, which resulted in a judgment against the surety, was a

bar to a recovery in this proceeding against the estate of Maxwell.

It may be regarded as well settled, that a recovery against one of several persons, who are jointly liable for the payment of a debt or the discharge of a legal liability, releases the others, and forms a complete bar to a recovery at law against them. *Wann* v. *McNulty*, 2 Gilm. 355; *Thompson* v. *Emmert*, 15 Ill. 415; *Moore* v. *Rogers*, 19 Ill. 347; *Mitchell* v. *Brewster*, 28 Ill. 163.

But the question presented by this record arises not upon a joint contract, but the obligation is both joint and several, and hence the rule in relation to a joint undertaking does not apply.

Contracts which are joint and several may be regarded as furnishing two distinct remedies: one by a joint action against all the obligors, the other by a several action against each. Freeman on Judgments, sec. 335. If this be correct, an action against all the obligors on the joint liability would not be a bar to an action against each one on the several liability.

As was held in *Moore* v. *Rogers*, *supra*, where the contract is joint and several, its legal effect is double, equivalent to independent contracts founded upon one consideration, for performance severally and also for performance jointly; and distinct remedies upon the same instrument, treating it as a joint contract and as a several contract, may be pursued until satisfaction is fully obtained.

The bond executed by Maxwell was a several contract on his part, upon which he could have been sued alone in his lifetime, and after his death the obligation remained as a valid legal claim against his estate.

But even if it was true the plaintiff, by instituting suit against two of the makers of the bond as a joint obligation, and obtaining judgment against one, could only proceed in equity to obtain satisfaction from the estate of the deceased, yet, under the authority of *Moore* v. *Rogers*, *supra*, the plaintiff had a clear and undoubted right to have the claim allowed against the estate.

Syllabus.

As the court erred in refusing to allow the claim upon the proofs, the judgment will be reversed and the cause remanded.

Judgment reversed.

Henry O'Brian *et al.*

v.

Abraham B. Fry.

1. Foreclosure—*of the decree providing for possession.* It is competent and regular, in a decree for the foreclosure of a mortgage by a sale of the mortgaged premises, to order that the mortgagor shall surrender possession to the purchaser after the expiration of the time for redemption, and upon the making of a deed to him.

2. Same—*of the right to writ for possession.* Where an order for possession, to be delivered to the purchaser after he receives his deed, is contained in a decree of foreclosure, the grantee of the master, upon affidavit showing service of a copy of the decree upon the mortgagor in possession, and a demand for possession and a refusal, will be entitled to a writ of possession.

3. But, if the original decree contains no such order, the court, on notice to the mortgagor in possession, and on motion, after the execution of the master's deed, will order a surrender of possession to the purchaser, and, on proof of the service of a copy of such order, and of a demand for possession and refusal, an injunction will issue enjoining a compliance with the order, and, on refusal to obey, a writ of assistance will, on motion, be issued to the sheriff.

4. Same—*decree for possession before sale.* A decree of foreclosure, requiring the mortgagor, in default of payment of the sum found due, to surrender the immediate possession of the mortgaged premises to the complainant before sale, is erroneous but not void, and such order is not an order requiring possession to be delivered to the purchaser, and is spent when a sale is made.

5. Where the original decree contains no order for the surrender of possession to the purchaser after the making of a deed to him, no writ of assistance or possession can be ordered until an order for possession has been obtained, on notice to the party in possession, and service of such order, with a demand for possession and a refusal.

Appeal from the Circuit Court of Jefferson county; the Hon. Tazewell B. Tanner, Judge, presiding.

Statement of the case.

The record shows that, at the March term, 1872, a decree in chancery was rendered in the circuit court, in a proceeding to foreclose a mortgage, wherein Fry was complainant and O'Brian and his wife were defendants, by which decree it was "adjudged and decreed that defendants pay, in thirty days, $556.33, and that, in case the defendants should make default in the payment of the said money, then, and in that event, the said defendants are hereby required to surrender immediate possession of the said mortgaged premises to the complainant." The decree further provided, that a commissioner (named) should proceed to sell the mortgaged premises (directing, in detail, the mode of sale), and that, in default of redemption, the commissioner should convey the premises to the purchaser. It was further ordered, that the commissioner should report his proceedings at the next term, and that the cause stand continued for report.

At the June term, 1873, the commissioner submitted his report, which, upon examination, was approved. The report stated, that on the 15th day of June, 1872, he had, in pursuance of the decree, sold the mortgaged premises to the complainant, and it was thereupon "ordered by the court that this cause go off the docket."

On the 16th day of July, 1875, the commissioner made a deed, in pursuance of that sale, by which he conveyed the premises to Fry.

At the February term, 1866, Fry filed, in writing, his "application and motion for a writ of possession," in which he stated, the rendering of the original decree, the making of the commissioner's sale in default of payment, the failure to redeem, and that Fry took a deed therefor from the commissioner and is now entitled to possession, and that O'Brian and wife are still in possession, "and refuse, on request and demand, to surrender the same to Fry;" that copies of the decree and report of sale, and notice of this application, were served upon O'Brian and his wife on the 22d day of January, 1876, and in which Fry prayed that, on hearing of this motion, the court would "grant and order that a writ of possession issue," and that

the defendants be immediately dispossessed and the possession be at once surrendered and delivered to the petitioner.

On the hearing of this application, at that term, the facts above stated were proven, and the court overruled the exceptions of defendants to the same, and "adjudged that said motion be allowed, and that a writ of restitution be awarded to said plaintiff; that defendants are required to surrender possession of the mortgaged premises," (describing them.)

From this order O'Brian and his wife bring this appeal.

Mr. T. S. Casey, and Mr. C. H. Upton, for the appellants.

Messrs. W. & E. L. Stoker, for the appellee.

Mr. Justice Dickey delivered the opinion of the Court:

In a proceeding in chancery to foreclose a mortgage by sale of the mortgaged premises, it is competent and regular for the court, in the original decree fixing the amount of the mortgage debt, and ordering a sale, to make an order that the mortgagor shall surrender to the purchaser the premises sold, after the expiration of the time allowed by law for redemption, and upon the making of the master's deed. Where such order is contained in the original decree, the purchaser may have an order for a writ of possession, or, as it is called, a writ of assistance, commanding the sheriff to put him in possession.

To procure an order for such writ, the purchaser must show to the court, upon affidavit, that, after receiving his master's deed, he has caused a copy of the original decree to be served upon the mortgagor in possession, and has demanded the possession under his deed, and that possession has been refused.

Where the original decree contains no such order, the court, on notice to the mortgagor in possession, and on motion made after the making of the master's deed, will order that the mortgagor surrender the possession to the purchaser.

On proof by affidavit of the service of a copy of this order, and of demand made for possession under the order, and of a refusal to surrender the possession, an injunction issues enjoin-

ing a compliance with this order; and upon the service of this injunction, on motion, a writ of assistance will be ordered to issue to the sheriff.

In this case no order is contained in the original decree requiring possession to be surrendered to the purchaser, on the making of the master's deed.

The decree, after fixing the amount of the mortgage debt, gives a time for payment, and orders that, in default of payment, the possession shall immediately be surrendered to the *complainant*, and then the decree proceeds further, and orders the master's sale, but the decree makes no provision for the delivery of the possession to the *purchaser*, by the mortgagor or mortgagee. The rights of the petitioner in this case rest upon his character as *purchaser* at the sale, and he has, as such, no rights other than a stranger would have, as such purchaser.

It is not to be supposed that, at the sale, the complainant, if he became a purchaser, would have any rights save those which any other purchaser would acquire.

The order for an immediate surrender of possession to the complainant, contained in the decree for a sale, though erroneous, was not void. It applied, however, only to the possession for the time intervening between the decree and the sale. When that time lapsed without the execution of the decree, it had spent its force.

The mortgagor had the right to the use and possession of the property from the date of the sale until the making of the master's deed after the time for the redemption from the sale had elapsed. Petitioner's rights as mortgagee were gone, for the mortgage debt was satisfied by the sale.

The original decree having made no provision for putting the purchaser in possession on the making of the master's deed, no writ of possession or writ of assistance could regularly be ordered to issue until an order for possession had been procured, on notice, and a demand for possession under the order, accompanied with a copy of such order, had been made and possession refused. The steps necessary in such case are

explained in the opinion of this court in the case of *Oglesby* v. *Pearce*, 68 Ill. 222, and need not be repeated here. The proofs in this case show no demand for possession, and no refusal to surrender possession. Each of the three essential preliminaries to an order for a writ of assistance, is wanting. There is no previous order that defendants surrender possession to the purchaser. There is no demand of possession, and no refusal to surrender the possession.

The final order in this case is reversed.

Decree reversed.

ELIZA BRANGER *et al.*

v.

EDWARD LUCY.

1. HEIRS—*when personal judgment against, is erroneous.* Where heirs at law are sued for a debt of their ancestor, who have not sold or aliened any part of the land cast upon them by descent, or received any rents and profits therefrom, or anything from the personal estate, it is erroneous to render a personal judgment against them. No other judgment can be rendered in such a case than one to be satisfied out of the real estate which descended to them.

2. SAME—*extent of liability for ancestor's debts.* The liability of heirs for their ancestor's debts is only to the extent of what descends to them from such ancestor.

3. WITNESS—*party in suit against heirs.* In a suit against the administrator and heirs of a deceased person, for a debt owing by the deceased, or a liability incurred by him in his lifetime, the plaintiff is not a competent witness to testify, except as to facts occurring after the death of such deceased.

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

Messrs. GILLESPIE & HAPPY, for the appellants.

Messrs. G. B. & F. W. BURNETT, for the appellee.

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

This was an action of assumpsit, brought by one surety upon a guardian's bond, against the administrator and heirs at law of a deceased co-surety, for contribution. The declaration sets out that, on the 19th day of April, 1869, the guardian's bond was entered into by Elias Morgan, the guardian and principal, together with the plaintiff and Christian Branger, as his sureties; that, on April 20, 1870, the said Christian Branger departed this life, leaving the defendants Eliza Branger, Wilhelmina Branger, Emma Branger, Josephine Branger, Matilda Branger, Ida Branger and Ellen Branger, his children and heirs at law, to whom the real estate which said Christian Branger had at the time of his death, descended, and that the defendant Martin Branger was his administrator; that, at the October term, 1864, the wards of the guardian, in a suit brought by them against Morgan and plaintiff upon the guardian's bond for a breach of condition, recovered a judgment against this plaintiff (Morgan not having been served with process) for $748.50, which judgment he had been compelled to pay, and claims to recover one-half thereof from the defendants.

A personal judgment, in ordinary form, for $385, was rendered against all the defendants except Martin Branger, the administrator, and Wilhelmina and Josephine Branger, who were not served with process. The defendants appealed.

The points made for the reversal of the judgment are upon the form in which it was rendered, and the admission of the plaintiff as a witness.

It appears, from the evidence, that the real estate which Christian Branger died seized of was 120 acres of land in a body, his homestead, upon which he resided with his family at the time of his death; that he left a widow and minor children, some of the children being still minors; that the widow had ever continued to live upon the place, and that the chil-

dren had never received any benefit from the land. It also appeared there were yet some $1600 of debts against the estate.

As the heirs had not sold or aliened any part of the land, nor received any rents or profits therefrom, it was erroneous to render a personal judgment against the heirs. No other judgment should have been rendered against them than one to be satisfied only out of the real estate which descended from their ancestor, Christian Branger. The liability of heirs for their ancestor's debts being only in respect of what has descended to them from such ancestor, the judgment against them should extend no further than that.

As the defendants were sued as the heirs and administrator of a deceased person, the plaintiff was, under the statute, improperly admitted to testify, except as to facts occurring after the death of the decedent.

The judgment will be reversed and the cause remanded.

Judgment reversed.

THE PEOPLE *ex rel.* The Paris and Danville R. R. Co.

v.

JOHN G. HOLDEN *et al.*

1. MUNICIPAL SUBSCRIPTION—*condition prevented.* Where a township, under warrant of law, voted in favor of a subscription to the capital stock of a railway company, without conditions, the same to be made without unnecessary delay, to be paid for in bonds, not to be delivered until the road was completed and in operation between two points named, within five years, and the road was in fact completed within three years, to its terminus, except about a mile, but, by arrangement with another company, it operated its trains to its terminus, supplying all the wants of the public, when it tendered stock and demanded the subscription to be made, which was refused, and it being admitted by the pleadings that this refusal prevented the completion of the road within the five years, it was *held*, that the township could not be excused from making the subscription and issuing its bonds after the entire completion of the road, even after the time limited, as it could not profit by its own wrong.

2. SAME—*what is a substantial performance of condition.* Where the issuing of corporate bonds to a railway company is dependent upon the

condition that its road shall be completed to a certain city within a given time, a completion of its road to about a mile from the city, and, by an arrangement with another road which it intersects, the running of its trains to the city over the other road, as fully accommodates the public as if its own line had been extended into the city, and will be regarded a substantial compliance with the condition.

3. CONTRACT—*party preventing performance can not take advantage of it.* A party, who prevents a thing being done within the time stipulated, will not be allowed to avail of the non-performance he has himself occasioned, and thus avoid his agreement.

4. SAME—*what is.* A petition for an election by a municipal corporation to take stock in a railway company, and to issue bonds in payment, upon certain conditions, the notice of the election, and an affirmative vote thereupon, upon the faith of which money is expended, and the road substantially built and equipped, is a contract between the corporation and the railway company.

5. DEMURRER—*admits all facts well pleaded.* A demurrer to a pleading is an admission of the truth of all the facts therein well pleaded.

WRIT OF ERROR to the Circuit Court of Vermilion county; the Hon. OLIVER L. DAVIS, Judge, presiding.

Messrs. HENRY & PENWELL, and Messrs. MANN & CALHOUN, for the plaintiffs in error.

Messrs. EVANS & SWALLOW, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

At the February term, 1876, of the Vermilion circuit court, the people of this State, on the relation of the Paris and Danville Railroad Company, a body politic and corporate under a law of this State, presented a petition to the court, praying that a peremptory writ of *mandamus* be awarded against the supervisor and town clerk of the town of Danville, in said county, commanding them to make a subscription of twenty-five thousand dollars to the capital stock of that incorporation, and to issue bonds of that township for that amount, in accordance with the provisions of the act of incorporation and the terms of the vote in that behalf.

The petition refers to the act of the General Assembly of this State, approved March 26, 1869, incorporating the Paris

and Danville Railroad Company, and sets out the petition to the supervisor of Danville township that an election might be ordered, the notice given of the election, the returns thereof and canvassing the same, by which it appeared a large majority of the votes cast at the election were cast in favor of the subscription.

The petition then avers, on this fact being ascertained, it then and there became the duty of the supervisor and clerk of the township to subscribe, at the request of the company, the sum of twenty-five thousand dollars, the amount so voted, to the capital stock of the company, and to issue and deliver to the company the bonds of the township for that amount, upon the terms and conditions in said petition mentioned, and made due and payable at the time and in the manner in the petition mentioned, upon the tendering by the company to the supervisor and clerk twenty-five thousand dollars of the capital stock of the company, and otherwise complying with the conditions of the vote.

It appears the petition of the voters to the supervisor was to this effect: that the question of subscribing twenty-five thousand dollars to the capital stock of this company should be submitted at an election to be held on the — day of December, 1869; but it further provided for the payment of the subscription in these terms: said subscription to be paid on the following express condition, that is to say, said subscription to be paid by the bonds of said township, payable in fifteen years absolutely, or sooner, at the option of said township, and to bear interest at the rate of seven per centum *per annum*, and said bonds are not to bear date, nor to be delivered, nor to bear interest, until the railroad is completed, equipped with rolling stock and running in successful operation from Paris, in Edgar county, in and to the city of Danville, Vermilion county, Illinois; and upon the further express condition, that no part of said railroad shall be located or built west of the north fork of the Vermilion river, in said city of Danville, and that said railroad should be completed and in successful

operation from Paris to Danville within five years from this date, and dated November 6, 1869.

The election notice issued upon this petition recites the same, filling the blank of the day of the election with the figures 11th; so that the day of election should be the 11th day of December, 1869. The ticket voted contains substantially the same conditions.

The petition alleges that, within five years from the date of the petition for an election, the railroad company, relying upon this vote and subscription, had built and completed the railroad track from Paris, in Edgar county, to a point in Danville township, on the line of the Toledo, Wabash and Western Railway Company, about one mile from the city of Danville, and had made an arrangement with and leased from that company, whereby the petitioners' company had the right to run its cars on the track of the Toledo, Wabash and Western Railway Company, in and to the city of Danville, which was substantially the completion of their railroad from Paris to the city of Danville; and they had their line of road equipped with rolling stock and in successful operation from Paris to Danville, and that they continued, under this arrangement, to operate their railroad until they extended their track. This extension of track is alleged to have been made by the month of September, 1875, and was from the point of intersection with the Toledo, Wabash and Western Railway Company, to a point on the west side of the north fork of the Vermilion river, directly opposite to the west line of the city of Danville, from which point it crossed the north fork into the city, and that no part of their railway was or is located or built west of the north fork of the Vermilion river, in the city of Danville; and averring that the railroad is in full and successful operation over said track as extended, and from Paris to Danville.

It is further alleged, that after the election to subscribe for this stock, and after the company had constructed its road to its intersection with the Toledo, Wabash and Western Railway, and after it was running to Danville under the arrangement

made with the Toledo, Wabash and Western Railway Company, the petitioners caused twenty-five thousand dollars of their capital stock to be duly executed, and, on —— day, tendered the same to the supervisor and town clerk of Danville township, and then and there specially requested the supervisor and town clerk to make the subscription voted, which they refused to do, which refusal greatly embarrassed the petitioners financially, and, by reason of this refusal, the petitioners were hindered and delayed in pushing the road to completion within the five years, from its intersection with the Toledo, Wabash and Western road to its present terminus in the city of Danville, which could readily have been done within the five years, had the township officers discharged their duty at the time requested.

It is further alleged, that within three years from the date of their petition the railroad was completed, equipped with rolling stock and in successful operation from Paris to Danville, by means of the arrangement with the Toledo, Wabash and Western Railway Company, and from that time, thenceforward, they have been able to, and have accommodated the township and city of Danville and the public, in carrying freight and passengers between these cities, as fully and as perfectly as they could have done if the railroad had been completed to its present terminus in the city of Danville, and, therefore, it became the duty of the supervisor and town clerk to make the subscription and issue the bonds of the township, upon the request of the company and the tender of the capital stock to the amount of twenty-five thousand dollars.

And it is further averred, that on the first day of January, 1874, the railroad company caused to be tendered to those officers twenty-five thousand dollars of the capital stock of the railroad company, duly executed, and then and there demanded that the subscription should be made and the bonds issued, but that the supervisor and clerk refused, and ever since have refused, in disregard of the duty imposed upon them by law. They further allege, they have the amount of stock ready, in court, duly executed, to be delivered to the supervisor and clerk, and will keep and maintain the tender in open court.

To the petition containing these allegations there was a demurrer, which was sustained by the court, the petition denied, and judgment rendered against the petitioners for costs. By agreement, the record is taken to the southern division by writ of error.

The demurrer brings before us the whole record, and we must determine, from an inspection of it, whether sufficient facts are pleaded to authorize the writ, for the demurrer admits all the facts well pleaded.

Unlike in other cases of this character, in this there is no question of power, and no rights of third parties intervening.

It will be observed, the law authorizing this election nowhere requires or contemplates there shall be any conditions attached to the vote, nor does the petition of the freeholders contain any, so far as the subscription to the capital stock of the company is concerned. On a majority vote in favor of subscription, the subscription was to be made by the supervisor and town clerk, without unnecessary delay thereafter, upon request of the railroad company. Nor does the notice for the election contain any condition as to the subscription. It is very clear the subscription was to be made, on a favorable vote at the election being returned, and that, too, without unnecessary delay, upon the request of the company.

It is averred in the petition, and admitted by the demurrer, that within three years from the date of the petition requesting an election, the railroad was completed, equipped with rolling stock and in successful operation from Paris to Danville, by means of the arrangement made with the Toledo, Wabash and Western Railway Company, by which all the trade and travel of those cities and of the public were fully accommodated.

This intersection with the Toledo, Wabash and Western Railway Company was at a point not exceeding one mile from the city of Danville, showing the relators were earnestly endeavoring to carry out the enterprise in which they had engaged. At this time, a request was made to the town authorities to make the subscription of twenty-five thousand dollars,

about which there was no condition whatever. This, it seems to us, was the plain duty of the authorities to do. The distance from Paris, in Edgar county, to the city of Danville, is, we understand, about thirty-five miles, with the Vermilion river between. Thirty-four miles of this distance had been occupied by the relators' railroad, and within three years from the time the petition for the election was presented, which was on November 6, 1869. Thirty-four miles out of thirty-five of railroad had been completed, and such arrangements made with a long established road, by a connection with it, as to subserve all the travel and trade of the cities and of the public at large, and was evidence certainly, and strong evidence, of sincerity and good faith on the part of the railroad company.

It is admitted that at this juncture a request was made by the railroad company to the supervisor and town clerk to make the subscription of twenty-five thousand dollars, which they refused to do. Up to this time the resources of the railroad company had been drawn upon to extend the road thus far, and it was pressed for funds to continue the work. Had the town authorities then performed their duty, a new source of supply would have been opened to the company, with which they could have completed the road by a continuous line of their own from Paris to Danville, for it may be admitted, for the purpose of this case, such a line was in contemplation of all the parties, and such an one could have been made with the twenty-five thousand dollars promised by the township of Danville, and a large surplus would be left. We all know, to prosecute vigorously works of this character, prompt payment on the part of stockholders is indispensable, for railroads can not be made without money.

The promise of the township, by the vote, was precedent to the promise of the company to build the road, and had the subscription been made when requested, it can not be doubted the entire road would have been completed in the time stipulated. This subscription by a township so populous and so wealthy as Danville township, one of the most flourishing in

the State, with the richest land and inexhaustible mines of most valuable coal, would have contributed to this struggling railroad company a basis of credit on which money could be raised without difficulty.

It is well known railroads are built, for the most part, with borrowed money, secured by a mortgage of the road and franchise. It can readily be seen how important it was to this company that it had as holders of a part of their capital stock a township so influential and wealthy as Danville, in the county of Vermilion.

Defendants are not entirely correct in saying the subscription and issuing of bonds was conditional. No conditions whatever were attached to the subscription; that was to be made on an affirmative vote of the people, without unnecessary delay, upon request of the railroad company. Such is the language of the act. 3 vol. Private Laws 1869, pp. 147–8.

The conditions applied to the payment of the subscription, and it is urged, the conditions on which the bonds were to issue in payment of the subscription, have not been performed, and that it would be an useless act now to compel a subscription, and by reason of their default the company have forfeited all right to the bonds.

It will be conceded, when a connection was made with the Toledo, Wabash and Western Railway Company, one mile south of the city of Danville, by which the trade and travel of the two cities, Paris and Danville, and the public generally, were fully subserved, there was not, by the railroad company, a literal compliance with one of the conditions on which the bonds were to be issued, if it was in the contemplation of these parties there should be one continuous line of road from Paris to Danville, under the management and control of the Paris and Danville Railroad Company, in its entirety, no part of it to be subject to, or under the control of any other independent authority or corporation. But, as we have said, when the road had been completed to that point, and the town authorities were then requested to make the subscription, they should have done so, as it is admitted, had they so done, the means

could have been procured thereby with which the road could have been and would have been completed by a continuous line to the city of Danville. And shall the township be permitted to profit by its own wrong in withholding, at this vital moment, the means by which to complete the road precisely as contemplated?

What right has the town of Danville to insist on a literal performance on the part of the company, they refusing to perform on their part?

The vote had by the people was, that a subscription should be made without unreasonable delay, on request of the company. The town entered into this engagement unconditionally, and is it right they should urge their own disobedience of the law, by which the railroad company was paralyzed in their operations, as an argument against the company?

We are all of opinion the subscription should have been made when requested by the railroad company. Had it been made at the time requested, the railroad being then completed to a point within one mile of the city of Danville, the common observation of any person must be sufficient to show that the sum to be subscribed would be a basis for raising funds to make the extension within the prescribed time.

Now, as to the bonds. It is urged by defendants, the railroad company have acquired no right to the bonds, although the road is completed to the city of Danville, fully equipped, and in successful operation, because it was not completed and equipped within five years from the 6th of November, 1869, the day the petition was presented for the election.

It is alleged in the petition as a fact, and the demurrer admits it, that the failure to complete the road within the five years was attributable to the failure to make the subscription upon the request of the railroad company. What is the recognized rule in such cases, when a precedent condition is to be performed, before liability can attach as against the other party? It is a sound principle, everywhere recognized, that a party who prevents a thing being done at the time stipulated, shall not avail of the non-performance he has himself occasioned.

It was the intention of the voters, when they voted, that their decision should be carried into effect, and the amount of twenty-five thousand dollars subscribed to the capital stock of this company by the township authority, without unreasonable delay, upon request of the railroad company. They knew that railroads could not be constructed without money, and they knew, in order to raise money, the company must have credit. This subscription, ordered by the voters to be made, it is readily seen, would have put the road in funds with which to construct one mile of road, without equipment, as agreed in the contract. We say contract, for we take the charter, the petition, notice of the election, and the vote thereupon, as a contract between these parties.

It is plain, the defendants in error prevented the construction of the road the entire length within the time limited, and they can not take advantage of their own wrong. A suspension of the work, or delay in its progress, after the time when the subscription should have been made, can not be a defense for the township.

But, it is urged, another express condition has not been complied with by the railroad company, and it is this: In the petition for an election, it was stipulated that no part of said railroad shall be located or built west of the south fork of the Vermilion river, in said city of Danville. What is the allegation in this petition for a *mandamus*, and which the demurrer admits? It is this: "By the month of September, 1875, said Paris and Danville Railroad Company had extended its track from said point on the Toledo, Wabash and Western railway to a point on the west side of the north fork of the Vermilion river, directly opposite to the west line of the said city of Danville, from which said point it crossed said north fork of the Vermilion river into the city of Danville, and no part of said railway was or is located or built west of the north fork of the Vermilion river in said city of Danville, and said railroad is now in full and successful operation over said track, as aforesaid, and from Paris to Danville, aforesaid."

Here is a distinct allegation, admitted to be true, that no

part of the railroad is located or built west of the north fork of the Vermilion river, in the city of Danville. Here there is no violation of the condition set up and claimed by the defendants, but fully meets the terms of the petition and vote.

But if the route of the road is not in precise accordance with the intention of the parties, defendants would have no cause to complain, as a complete line of transit, starting from Paris and terminating at the city of Danville, accommodating all the travel and freights, and promoting the same general interests, exists. The principles recognized in *The Terre Haute and Alton Railroad Co.* v. *Earp*, 21 Ill. 291, and cases there cited, are applicable here. See, also, *Banet* v. *Alton and Sangamon Railroad Co.* 13 Ill. 504; *Sprague* v. *Illinois River Railroad Co.* 19 ib. 174; *Illinois River Railroad Co.* v. *Zimmer*, 20 ib. 654.

On a careful examination of this record, we are satisfied the petition sets forth facts sufficient to authorize the court to issue the writ of *mandamus*, as prayed. The relators seem to have exerted themselves to bring their enterprise to a successful termination within the time limited, and would have done so had they not been prevented by the refusal of the defendants to perform their duty.

The road is completed from one terminus in Paris, Edgar county, to the city of Danville, in the township of Danville, and is answering all the demands and wants of the public, and there is no reason or justice in permitting the township to escape its liabilities. Even if the road had not been completed within the time, in the absence of any fault on the part of the defendants, still, it would be received if it was completed and equipped and in successful operation, as this road is. Such a plea ought not to avail in a court where justice is supposed to be administered. The town has obtained all it expected to obtain, and ought to pay what it agreed to pay. If the defendants, or those they represent, have sustained damages by the delay, they might be entitled to recover from the company to the extent of these damages. This would be more in accordance with justice than the demand they set up, that they shall

go "scot free," although the road has been made for them as contemplated.

There are some minor points made by defendants in error, but as the petition did not state a day for the election, they are settled by the case of *Marshall et al.* v. *Silliman et al.* 61 Ill. 218. The notice fixed a time and place for the election, which was a sufficient compliance with the law.

Entertaining these views, the judgment on the demurrer should have been for the petitioners. Sustaining it was error; and for the error, the judgment is reversed and the cause remanded for further proceedings.

Judgment reversed.

Mr. JUSTICE WALKER: I am unable to concur in this opinion or the judgment rendered in this case.

Mr. JUSTICE DICKEY: I can not concur in this opinion or judgment.

CHARLES LEWIS

v.

THE PEOPLE *ex rel.* LOUISA GOODMAN.

1. APPEAL—*lies from county to circuit court in bastardy case.* Under the Revised Statutes of 1874, an appeal lies from the county to the circuit court in bastardy cases, and it is proper to try the same *de novo*.

2. SAME—*from county to circuit court.* An appeal, for the purpose of a trial *de novo*, lies from the county to the circuit court in all cases where no appeal or writ of error is allowed to this court.

3. BASTARDY—*degree of proof required.* A prosecution for bastardy being merely a civil proceeding, the defendant may be found guilty on a preponderance of evidence, and it is no error to so instruct the jury.

WRIT OF ERROR to the Circuit Court of White county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Messrs. McDOWELL & McCLINTOCK, and Messrs. POLLOCK & KELLER, for the plaintiff in error.

Messrs. CREBS & CONGER, for the People.

Mr. JUSTICE WALKER delivered the opinion of the Court:

On the 28th day of October, 1874, Louisa Goodman filed a complaint before a justice of the peace, charging plaintiff in error with being the father of a bastard male child, of which she had been delivered. An examination was had by the justice, and plaintiff in error was recognized to appear at the next term of the county court. A trial was had therein, resulting in a verdict of not guilty, and he was discharged; but an appeal was taken to the circuit court, and, on a trial of the case by the court and a jury, a verdict of guilty was returned, and, after overruling a motion for a new trial, the court rendered the judgment required by the statute. A transcript of the record is brought to this court on error, and a reversal of the judgment is asked.

The first objection urged is, that the statute does not give an appeal from the county to the circuit court in this class of cases, and hence the latter court had no jurisdiction to try the case on appeal. A reference to the 187th sec. of chap. 37, R. S. 1874, p. 344, will show that an appeal is allowed from the county to the circuit court in all cases not otherwise provided for in the 188th section of the same chapter. When the latter section is examined, it is found that it provides for appeals and writs of error, directly to this court, from judgments for the sale of lands for taxes and special assessments, and from orders on applications by executors, administrators, guardians and conservators, for the sale of real estate, rendered by the county courts. These are the only cases provided for in that section, and hence are the only limitation of appeals to the circuit court. It then follows that, as this class of cases is not excluded, an appeal, in this case, was properly granted, perfected, and tried in the circuit court.

We are referred to *Peak* v. *The People*, 76 Ill. 289, as bearing on this question of jurisdiction of the circuit court on appeals in such cases. That case does settle the doctrine that where no appeal is given from the county court to the circuit court, a writ of error lies to this court, but error will not so lie when such an appeal is given to the circuit court. That case holds that, when an appeal is given to the circuit court, the case must come to this court through the circuit court. That case is an authority against the position assumed by plaintiff in error in this case.

It is next urged, that the court below erred in giving the second instruction asked by defendant in error. It is this:

"The court instructs the jury, that a mere preponderance of the testimony is sufficient, in this case, to determine their verdict, and if, from the evidence, they believe that the defendant, Charles Lewis, is the father of the child, they should so return in their verdict."

We are aware of no case which holds that anything more than a preponderance of evidence is necessary to sustain a verdict in a civil case. It has been held by this court, that the fact of paternity, in a prosecution of this kind, may be found on a preponderance of evidence, and that all reasonable doubts need not be excluded. This instruction requires that the fact should be proven by a preponderance of evidence. It is not like the instruction in *Peak* v. *The People*, *supra*. That instruction told the jury that it would be sufficient if evidence created probabilities in favor of the opinion, and that the weight of evidence inclined to that side of the question. The instruction in this case is unlike that. This does not authorize a finding on probabilities, but it requires it to preponderate in favor of the plaintiff. This is all the law requires in such a case. We fail to see that the two instructions are, in any respect, similar in substance or in form. Nor can we imagine that this instruction, especially when taken with the others, could have misled the jury.

It is also urged, that the verdict is not sustained by the evidence. As it appears to us, as embodied in the bill of exceptions, we think it preponderates in favor of the verdict. If the evidence of the prosecution were alone considered, it would not leave a doubt that plaintiff in error was the father of the child. It was for the jury to determine whether he had overcome the evidence on the part of the people, and they have found that he had not, and, we think, correctly. It is true that the prosecutrix made statements, out of court, inconsistent with a portion of her testimony, but she, frankly and without evasion, stated that she had, and gave the statements as they were testified to by others, and she gave reasons for so doing that seem to have been satisfactory to the jury, who saw her testify and had ample means of determining the weight of all the testimony.

It is also true that plaintiff in error denies, as positively as the prosecuting witness affirms, that he ever had coition with her. But it is manifest that he endeavored to give a coloring to his evidence, to make a false impression on the minds of the jury. There is evidence in the record tending to impeach his character for veracity.

All the evidence considered, we perceive no reason for disturbing the verdict. The judgment of the court below must be affirmed.

Judgment affirmed.

ASAPH DARWIN *et al.*

v.

GABRIEL S. JONES, Admr.

1. APPEAL—*from county to circuit court.* The words, "as in other cases," in the statute of 1872 in relation to appeals from the county to the circuit court, on applications by administrators to sell real estate to pay claims, mean that appeals shall be taken in the usual manner of taking in other cases.

2. SAME—*bond must be filed in time.* In order to perfect an appeal from an order of the county court for the sale of land by an administrator, to the circuit court, the appeal bond must be filed within twenty days, as in other cases.

APPEAL from the Circuit Court of Randolph county; the Hon. AMOS WATTS, Judge, presiding.

Mr. HARVEY NEVILL, for the appellants.

Mr. WILLIAM HARTZELL, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This proceeding was commenced in the county court, by the administrator of the estate of John G. Darwin, for an order to sell real estate to pay debts. A decree was rendered at the June term, 1873, directing a sale of so much of the real estate of which the intestate died seized as might be necessary to pay the claims allowed against the estate. The adult defendants prayed an appeal to the circuit court, which was allowed, and the bond fixed at $100. It does not appear the adult defendants ever perfected an appeal, but the guardian attempted to take an appeal on behalf of his wards by filing a bond, with security, and giving notice to the administrator of his intention to prosecute an appeal. On the hearing in the circuit court, petitioner entered a motion to dismiss the appeal, because it was not taken in apt time, and defendants entered a cross-motion to dismiss the suit, but the latter motion was overruled and the appeal dismissed.

Whether the appeal was properly dismissed, depends upon the construction that shall be given to the act of 1872 allowing appeals, under which this proceeding was had. That act provided, "appeals shall be allowed from all judgments, orders or decrees of the county court, in all matters arising under this act, to the circuit court, in favor of any person who may consider himself aggrieved by any judgment, order or decree of such court, and from the circuit court to the Supreme Court, as in other cases, and bonds, with security, to be fixed by the

county court or circuit court, as the case may be." Laws 1872, page 109, sec. 124. The ambiguity in this section arises out of the words, "as in other cases." Obviously, it is meant, appeals from the county court to the circuit court, in applications for the sale of real estate, should be taken in the same manner as appeals in "other cases" from the county court, in probate matters, and from the circuit court to the Supreme Court, in the usual manner of taking other cases.

The same words, "as in other cases," are found in that section allowing appeals under the Statute of Wills, in the act of 1845. As there used, they, no doubt, had reference to the section of the statute that gave an appeal from the "judgments, decrees and decisions rendered" by judges of probate, to be taken and prosecuted in like manner as appeals from justices of the peace. R. L. 1845, pp. 429, 564, secs. 20, 138. When the act of 1872 was adopted, there was no law in force allowing appeals from the county court to the circuit court, in probate matters, except that which gave appeals in the same manner as from justices of the peace. It would seem the words, "as in other cases," can have no other meaning in the act of 1872 than they had in the act of 1845; and hence it follows the appeal should have been taken within twenty days after the rendering of the decree. This was not done. The court fixed the penalty of the bond, but no appeal bond was, in fact, filed until after the elapse of twenty days. It was then too late, and the appeal was properly dismissed.

The judgment will be affirmed.

Judgment affirmed.

JOHN FRIZELL *et al.*

v.

JOHN ROGERS.

1. HIGHWAYS—*notice of hearing and posting of petition jurisdictional.* In counties under township organization, unless copies of the petition for laying out a highway are posted as required by the statute, and notice is

given by the commissioners of highways to hear reasons for or against, they will have no jurisdiction to act. Such notices are jurisdictional, and unless proved by affidavit, or other legal evidence, an order establishing a highway will be enjoined in equity.

2. SAME—*posting may be shown by recital in order.* Commissioners of highways may receive any competent evidence of the posting of copies of a petition for a new road, and if their order establishing the road shows that such evidence was received, showing the fact of posting, it will be sufficient evidence of their jurisdiction to act.

3. SAME—*appeal.* If commissioners of highways, in making an order to lay out a highway, have no jurisdiction, their proceedings will be void, and there will be nothing to appeal from. An appeal is a recognition of jurisdiction.

4. CHANCERY JURISDICTION—*enjoining opening of road.* Where an order of commissioners of highways establishing a highway is void for want of jurisdiction, a court of equity will entertain a bill to enjoin the opening of the road, although no order is made to open the same.

APPEAL from the Circuit Court of Jefferson county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Messrs. GREEN & CARPENTER, for the appellants.

Mr. GREENBERRY WRIGHT, and Mr. WILLIAM J. KERR, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This appeal is prosecuted to reverse a decree of the court below enjoining commissioners of highways from ordering the opening of a certain highway.

The order of the commissioners laying out the highway is, as disclosed by the record before us, clearly void, for want of jurisdiction in them to make such an order. It is provided by § 71 of chap. 121, entitled "Roads and Bridges," R. Laws of 1874, p. 924, that "Whenever any such number of freeholders" (that is twelve, residing within three miles of the road to be laid out, § 69), "determine to petition the commissioners of highways for the alteration, widening or vacation of any road, or laying out any new road, they shall cause a copy of the petition to be posted up in three of the most pub-

lic places in the town, in the vicinity of the road to be laid out, altered widened or vacated, at least twenty days before any action shall be had in reference to such petition. The posting of any such notice required by this act may be proved by the affidavit of the person posting the same, or by other legal evidence."

And, by § 72, "Whenever the commissioners of highways shall receive any such petition, with the proof of the posting of copies, as in the next preceding section specified, they shall fix upon a time when and where they will meet to examine the route of such road, and to hear reasons for or against the altering, widening, vacating or laying out the same—which meeting shall be within twenty days after the expiration of twenty days required for the posting of the copies of the petition in the next preceding (71) section, and they shall give at least ten days' notice of the time and place of such meeting, by posting up notices in three of the most public places in the township, in the vicinity of the road to be widened, altered, vacated or laid out."

The notices required to be given by these sections are jurisdictional, and unless they have been given, the commissioners are not authorized to act. *Commissioners* v. *Harper*, 38 Ill. 103; *Corley* v. *Kennedy*, 28 id. 143.

There is no evidence of the posting of the petition. True, at the end of the petition as copied there appears this: "I hereby certify this was posted according to law. J. B. Bradford, Esq." But no law makes the certificate of a party posting, sufficient. It must be proved by his affidavit or by other legal evidence. Sec. 71.

The commissioners might have received any competent legal evidence of the posting, and if their order had showed they had received such evidence, or that the fact of posting had been proved, it would have been sufficient. *Shinkle et al.* v. *Magill et al.* 58 Ill. 422. Their order entirely omits all mention of the posting of the petition, and, therefore, fails to supply the omission in the record.

Although the entire record, as certified by the proper custodian, in relation to the laying out of the highway, is before us, it does not appear that the notice required by § 72 was ever given. There is no evidence whatever of such a notice in the record.

Although no order was made directing the highway to be opened, we think the fact that the highway was laid out was sufficient to justify appellee in resorting to chancery, to enjoin future proceedings based on that order.

The order to open would follow, as a necessity, the order laying out the road, and it might be made at any subsequent time, so as to cause the road to be opened within five years from the time it was laid out. R. L. 1874, p. 932, § 119.

It can not be said appellee ought to have appealed, because the commissioners having acted without jurisdiction, there was nothing to appeal from. An appeal pre-supposes, and, indeed, is a recognition of jurisdiction.

The equitable jurisdiction in such cases is well settled.

Decree affirmed.

Mr. CHIEF JUSTICE SHELDON, dissenting:

I adhere to the rule laid down in *Nealy* v. *Brown et al.* 1 Gilm. 10, and which I had supposed to prevail in this State, that where the question of the existence of a public highway comes up collaterally, as in this case, it is enough, in the first instance, to introduce in evidence the order establishing the road, without making proof of the previous steps required by the statute for laying out the road; that the presumption is, that the antecedent proceedings had been regular, subject, however, to be rebutted. There was no evidence in the present case rebutting the presumption that the antecedent proceedings had been regular—no evidence that a copy of the petition and notices had not been posted—all that appears is, that the proceedings, on their face, do not show such posting.

ROBERT J. S. HATFIELD *et al.*

v.

MICHAEL MEROD.

FRAUDULENT CONVEYANCE—*right of grantor's surety to impeach.* A surety of a party at the time he makes a conveyance of land, who is afterwards compelled to pay the grantor's debt, is a creditor, within the meaning of the statute, and has the right to impeach the deed as fraudulent, by bill in chancery.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. FRANKLIN A. MCCONAUGHY, for the plaintiffs in error.

Mr. JAMES M. DILL, for the defendant in error.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This was a bill filed by Merod, a judgment creditor of Hatfield, to set aside a deed, made by Hatfield to his sister, Clark, purporting to convey his undivided interest in eighty acres of land, (his interest therein being, at that time, one undivided fourth thereof,) and to subject the same to sale in satisfaction of Merod's judgment.

The bill charges that the deed was made without valuable consideration, and for the purpose of hindering the creditors of Hatfield, and especially Merod. The decree of the circuit court granted the relief sought.

At the time of the making of the deed, Merod was bound as the security of Hatfield upon a promissory note to Dunn. Afterwards, Merod was compelled to pay Dunn, and brought suit against Hatfield for the money so paid, and recovered judgment against Hatfield. This proceeding is for the satisfaction of that judgment. Merod was then a creditor, in the sense of the statute, at the time of the making of the deed, and has a right, as such, to call in question the deed. *Choteau* v. *Jones*, 11 Ill. 300.

No other question of law is presented in this case. It is contended, however, that the proofs are not sufficient to support the decree. We have carefully examined all the evidence in the record, and find no good reason to disturb the decree. It is unnecessary to discuss the proofs in detail. It is enough to say that the testimony is contradictory, and that upon the whole evidence, properly weighed, we concur in the conclusion of the circuit court.

The decree is, therefore, affirmed.

Decree affirmed.

JOHN G. FELLERS *et al.*

v.

WILLIAM RAINEY, JR. *et al.*

1. BILL OF REVIEW—*does not lie on finding of court.* A bill of review can not be sustained on the ground that the court decided wrong on a question of fact, nor for wrong inferences of the court on matters of evidence, nor on the ground that the decree which is attacked was not warranted by the evidence.

2. FRAUD—*in procuring decree.* Where defendants are induced to enter their appearance in a suit in chancery to save the cost of service, and have ample opportunity to contest the equities claimed, and nothing is done to prevent their defending, the decree can not be impeached for fraud.

WRIT OF ERROR to the Circuit Court of Jefferson county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Mr. JAMES M. DILL, Messrs. CASEY & WILSON, and Messrs. WILDERMAN & HAMILL, for the plaintiffs in error.

Messrs. W. & E. L. STOKER, and Mr. W. RAINEY, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The proceedings set forth in this record were commenced on the equity side of the circuit court of St. Clair county, by

Emeline Fellers, and John C. Fellers, her husband, complainants, and against William Rainey, junior, and others, respondents, the scope of which was, to set aside a certain decree of that court, passed in favor of William Rainey, Jr., in a cause wherein said Rainey was complainant, and his co-respondents here, together with the complainant Emeline Fellers, were defendants, on the allegation of fraud on the part of William Rainey, Jr., in obtaining the decree.

All the parties claim to be heirs at law of one Isaac Rainey, deceased, who died on the 26th of February, 1871, intestate, and possessed of both real and personal estate.

The object of the bill exhibited by William Rainey, Jr., the decree on which is sought to be set aside by these proceedings, was, to enable him to participate in the estate of his grandfather, Isaac Rainey; the bill alleging that all the other heirs had received advancements from the intestate, Isaac Rainey, alleging a refusal on their part to give any account of their advancements, and praying that they be compelled to bring their advancements into *hotchpot*, or on failure to do so, the residue of the estate of said Isaac Rainey may be decreed to complainant and his brother, Jefferson Rainey, Jr.

To this bill of complaint, the defendants, including the complainants in this proceeding, subscribed this writing, after entitling the cause and nature of the suit, as follows:

"We do hereby enter our appearance in the above entitled cause, waive all process of summons, and pray a speedy hearing and adjudication of this cause; this 7th day of February, 1872."

At the return term a rule was taken against the defendants to answer, and on failure their default was entered.

An answer was put in by the guardian *ad litem* of the minor defendant, Jefferson Rainey, Jr., who was really a party in interest with the complainant.

A decree *pro confesso* was entered against the adult defendants, and the residue of the estate of Isaac Rainey, deceased, was adjudged to be vested in the complainants, William Rainey, Jr., and Jefferson Rainey, Jr.

Emeline Fellers, with her husband, John G. Fellers, exhibited their bill in chancery in the St. Clair circuit court, at the February term, 1873, to set aside this decree for fraud practiced by William Rainey, Jr., the complainant, in obtaining the same.

The cause was transferred to the Jefferson county circuit court, in which, on a general demurrer interposed by the defendants, the bill was dismissed.

To reverse this decree the record is brought here by writ of error.

It would seem the fraud relied on by plaintiffs in error, consists in certain letters written by William Rainey, Jr., the complainant in the original proceedings, to induce the defendants in that bill, among them the plaintiffs in error, to enter their appearance to his suit without issuing summons against them, assuring them that their rights would not be prejudiced thereby, and there would be a saving of costs, and that there was no trickery about it at all. The first letter is dated Nashville, February 17, 1872, and addressed to his uncle, William Rainey, senior, as is the second also, bearing date February 25, 1872. In neither of those letters can we perceive any indications of fraud of any kind. On the contrary, there is an expression of a desire only that the parties in interest should have ample notice of the suit, and an opportunity afforded them to defend against it, if they deemed it proper so to do. None of the defendants were willing to defend the suit and contest the equities set up by complainants, and they all acquiesced in the decree except Mrs. Fellers, who had ample opportunity to contest the claim of complainants. A rule was regularly taken against her to answer, which she failed to do, and she must be concluded by the *pro confesso* decree.

It is well settled, a bill of review can not be sustained on the ground that the court decided wrong on a question of fact, nor for wrong inferences of the court on matters of evidence, nor on the ground that the decree, which is attacked, was not warranted by the evidence. 3 Daniell's Chy. Pr. 1727, and notes.

We fail to perceive any fraud practiced by William Rainey in obtaining the decree sought to be set aside. There is nothing shown which should vitiate and avoid the decree. It was in the power of plaintiff in error to make complete defense to that suit and have all her rights adjudicated. It was her own fault, this has not been done.

An act of the clerk in making up this record, requires noticing. It appears there is embodied in the transcript of the record before us, the argument of the defendants in error in support of the demurrer to this bill, filling nine pages, occupying pages 48 to page 56, both inclusive. There is no authority for this, and the same must be expunged from the transcript.

Seeing no error in the record, the decree is affirmed.

Decree affirmed.

ADOLPH MULHEISEN *et al.*

v.

WILLIAM LANE.

1. TROVER—*when it lies.* An officer acquires no such interest in property, until he has seized it under execution, as gives him the right to recover the value in an action of trover, or the property itself in replevin. Until after a levy, he can maintain no action in respect to personal property of the defendant in execution.

2. SAME—*when demand is necessary.* Where personal property is taken on execution by a constable, trover can not be maintained against the plaintiff in the execution when sued with the officer, without proof of a demand and refusal to surrender the property.

3. OFFICER—*rights of, under execution.* If an officer reduces personal property to possession by a levy under an execution, and any one dispossesses him, he may recapture it, or recover the value of his special interest in it, in an action of trover.

APPEAL from the Circuit Court of Washington county; the Hon. AMOS WATTS, Judge, presiding.

Mr. GREENE P. HARBEN, for the appellants.

Mr. P. E. HOSMER, and Mr. DANIEL HAY, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The officer being unable to find the property described in the writ of replevin, so as to deliver it to plaintiff, a count was added to the declaration, in trover, upon which a recovery was had.

Plaintiff was a constable, and had in his hands an execution, issued by a justice of the peace, against the goods and chattels of John L. McNeil. The property in controversy is a sewing machine. No levy had been made upon the property, and, indeed, plaintiff never saw it. He understood McNeil was the owner of a sewing machine, and went to make a levy upon it, but was told defendants had just taken it away. At an interview subsequently had with Mulheisen, who was also an acting constable, he told plaintiff he had taken the machine on an execution in favor of McElwaine, against McNeil, but plaintiff says, on comparing the executions, he found his was some ten or twelve days the oldest. Upon making this discovery, he demanded the property of Mulheisen, but he refused to give it up, saying he must first see McElwaine. There was some evidence tending to show the machine was worth $50. Upon this evidence the jury found a verdict in favor of plaintiff for the value of the machine, on which the court rendered judgment against both defendants.

There is a total want of evidence to sustain the verdict. Plaintiff was neither the owner, nor entitled to the possession of the property, in the sense that would enable him to maintain trover for its value. Really, there is no evidence in the record the machine was the property of the execution debtor. But, waiving this question, what right had plaintiff to the possession of the property? He never saw the machine, had made no levy upon it, and never had it in his possession. We do not understand an officer acquires such interest in property, until he has seized it under execution, as gives him the right

to recover the value in an action of trover, or to recover the property itself in replevin. Had he reduced the property to possession by a levy, if any one should dispossess him, he could recapture it, or recover the value of his special interest in it, in an action of trover. Until after seizure, he could maintain no action. The mere right to levy upon it gives the officer no interest in the property itself.

But in no event could a recovery be had against McElwaine until after demand had been made upon him, and a refusal to surrender the property. He was afforded no opportunity to deliver it. When plaintiff demanded the machine of Mulheisen, he declined to give it up until he could see McElwaine. This was all the demand that was ever made upon any one, and it would, in no event, warrant a judgment against McElwaine, the execution creditor. Before he could be held liable as for a conversion, it was indispensable to prove a demand upon him, and a refusal to surrender the property to the party entitled to the possession. This was not done.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

COLMORE HARRIS *et al.*

v.

JOSEPH SCHRYOCK *et al.*

1. TOWNSHIP ORGANIZATION—*changing towns and forming a new one.* The proviso in the statute giving the board of supervisors power to form new towns, and to divide or enlarge towns, requiring a vote in case an incorporated town is to be divided, refers to incorporated towns and villages, and not to towns under the township organization law; and where no such incorporated town or village is to be divided, by any change of boundaries or the formation of a new town, no vote is required.

2. INJUNCTION—*holding of an election.* The power to hold an election is political and not judicial, and a court of equity has no jurisdiction to restrain officers from the exercise of such powers.

WRIT OF ERROR to the Circuit Court of Jasper county; the Hon. JAMES C. ALLEN, Judge, presiding.

Mr. J. M. HONEY, Mr. D. B. BROWN, Mr. J. W. GIBSON, Mr. S. W. WISHARD, and Mr. H. B. DECIUS, for the plaintiffs in error.

Messrs. WILSON & HUTCHINSON, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The board of supervisors of Jasper county, on the 15th of January, 1875, made an order establishing a new township from territory taken from Ste. Marie township, in that county. The board appointed plaintiffs in error judges of election of the township thus created, for the choice of town officers. To prevent plaintiffs in error from performing their duty and holding the election this bill was filed, and a temporary injunction granted, restraining them from acting as such judges, until the consent of the people to such division should be obtained from the majority of the electors at an annual election in the original township. At the spring term, 1875, of the circuit court, a hearing was had, and the injunction rendered perpetual. To reverse that decree the record is brought to this court, and various errors have been assigned.

It is urged, that the whole question in the case turns upon the construction of the 26th section of the Township Organization Law (R. S. 1874, p. 1069.) The section confers ample power and jurisdiction upon the county board to alter the boundaries of towns, to change town lines, and to divide, enlarge and create new towns in their respective counties, to suit the convenience of the inhabitants residing therein. The section also provides for the amount of territory which the new town shall embrace, the number of voters it shall contain, for a petition to be presented, etc. To the section is added this proviso: "*Provided*, that no incorporated town shall be divided, except consent thereto is given by a majority of all the electors voting at a general election in said town—notice that

the question of dividing said town will be submitted to the legal voters thereof having been given by the county clerk at the same time and in the same manner as the notice of said general annual election."

The question presented is, where and by whom is the election to be had? Is it by the incorporated town or village, by the township as it was before the division, or by the electors in the territory proposed to be erected into a new township? This proviso is not free from obscurity and doubt as to the true meaning of the language employed. It seems to be obvious that the division of an incorporated town or village can not be had by changing township lines, by enlarging or dividing the township, or the creation of a new township, without the vote provided for by the proviso. The language employed seems to embrace each and every one of these contingencies.

Where the county board proposes to enlarge a township, two of these bodies are directly interested in the division, and yet, if the proviso was intended to embrace such a case, but one township would be embraced by the language of the proviso, and it would be unknown which, nor could we conjecture which was intended. And if the townships were intended to vote, it would have specified whether both or which one should consent to the enlargement. So of the change of the township lines.

Again, the townships are designated as towns, but the village is designated as an incorporated town by this section. The fact that this difference in the terms employed was used, would manifest a design to make a broad distinction of the subjects embraced by each. Whilst the word "town" is sometimes employed to designate a township, the term "incorporated town" is seldom, if ever, employed to embrace such a body. According to the canons of construction, ordinary terms must be held to have been used in their general and popular sense. We must, therefore, conclude that the proviso only requires an election held in case an incorporated town or village is to be divided by the alteration of the township line, the alteration, the division, or the formation of a new town-

ship. And the words "said town," employed in reference to the election and notice, as used in the proviso, must be held to apply to an incorporated town or village. It then follows, that in such case the election can only be held in the incorporated town or village. It was the design of submitting the question whether the incorporated town or village should be divided, to the voters of that municipality before the order of the county board could become operative. No such incorporated town having been divided by the order of the county board in this case, no election was required to be held, and the order of the board became operative by its own force.

We are fortified in this construction from the fact that, in organizing townships, in the first place the inhabitants have no right to vote, although fractional townships may be added to others that are full, or a township not having a sufficient number of inhabitants may be divided and added to others. It would, therefore, seem, that the General Assembly have only provided that a vote shall be had when it is proposed to divide an incorporated town or village, and that the voters therein shall alone vote on the question of its division.

But, according to the repeated decisions of this court, the power to hold an election is political and not judicial, hence a court of equity has no power to restrain officers from the exercise of such power. See *The People* v. *The City of Galesburg*, 48 Ill. 485; *Walton* v. *Develing*, 61 Ill. 201; *Darst* v. *The People*, 62 Ill. 306; and *Dickey* v. *Reed et al.* 78 Ill. 261. These cases fully establish this doctrine, and further discussion of the rule is deemed wholly unnecessary, as we perceive no reason to overrule, modify or change the rule. We regard it as firmly settled.

From what has been said, it will be seen that the court had no jurisdiction to decree an injunction, and, had the power existed, the decree rendered would have been erroneous, and it must be reversed, and the bill dismissed.

Decree reversed.

The Ohio and Mississippi Railway Co.

v.

Joseph A. Clutter.

1. Railroads—*liability for injury from neglect to keep fence in repair.* Where stock is killed or injured by reason of the insufficiency of the fences of a railway company along its track, and the fences have been out of repair so long that the company must have known it, and the owner of the stock is guilty of no negligence, the company will be liable for the injury.

2. Pleading—*declaration—surplusage.* Where the value of stock killed by a railroad company, through negligence, is laid, under a *videlicet*, at $200, an averment that the cattle were of the value of $19.50 each, may be regarded as surplusage.

3. Instruction—*assessed value in, construed.* Where an instruction informed the jury that, in case of a finding for the plaintiff, in an action against a railway company for killing stock, the plaintiff's damages would be the "assessed value" of the cattle, and there was no proof of any assessment of their value, it was *held*, that these words must have been used and understood as the value proved or estimated by the jury, from the evidence before them.

4. Negligence—*weeds and grass on right of way.* It is negligence on the part of a railway company to permit grass or weeds to grow on its grounds so as to obstruct the view of stock by the engine-driver.

Appeal from the Circuit Court of Richland county; the Hon. James C. Allen, Judge, presiding.

Messrs. Wilson & Hutchinson, and Mr. C. A. Beecher, for the appellant.

Mr. Justice Scott delivered the opinion of the Court:

This action was brought to recover the value of stock, belonging to plaintiff, that had been killed by the engine and cars on defendant's road. The negligence charged was, the failure of defendant to erect and maintain suitable and sufficient fences to keep cattle and other stock off the track of its railroad, as required by statute. Eight head of cattle were either killed, or so badly injured they had to be killed, and were lost to plaintiff.

Evidence introduced at the trial shows, beyond controversy, the fence along the line of defendant's railroad, that separates it from the adjoining fields at the point where the cattle got upon the track, was wholly insufficient to turn stock, and that it had been so long out of repair it must have been known to the company. Plaintiff had been guilty of no negligence in respect to the care of his stock, and proof of the omission of the statutory duty of defendant in regard to fencing its track, established the liability of defendant. On the evidence, no other verdict than the one rendered could be permitted to stand.

The total value of the stock killed is laid, in one count of the declaration, under the *videlicet*, at $200. The averment, in that connection, that the cattle killed were of the value of "nineteen dollars and fifty cents each," may be rejected as surplusage, and when that is done, no question can be made that the declaration is not sufficient to sustain the judgment for the amount found by the verdict.

There is some obscurity in the first instruction given for plaintiff, which asserts that, in case of a finding for plaintiff, his damages would be the "assessed value of the cattle killed and wounded." No evidence of any assessment of the value of the cattle killed and wounded is contained in the record. If the word "assessed" is correctly transcribed in the transcript, it must have been used in the sense of "proven," or "estimated" value, as shown by the testimony given on the trial. No other evidence of the value of the stock was given, and it must have been in this sense the jury understood the instruction. In no view that can be taken could it have misled the jury, on the evidence in the record.

The fifth instruction states accurately an abstract principle of law, viz: that it was negligence on the part of the railroad company to permit grass or weeds to grow on its grounds so as to obstruct the view of the engine-driver, and if damages should result by reason of such negligence, the company would be liable. On the authority of the case of the *Indianapolis and St. Louis Railroad Co.* v. *Smith*, 78 Ill. 112, the prin-

ciple embodied in this instruction is correct. The application of the principle announced was rendered necessary by testimony given by the company itself, that the cattle were in the "brush and weeds" along the side of the track, and out of sight of the engine-driver until the train was near upon them.

Justice has been done, and the judgment will be affirmed.

Judgment affirmed.

M. H. PRESLEY, ADMR.

v.

FRANK POWERS.

1. PRACTICE IN SUPREME COURT—*when error in excluding evidence is obviated.* If it is error to exclude the records of the probate court, showing the amount of claims allowed against an estate, it will be obviated by the testimony of a witness showing the indebtedness of the estate.

2. IMPEACHMENT OF WITNESS—*declarations out of court.* In trover, by the administrator of an estate, where the husband of the intestate is called as a witness to prove title to the goods in her, if the proper foundation is laid, the defendant may prove the declarations of the husband inconsistent with his testimony in the case.

3. TROVER—*when it will lie.* To maintain trover, the plaintiff must prove that the goods in question were his property, and that while they were so, they came into the defendant's possession, who converted them to his own use.

4. Where a wife dies indebted for goods purchased by her to be sold at retail, and after her death, while her husband is continuing the business, an agent of a principal creditor calls for pay, and the husband offers to sell the goods to him in payment, which he declines to buy, but finds a purchaser, to whom the husband sells, and the husband gives one of the purchaser's notes to the agent, on the debt, the agent, not assuming any control over the goods, will not be liable in trover to the administrator of the wife for a conversion of the goods.

WRIT OF ERROR to the Circuit Court of Clay county; the Hon. JAMES C. ALLEN, Judge, presiding.

Mr. RUFUS COPE, for the plaintiff in error.

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

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of trover, brought by M. H. Presley, administrator of the estate of Maria L. Marshall, deceased, in the circuit court of Clay county, against Frank Powers, to recover the value of a certain stock of goods, alleged to have been converted by the defendant to his own use, which, as it is claimed, belonged to the estate of the deceased.

A trial of the cause before a jury resulted in a verdict and judgment in favor of the defendant. The plaintiff appealed, and insists upon a reversal of the judgment, on the ground that the court erred in the rejection and admission of certain evidence, and in giving instructions for the defendant.

The offered evidence which the court excluded, was, the records of the probate court, showing the amount of indebtedness which had been probated against the estate of the deceased.

We perceive no objection to the evidence, and it should have been admitted. But the first witness on the stand testified that Maria L. Marshall, at the time of her death, owed from $7000 to $8000. This proof obviated the necessity of introducing the probate records, and, even if it was error to exclude the offered proof, the same facts having been established by other evidence, the plaintiff was in no manner injured.

The court allowed the defendant to prove the declarations of L. G. Marshall, the husband of the deceased, to the effect that he "was running the store in his wife's name, because of some old debts in Ohio."

These declarations were offered for the purpose of impeaching the evidence of L. G. Marshall, a witness for the plaintiff, by showing that he had made statements out of court inconsistent with his evidence given on the stand. If the proper foundation was laid, which does not seem to be controverted, the declarations were proper for the purpose for which they were offered.

In regard to the defendant's instructions, we are free to concede that the third in the series had no application to the

question involved, and besides, it did not contain correct propositions of law, and should have been refused.

The correctness of the ninth instruction might well be questioned. But even if these instructions had been refused, and the offered evidence admitted, which the court excluded, the result of the case could not have been otherwise than a verdict in favor of the defendant.

It appears, from the record, that Maria L. Marshall owned a stock of goods in her own right. L. G. Marshall, her husband, carried on the business for her, and in her name. On the 19th day of October, 1873, she died. At the time, the goods on hand were worth $3000. After the death of the wife, the husband continued the business for over three months. During this time a bill of goods was bought and sales by retail were made, in the same manner as before the wife died.

Shipley, Pumphry & Co. had for several years been selling goods to M. L. Marshall, and, at the time of her death, she was indebted to them in the sum of $964.84.

In the month of February, 1874, the defendant, who was the traveling salesman of Shipley, Pumphry & Co., called on Marshall for the purpose of collecting the amount due the firm. Marshall, not having the money to pay, proposed to sell out the goods to the defendant, but the firm notified him not to buy the goods, either for them or himself.

Subsequently, Powers met Chas. B. Ferryman, and informed him that the store was for sale, and, after some negotiation, the goods were purchased by him. An invoice was taken, and a written contract of sale made out and executed. Ferryman bought the store on credit, and gave his notes in payment, which were signed by the defendant as surety.

These notes, with the exception of $200, which Marshall received, were delivered over by Marshall to Powers, in payment of the indebtedness held by Shipley, Pumphry & Co. against the Marshalls, and the balance after the payment of the firm was to go to other creditors.

These are the leading facts in the case, proven before the jury,

and had a verdict been rendered againt the defendant on the facts proven, it could not have been sustained.

It does not appear that the defendant purchased the goods, neither did he acquire the possession or convert them to his own use.

The defendant, as an agent for the firm of Shipley, Pumphry & Co., called upon Marshall, to collect a debt due his principals. Marshall requested him to find a man who would buy the goods. This he succeeded in doing, and after the sale and delivery of the goods to Ferryman, the purchaser, Marshall delivered the notes obtained for the goods to the defendant, in payment for indebtedness due Shipley, Pumphry & Co. and other creditors.

The goods passed from the possession of Marshall into the hands of Ferryman. The defendant had no control or possession of the property; he assumed no dominion over it.

In Bacon's Abridgment, vol. 9, p. 640, it is said: "In order to maintain an action of trover, the plaintiff must prove that the goods in question were his property, and that, while they were so, they came into the defendant's possession, who converted them to his own use."

Here, as we understand the evidence, the defendant never had the possession of the property, nor did he, by act or deed, convert the same to his own use, or assume control or dominion over it.

What the liability of Marshall or Ferryman might be, had the action been brought against them, it is not necessary to determine, as they are not before the court; but we perceive no ground upon which the action can be sustained against the defendant.

Under such circumstances, while the court may have erred in the admission or exclusion of the evidence heretofore alluded to, or in the instructions to the jury, yet, as the verdict could not have been other than in the defendant's favor, we can not reverse.

The judgment will be affirmed.

Judgment affirmed.

The Illinois and St. Louis Railroad and Coal Co.

v.

Louis Fehringer.

Variance. Where a declaration alleges the construction of a dam by a railway company on its land adjoining that of the plaintiff, and thereby overflowing the land of the latter, and the proof shows the closing of a culvert under its road by the defendant, through which the water was accustomed to flow, this will sustain the allegation in the pleading, and there will be no variance.

Appeal from the Circuit Court of St. Clair county; the Hon. William H. Snyder, Judge, presiding.

This was an action on the case, by the appellee against the appellant. A trial was had, resulting in a verdict and judgment of $465 for the plaintiff.

Messrs. G. & G. A. Kœrner, for the appellant.

Mr. C. F. Nœtling, and Mr. R. A. Halbert, for the appellee.

Mr. Justice Dickey delivered the opinion of the Court:

This was an action by appellee against appellant, wherein plaintiff in his declaration alleged that he was the owner, and possessed of certain lands, and defendant was possessed of certain adjoining lands, over which the water from plaintiff's land naturally flowed, and that defendant, in 1871, "did make and construct a certain earthen dam, on defendant's premises, across the channel of said natural flow of said water so flowing from plaintiff's premises, and that by reason of said dam, water from plaintiff's land could not naturally flow off, and the land of plaintiff was thereby overflowed," etc., by means whereof plaintiff's crops were lost and destroyed.

Defendant pleaded the general issue and the statute of limitations. The jury rendered a verdict for plaintiff, and judgment was entered on the verdict.

On the trial plaintiff offered evidence tending to show that long before 1871 the defendant had constructed on its own land a railroad embankment across the natural course of the surface water escaping from plaintiff's premises, and constructed a culvert under the embankment, through which the water from plaintiff's premises was accustomed to escape, until the year 1871, when defendant, by depositing earthy material on the sides of said embankment, closed up the culvert so that the water could not escape by this channel, and was thereby thrown back upon plaintiff's land, and by reason thereof overflowed plaintiff's land and injured his crops.

The defendant insisted that this proof was variant from the allegations in the declaration, and asked the court to instruct the jury that, "proof that the company had stopped up a culvert heretofore existing, is not proof of the facts alleged by plaintiff, and the latter can not recover."

The court refused the instruction, and of this appellant complains.

We think the proof tended to sustain the allegations. If, by closing up the culvert, the defendant converted the old embankment into a dam, which, with the culvert open, did not operate as a dam, this was, in substance, constructing a dam, and no just objection would lie to this proof upon the ground of a variance.

It is also insisted that the verdict is against the weight of the evidence. There were some contradictions in the testimony, but we find no sufficient ground for setting aside the verdict. The judgment is affirmed.

Judgment affirmed.

The Franklin Insurance Company of Indianapolis

v.

Patrick Smith.

Pleading and evidence—*variance.* If a party, in suing upon a policy of insurance or other written contract, sets out the same *in hæc verba*, he must be strictly accurate. If that offered in evidence is variant, it is error to admit it in evidence if objected to on that ground.

Appeal from the City Court of East St. Louis.

Messrs. C. W. & E. L. Thomas, for the appellant.

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

This was an action upon a policy of insurance, to recover for a loss by fire. The plaintiff below recovered, and the defendant appealed.

We find it necessary to notice but one of the errors assigned for the reversal of the judgment: the one respecting a variance.

The declaration contains but one count, and purports to set out the policy of insurance in *hæc verba.* One of the conditions of the policy of insurance is set out in the declaration as follows: "The company may, at any time, cancel this policy, returning the unexpired premium *pro rata*, and the assured may cancel by paying customary short rates for the *unexpired* time." As it appears in the policy of insurance, the condition is as follows: "The company may, at any time, cancel this policy, returning the unexpired premium, and the assured may cancel by paying customary short rates for the *expired* time."

Upon offering in evidence on the trial the policy of insurance, the defendant objected to its introduction because it was not the one set out in the declaration; but the objection was overruled, and the policy of insurance was read in evidence, defendant, at the time, excepting. A motion for a new trial, made by the defendant, was also overruled, one ground of the motion being the admission of improper evidence.

Setting out a written instrument, "in the words and figures following," binds to an exact recital. 3 Stark. Ev. 1587.

In the case of *Sheehy* v. *Mandeville*, 7 Cranch, 217, Chief Justice MARSHALL uses the following language upon this subject: "One of these rules (of law) is, that in all actions on special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration. The reason of this rule is too familiar to every lawyer to require that it should be repeated. It is not necessary to recite the contract in *hæc verba*, but if it be recited the recital must be strictly accurate. If the instrument be declared on according to its legal effect, that effect must be truly stated. If there be a failure in the one respect or the other, an exception for the variance may be taken, and the plaintiff can not give the instrument in evidence."

There was error in the admission in evidence of the policy of insurance and overruling the motion for a new trial, for which the judgment must be reversed and the cause remanded.

Judgment reversed.

HUGH C. ADAMS *et al.*

v.

THE STATE OF ILLINOIS, for use, etc.

1. SCHOOL DIRECTORS—*liability for exceeding their powers.* The duties of school directors are derived exclusively from the statute, and are specifically defined, and if they exercise powers and functions not conferred upon them, the statute makes them responsible for all losses that may ensue.

2. SAME—*liability for money borrowed.* School directors may borrow money for certain enumerated purposes, on terms prescribed by the statute, and when obtained, it is their duty to pay it to their treasurer, who is the only proper custodian. Should they place it in the hands of any one else, it is at their own risk.

3. SAME—*power to issue and sell bonds.* No authority is given school directors to issue bonds and place them upon the market for what they may

bring, or for anything less than their par value. If they do, they are liable, under section 77 of the School Law, for any loss the school fund may sustain.

APPEAL from the Circuit Court of Washington county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. HAY & ROUNTREE, for the appellants.

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

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Under the 47th section of the School Law, R. S. 1874, p. 962, school directors, when authorized by a vote of the people of the district, have power to borrow money for certain enumerated purposes, and issue bonds to secure the same, in sums of not less than $100, bearing interest at a rate not exceeding ten per cent per annum; nor shall the sum borrowed in any one year exceed five per cent of the taxable property of the district, including previous indebtedness, to be ascertained by the last assessment for State and county taxes previous to incurring such indebtedness. This is all the authority given directors in the matter of borrowing money, and it would appear to be a limitation upon their action in issuing bonds, to sums of money actually received. No authority is given to issue bonds and place them upon the market to be sold for what they might bring, or for anything less than their par value. Without an enabling statute, it is apprehended they can not thus issue and sell bonds, and should the directors make such disposition of them, they would clearly be liable, under the 77th section of the statute, for any loss the fund of the district might sustain.

The duties of school directors are derived exclusively from the statute, are specifically defined, and if they exercise powers and functions not conferred upon them, the statute has made them responsible for all losses that may ensue. They may borrow money for enumerated purposes, on terms prescribed, and when obtained, it is their duty to pay it over to

the treasurer, who is the only proper custodian. Should they place it in the hands of any one else, it is at their own risk.

Under this view of the law, the pleas constituted no defense to the action. The demurrer was therefore properly sustained, and the judgment will be affirmed.

Judgment affirmed.

WILLIAM T. DITCH, Admr.

v.

ANDREW VOLLHARDT.

1. LIMITATION—*new promise.* Where a debtor, within five years before suit brought, recognizes the debt as due, and expressly promises to pay a certain part of it by a day named, and thereby impliedly promises to pay the balance at some future time, this will be sufficient to prevent the bar of the Statute of Limitations.

2. RECEIPT—*may be explained or contradicted.* Parol or other extraneous evidence is admissible to explain, vary or even contradict a receipt for money, and it is not necessary to deny the execution of the receipt, under oath, before the party can so contradict it.

3. INTEREST—*on liquidated amount.* Where the sum due from one party to another is fixed, certain and agreed upon, interest at six per cent is recoverable thereon after it is due.

APPEAL from the Circuit Court of Monroe county; the Hon. AMOS WATTS, Judge, presiding.

Mr. J. BLACKBURN JONES, for the appellant.

Messrs. WINKELMAN, SLATE & RIESS, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellee filed a claim in the county court of Monroe county, against the estate of Stephen W. Miles, deceased. A trial was had before a jury, resulting in a verdict for $1631.43, on which the court rendered a judgment that the amount be paid in due course of administration. From this judgment the administrator prosecuted an appeal to the circuit court, where,

on a trial, the jury found a verdict for $1646.83, upon which a judgment was rendered, and the administrator appeals to this court.

It is urged that the claim was barred by the Statute of Limitations. It appears, from the evidence, that the demand was for wheat delivered to deceased and his partner, Smith, in 1866, to be shipped by them to market; that they did so, and received the money therefor. Appellee, afterwards, gave to Miles & Smith a receipt for $1109.50 on account of money received on the sale of this wheat; but it appears that they paid no money at the time, but it was agreed that appellee should look to and Miles was to pay the money to him. This receipt was dated the 25th day of July, 1867.

Again, in August, 1871, the evidence shows that deceased admitted to appellee that he owed him about $1500 on one wheat crop, but that he could not fix the precise amount until they should have a settlement. This evidence fully warranted the jury in finding that this admission related to the crop of 1866; especially so when it appears that, in 1867, when deceased paid appellee $600, and he asked if it was on the crop of 1866, and he replied, no, it was on the crop of 1867; and when he made the admission of the sum he probably owed appellee, he also promised to pay him a part of it on the following Friday.

This evidence all tends strongly to show not only that deceased was owing appellee for that wheat, but that he recognized the debt and impliedly agreed to pay the money. There was an express promise to pay a part of it by a day named, and there was nothing said from which it could be inferred that he would not pay it, but all he said and did impliedly amounted to a promise to pay whatever remained unpaid at the time named, at some future time.

We regard this as amounting to not only an admission that sum was due, but to a promise to pay it, and entirely sufficient to prevent the bar of the statute. If he had not intended to pay the amount, he would not have promised to pay a part of it on the day named, and would have objected to the claim,

but, on the contrary, he voluntarily stated what he supposed was near the amount he owed appellee.

It is urged that the court erred in permitting appellee to prove that no money was paid to him when he gave the receipt to Miles & Smith, without denying the execution of the receipt, under oath. Appellee did not prove, nor did he offer to prove, that he did not execute the receipt, but simply that he did not receive the money, and that Miles was to pay it to him. He admitted its execution, but proved that it did not state the facts truly. This he had a right to do, as the rules of evidence allows the admission of extraneous testimony to explain, vary or even contradict a receipt. It is not governed by the rules applicable to other writings in this respect. This is the doctrine of this court, repeatedly announced in former opinions.

It is objected that the jury should have found for appellant, because several settlements were shown to have been made after the receipt was given. It does not appear, from either of them, that this item was embraced in the settlements. On the contrary, it appears that, in the settlement of January 18, 1867, this wheat transaction for the crop of 1866 is expressly excluded by the written statement then executed by the parties. This writing refers to the wheat crop of that date, and states it was excluded from the settlement, and virtually admits that it was due to appellee. Nor are we warranted, from any evidence in the record, in finding that this wheat was ever paid for by deceased.

It is next urged that it was error to allow interest on the $1109.50, as it was an open account. The amount was ascertained and liquidated, and, under the statute, it drew interest. It was unlike a running or unsettled account. The statute provides that the creditor shall be allowed six per cent on money found due, on the settlement of accounts, from the day of liquidating the same between the parties and ascertaining the balance. Here, the amount was fixed, certain and agreed upon between the parties, and the case falls clearly within the provisions of the statute. There was therefore no error in allowing six per cent interest.

Although the instructions may be liable to some slight criticism, still they could not, under the evidence, have misled the jury.

We are unable to perceive any error in the record, and the judgment of the court below must be affirmed.

Judgment affirmed.

THE COUNTY OF CLINTON, for use, etc.

v.

JOHN SCHUSTER.

CHANCERY JURISDICTION—*remedy at law.* If the assessor and treasurer receives fees and emoluments in excess of his compensation as fixed by the county board, and refuses or neglects to render any account thereof, a court of equity will have no jurisdiction to compel an account, there being a complete remedy at law, by action against him personally or upon his official bond, and an admission of the facts charged, by demurrer, does not change the rule.

WRIT OF ERROR to the Circuit Court of Clinton county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. LIETZE, STOKER & SON, for the plaintiff in error.

Mr. G. VAN HOOREBEKE, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Defendant was elected assessor and treasurer of the county of Clinton, was duly qualified, and held the office, performing its duties, from the first Monday in December, 1871, to the same date in 1873. Shortly after he entered upon the discharge of the duties of the office, the county board, under the statute, fixed his salary at $1500 per annum.

Under the law, it is claimed, it became his duty to make semi-annual reports, under oath, of all fees and emoluments which might come to his hands as such officer, and, after deducting therefrom his salary or compensation, to pay the bal-

ance into the county treasury, and, at the expiration of his term of office, to account for the same to his successor. During the period he held the office, it is charged, he received fees and emoluments amounting in the aggregate to the sum of $15,000; that he has neglected to render any account to the county board, as was his duty; that he has failed to pay any portion of the sum so received to his successor in office, and this bill is for an account of such fees and emoluments so received from his office, and when ascertained, after deducting his annual salaries, for a decree against defendant for the balance.

Without expressing any opinion on the merits of this controversy, it is sufficient to say, complainant has a complete and adequate remedy at law, and the facts, admitting them to be true, as the demurrer does, present no grounds for the interposition of a court of equity. There can be no reason for a discovery, for whatever official acts may have been done by defendant from which he derived "fees and emoluments," are matters of record, and may be readily ascertained. Should it be made to appear defendant has received "fees and emoluments" from his office over and above the amounts allowed for annual salaries or compensation by the county board, the remedy, if any, is in an action at law, either against him personally or upon his official bond. Hence, complainant will be remitted to an action at law, to establish whatever claim it may have against defendant.

The decree will be affirmed.

Decree affirmed.

THE COUNTY OF HARDIN

v.

JAMES MCFARLAN.

1. COUNTY COURT—*power to bind county exists by statute only.* County courts can only exercise such powers, when sitting for the dispatch of county business, as have been conferred on them by express law, or are necessary to be exercised in order to carry into effect such granted powers.

2. MUNICIPAL DEBTS—*means provided excludes all others.* It is a familiar principle, that where a statute points out a particular course to be pursued to effect a particular purpose, no other course can lawfully be pursued.

3. Thus, where an act to enable counties to liquidate their debts, provides that the county courts, or boards of supervisors, may levy a special county tax for that purpose, they can only be discharged by the levy of such tax, and the county board has no authority to take up its outstanding orders and give bonds in lieu thereof, bearing interest. Interest-bearing obligations can not be issued in the absence of statutory authority.

WRIT OF ERROR to the Circuit Court of Hardin county; the Hon. DAVID J. BAKER, Judge, presiding.

Mr. W. S. MORRIS, for the plaintiff in error.

Messrs. GREEN & GILBERT, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the Hardin circuit court, by James McFarlan, plaintiff, against the county of Hardin, to recover interest money on certain bonds, of different denominations, issued by the county in 1869.

The question raised was upon demurrer to the declaration, and which went to the power of the county court to issue the bonds.

The court, in overruling the demurrer, decided the county court had the power, and gave judgment for the plaintiff, and the county brings the record here by writ of error.

The action was brought for the interest, at ten per centum per annum, on nine bonds.

The question raised by the demurrer is not difficult of solution.

It will not be denied, the county courts in the several counties in the State can only exercise such powers as have been conferred upon them by express law, or are necessary to be exercised in order to carry into effect such granted powers. When these bonds were issued, admitting they were so issued as evidence of indebtedness by the county, the law provided

the means, and the only means, by which such indebtedness could be discharged; and it is a familiar principle, where a statute points out a particular course to be pursued to effect a particular purpose, no other course can be lawfully pursued.

The law in force when these bonds were issued bears this title: "An act to enable counties owing debts to liquidate the same," and it provides, that the county courts for county business, in counties without township organization, and the board of supervisors of counties under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed, in any one year, one per cent on the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation, as other county taxes, and, when collected, to be kept as a separate fund in the county treasury, and to be expended under the direction of the said county court, or board of supervisors, as the case may be, in liquidation of such indebtedness. Session Laws 1863, p. 41.

This statute provides, fully, the mode, and the only mode, by which the debts of a county can be paid. Public municipal corporations, as counties are, must, like private corporations, act within the grant of their powers and not beyond. The legislature, well knowing the condition of the several counties in the State, and that they might be involved in debt to a greater or less extent, provided, in their wisdom, ample means by which their debts could be paid, and to those means must they be confined. To suffer them to devise other means might, in many instances, be destructive of the best interests of the people.

It is not a question of advantage which the tax-payers may derive from the exercise of the power claimed, but it is a question of the right to exercise the power. Defendant in error relies on what was said by this court in *The City of Galena* v. *Corwith*, 48 Ill. 423, for the exercise of this power. The decision in that case was based upon the ground, that the city, by its charter, had power to borrow money, and not having been restricted as to

the means of exercising this power, could issue the bonds. It was held, in *Commissioners of Highways* v. *Newell*, 80 Ill. 587, that more was said in that case than the subject justified, and that it needed modification confining it to cases where the charter of incorporation expressly grants a power, for a corporation can not exercise any powers, save those granted, or necessarily implied in order to carry into effect a granted power.

The county orders, which were surrendered for these bonds, were evidences of county indebtedness only, and the manner of issuing them, and of their payment, is carefully provided for by law. All discretion on the part of the county officials, is taken away by this legislation.

We are satisfied the county court of Hardin county had no power or lawful authority to issue the bonds out of which this controversy arises, and the demurrer to the declaration should have been sustained.

We fail to discover, in any statute in force when these bonds were issued, any power in the several county courts to issue interest-bearing orders, and we are satisfied no such power existed. The county court could exercise no discretion in this matter—it was controlled by positive law.

To enable counties to fund their indebtedness, the legislature passed an act, approved April 14, 1875. The question and policy is left, by that act, to a vote of the majority of the legal voters of the county. Sess. Laws 1875, p. 68. The implication would be, that prior to the passage of this law, counties had not the power exercised in this case.

We perceive no ground of action set forth in this record, and the judgment must be reversed.

Judgment reversed.

Mr. JUSTICE WALKER: I think, under previous decisions of this court, the county had power to make the contract for the payment of interest on these evidences of indebtedness, and can not, therefore, concur in the conclusion reached.

Mr. JUSTICE SCOTT: I can not concur in this decision. It must be conceded, the county had authority to contract the

indebtedness, and, it seems to me, it follows it could evidence the fact by any written instrument, whether denominated a bond, order or certificate; and I know of no reason why it may not also agree to pay its creditor interest, in consideration of forbearance to enforce collection. This is the doctrine of *The City of Galena* v. *Corwith*, 48 Ill. 423, and I see no reason for departing from the principle of that case. As supporting my view of the law, reference is made to *Aurora Agricultural and Horticultural Society* v. *Paddock*, 80 Ill. 263, and *West* v. *Madison County Board of Agriculture*, *post*, 205. In my opinion, the judgment of the circuit court should be affirmed.

CATHARINE FAHS *et al.*

v.

ADALINE DARLING *et al.*

1. JURISDICTION—*agreement not to prosecute a writ of error.* An agreement not to take a case to this court on appeal or writ of error, which is broken, is not such a fraud as to deprive the court of its jurisdiction. Jurisdiction, so far as relates to the subject matter, depends not upon the agreement of the parties, but on the law.

2. SAME—*finding as to, conclusive when assailed collaterally.* Where this court proceeds to give judgment on a writ of error, where publication of notice is made as to the defendant in error, it necessarily passes upon the question of jurisdiction as to his person, and finds in favor of the same, and this finding is conclusive, unless set aside by this court in a direct application for that purpose.

3. JUDGMENT—*in violation of agreement.* If parties make agreements that suits shall not be brought, or prosecuted or appealed, which are subsequently violated, they must either apply to the court before which the cause is pending before it has passed from its jurisdiction, or resort to an action on the agreement, for relief.

4. INJUNCTION BOND—*reversal of judgment sought to be enjoined, as a defense.* In a suit upon an injunction bond, given in a case seeking to enjoin the collection of a judgment, which is conditioned for the payment of the judgment in case the injunction is dissolved, it seems that a reversal of the judgment at law, before suit is brought on the bond, is a good defense.

WRIT OF ERROR to the Circuit Court of Richland county; the Hon. JAMES C. ALLEN, Judge, presiding.

Mr. B. B. SMITH, and Mr. H. HAYWARD, for the plaintiffs in error.

Mr. C. A. BEECHER, Mr. R. P. HANNA, and Mr. R. D. ADAMS, for the defendants in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Suit was brought against Andrew Darling, in his lifetime, by appellant and William T. Shelby, who sued for her use, on a bond executed by Marshall O. Roberts and others, as trustees of the Ohio and Mississippi Railroad Company, and Andrew Darling and John W. Miller, their sureties, for the purpose of obtaining an injunction to restrain the collection of a judgment obtained by appellant and her husband, John Fahs, against the Ohio and Mississippi Railroad Company, in the circuit court of Edwards county, for the sum of $4000.

The issues presented by the pleadings, so far as material to the questions before us, are as follows: It is alleged in the declaration, that the bill for injunction was taken, by change of venue, to the circuit court of St. Clair county, where, at the September term, 1865, of that court, the injunction was dissolved and the bill dismissed; and it is alleged, as a breach of the bond, that the judgment sought to be enjoined remains unpaid.

To this breach the 5th plea alleges, as a defense, that the judgment sought to be enjoined was, at the November term, 1860, of this court, "reversed, remanded and set aside, and for naught esteemed."

Five replications were filed to this plea:

1st. *Nul tiel record.*

2d. That the service and constructive notice by which plaintiffs were brought into this court, at the time when, etc., were insufficient, by reason of proper notice of publication not having been given.

3d. That Homes, attorney for the Ohio and Mississippi Railroad Company, perpetrated a fraud upon plaintiff's attorneys, by stating that he would not take said cause to this court, and that afterwards the cause was taken to this court, and, the plaintiffs being non-residents, service was had by publication, knowledge of which never came to the plaintiffs.

4th. Substantially the same as the third.

5th. That this court, at the time of the reversal of the judgment of the circuit court, had not jurisdiction of the plaintiffs.

Demurrers were sustained to the 2d, 3d and 4th replications, and issues were joined on the 1st and 5th.

The record of this court, in the case mentioned in the 5th plea, was, among other things, given in evidence, and the judgment of the court was for the defendant.

The questions discussed arise on the ruling of the court in sustaining demurrers to the replications, and the sufficiency of the evidence to sustain the 5th plea under the issues thereon, presented by the 1st and 5th replications.

We are aware of no authorities going to the length of holding that a statement of counsel, or a promise, even, by him, that he will not take a case from a lower court to this court, has the effect to deprive this court of jurisdiction in the case, when it is subsequently brought here on appeal or by writ of error, contrary to the statement or promise. The authorities cited by the counsel for appellant, *Rae* v. *Hulbert et al.* 17 Ill. 572, and *Carr* v. *Miner*, 42 id. 179, certainly do not do so. They recognize the general doctrine, that fraud will vitiate a judgment, but they furnish no sanction for the position that what, at the utmost, is but a breach of an executory agreement, is a fraud which will oust the court of jurisdiction.

The jurisdiction of courts, so far as relates to the subject matter of litigation, depends not on the agreement of parties, but on the law; and where parties make agreements that suits shall not be brought, or prosecuted or appealed, which are subsequently violated, they must either apply to the court before which the cause is pending before it has passed from

its jurisdiction, or resort to an action on the agreement, for relief.

It does not comport with the solemn and permanent character of the judgment, that it shall be liable to be set aside and annulled, at however remote a period, upon parol proof, simply, that it was obtained in violation of the terms of an agreement.

Whether the defendants in the writ of error had the constructive notice required by the rules of practice of this court to bring them before the court, and give jurisdiction to proceed in the case, was one of the questions this court had to determine before rendering judgment. It heard evidence upon the question, and determined it by proceeding to render judgment. This determination is final and conclusive, unless set aside by this court on a direct application for that purpose. Its correctness can not be made an issue in the circuit court.

We are of opinion there is no error of law or fact in the record before us, and the judgment is, therefore, affirmed.

Judgment affirmed.

JASON GULLIHER *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

WITNESS—*impeachment by contradicting his statements.* If a witness, whether defendant in a criminal proceeding or not, has sworn wilfully and knowingly false on any material matter, his whole evidence may be rejected, so far as it is not corroborated. But the mere fact that he is contradicted as to some material matter, is not enough to warrant the rejection of his testimony, unless the jury may believe he has sworn falsely and knew it to be false.

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

Messrs. WILLIAMS, MCKENZIE & CALKINS, for the plaintiffs in error.

Mr. J. J. TUNNICLIFF, State's Attorney, for the People.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an indictment against plaintiffs in error, for robbery, upon which they were convicted.

On the trial, Foote was sworn as a witness, and testified to matters which, if true, tended to rebut the proofs of the prosecution in material matters relating to himself and to his co-defendant. He was, however, in this contradicted by other witnesses.

The court gave to the jury the following instruction:

"The court instructs the jury that while, under the statute, the defendants are permitted to testify, their credibility is left to the jury; and if the jury believe that the defendant, Alfred F. Foote, has sworn wilfully false, or been contradicted on a material point, then the jury have a right to disregard his whole testimony, unless corroborated by other testimony."

Exception was taken by each of the plaintiffs in error to this ruling of the court.

The instruction was clearly erroneous. When analyzed, it plainly tells the jury that, "if they believe, from the evidence, that Alfred F. Foote has been contradicted on a material point, then the jury have a right to disregard his whole testimony, unless corroborated by other testimony." This is not the law. The defendant in a criminal prosecution, in this respect, when he testifies, must be tried, as a witness, by the same rules which prevail as to other witnesses.

If the witness, whether defendant or otherwise, is shown, by proofs, to have sworn wilfully and knowingly false on any material matter, his evidence may be rejected, so far as it is not corroborated. Of course his interest in the result goes to his credibility, which the jury are to weigh. The mere fact, however, that he is contradicted as to some material matter, is not enough to warrant the rejection of his evidence altogether, unless the jury believe that, as to the matter in which he has been thus contradicted, he has sworn falsely, and knew his evidence was false.

There is no force in the other objections urged by plaintiffs in error.

For this error, the judgment and verdict must be set aside, and the cause remanded for a new trial.

Judgment reversed.

FRANKLIN L. RECHT

v.

RICHARD KELLY.

1. EXEMPTION—*waiver, by executory contract.* A waiver of a debtor's right to claim personal property as exempt from execution, when attempted to be made by an executory contract, is ineffectual, and will not be enforced.

2. A clause in a promissory note, expressly waiving the "benefit of all laws exempting real or personal property from levy and sale," being contrary to public policy, is inoperative, and confers no right to levy upon and sell personal property which is exempt.

WRIT OF ERROR to the Circuit Court of Jersey county; the Hon. CYRUS EPLER, Judge, presiding.

This was a suit originally brought before a justice of the peace, by Franklin L. Recht against Richard Kelly, who was a constable, to recover three times the value of a heifer and calf of the plaintiff, which the defendant levied upon and sold under execution, and taken, by appeal, to the circuit court. A trial was had, resulting in a judgment for the defendant.

Mr. GEO. W. HERDMAN, and Messrs. DUMMER, BROWN & RUSSELL, for the plaintiff in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Under the statute, the property levied upon by defendant was, in terms, exempt from levy and sale, the owner being the head of a family, residing with them, unless that right was barred by that clause in the note, upon which the judgment

was recovered, that provides, the maker, although confessing judgment and releasing all errors, expressly waived the "benefit of all laws exempting real or personal property from levy and sale." That such a waiver, where the same is attempted to be made by an executory contract, is ineffectual, and will not be enforced, is definitely settled by the decisions of this and other courts. *Phelps* v. *Phelps*, 72 Ill. 545; *Curtiss* v. *O'Brien*, 20 Iowa, 376; *Maxwell* v. *Reed*, 7 Wis. 583.

The principle of the cases cited is, that the exemption created by the statute is as much for the benefit of the family of the debtor as for himself, and, for that reason, he can not, by an executory contract, waive the provisions made by law for their support and maintenance. Such contracts contravene the policy of the law, and hence are inoperative and void. The owner may, if he chooses, sell, or otherwise dispose of any property he may have, however much his family may need it, but the law will not aid him in that regard, nor permit him to contract, in advance, his creditor may use the process of the courts to deprive his family of its benefit and use, when an exemption has been created in their favor. Laws enacted from considerations of public concern, and to subserve the general welfare, can not be abrogated by mere private agreement.

Notwithstanding plaintiff demanded the property of defendant, he disregarded such demand and sold it under the execution. That, he had no lawful right to do. On demand being made, it was his plain duty to have surrendered the property. The exemption clause in the note was no waiver, and conferred no authority whatever upon the officer to sell property, against the protest of the owner, the law had exempted for the benefit of the debtor and his family.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

EMILY ALLMON *et al.*

v.

THOMAS PIGG *et al.*

1. WILL—*undue influence to avoid.* The influence to avoid a will must be such as to destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others, than of his own. It must be an influence specially directed towards the object of procuring a will in favor of particular parties; and if any degree of free agency or capacity remains with the testator, so that, when left to himself, he is capable of making a valid will, then the influence must be such as was intended to mislead him to make a will essentially contrary to his duty, and it must have proved successful to some extent.

2. SAME—*influence by withholding knowledge of facts.* Where a testator, by his will, gave all his property to his wife, except one dollar to each of his children, expressing a determination that none of his property should go towards paying a large judgment against a son, the fact that such son desired the will to be so drawn, and failed to inform his father that he had compromised the judgment, without clear proof that this influenced his action, is not any ground for setting aside the will.

3. TRUST—*devise with request as to future disposition.* No verbal understanding between a testator and his wife at the time of making a will giving her most of the property, as to her final disposition of it, will create a trust.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. B. B. SMITH, and Mr. W. W. WILLARD, for the plaintiffs in error.

Messrs. BRYAN & KAGY, Mr. H. C. GOODNOW, and Mr. T. E. MERRITT, for the defendants in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The decree of the court below sets aside, as null and void, the last will and testament of Hiram Allmon, deceased, and also certain conveyances made by his widow, the principal devisee under the will, on the ground of undue influence and fraud.

The rule recognized by this court is, "that the influence, to avoid a will, must be such as to destroy the freedom of the

testator's will, and thus render his act obviously more the offspring of the will of others than of his own; that it must be an influence specially directed toward the object of procuring a will in favor of particular parties; and if any degree of free agency or capacity remained in the testator, so that, when left to himself, he was capable of making a valid will, then the influence which so controls him as to render his making a will of no effect, must be such as was intended to mislead him to the extent of making a will essentially contrary to his duty, and it must have proved successful to some extent, certainly." *Roe et al.* v. *Taylor*, 45 Ill. 491.

The evidence in this record entirely fails to even approximate this requirement. The will in itself is not an unreasonable one. The property, except the nominal sum of one dollar given to each of the testator's children, is left to his wife, their mother. The evidence shows the testator was in his right mind when he made the will, and there is no evidence that it was not his own voluntary act. He dictated the terms of the will, and when the first copy was drafted he objected to it because it gave all the property to his wife—he being of opinion, as he expressed himself, that, to make it legal, it was necessary to give the heirs something; and at his instance it was redrawn with that correction, and signed by him. He then expressed himself entirely satisfied, and that "he was ready to go"—meaning thereby that he was prepared to die.

As to the ultimate disposition of the property, there is no doubt he expected his wife to make an equitable distribution of what she should not consume, among their children, and it may be they had, between themselves, some understanding how that ought to be. But he trusted this all to her, and there is no evidence that he designed other restrictions upon her than those contained in the will.

The evidence tends to show that the testator desired to make a will, chiefly because there was a judgment against his son Thomas, in favor of one Oglesby, for some $2000, which he did not want to have paid out of any portion of his estate; and there is evidence that Thomas was urgent that he should

make a will, but the proof does not show that the desire to avoid having this judgment paid from the estate was induced by Thomas, or that the persuasions of Thomas affected him in making his will, and caused him to make it otherwise than he would have done but for his influence. But it is said Thomas had compromised, or arranged to compromise the judgment, for a small sum of money, and he withheld knowledge of this from the testator at the time he made the will. The proof of this is not at all satisfactory—that is, that knowledge of the efforts being made to compromise, and the amount required for that purpose, were unknown to the testator. Thomas swears he did know of it; that he told him of the amount, and asked to borrow the sum of him, but he did not have it. But the evidence is not clear that he would not have made the will as he did, if he had known that the judgment had been fully paid, and to justify a court in setting aside a will, the evidence should be clear and convincing.

The real difficulty here seems to be, the devisee has given more of the property to some of the children than to others, and those to whom the lesser shares are given, very naturally have an extreme solicitude to have what they regard as a more equitable division.

The will being made by one in his right mind, unaffected by such improper influence as, in legal estimation, prevents it from being considered as his will, must control. Whatever verbal understanding there may have been between the testator and his wife with regard to her final disposition of the property, it did not create a trust. *Rogers* v. *Simmons et al.* 55 Ill. 76. And there is no foundation for relief on that ground.

The decree is reversed and the bill dismissed.

Decree reversed.

Statement of the case.

WILLIAM A. FORTH

v.

GEORGE PURSLEY.

1. TROVER—*right of plaintiff to maintain.* In trover, it is essential that the plaintiff, at the time of the alleged conversion of the property, have not only the right of property in the chattel, but also the right to its immediate possession.

2. SAME—*when plaintiff has leased the property.* If, at the time of an alleged conversion by refusal to give possession, the property is leased to a third party, whose term has not expired, even the owner can not maintain trover, as he has no right to possession.

3. SAME—*proof of conversion.* Where the proof fails to show that the defendant ever had the actual possession of a chattel, or in any way prevented the plaintiff from using the same, but shows that, while it was leased by the plaintiff, the defendant purchased the same at a sale for taxes, and, before the lease had expired, the defendant refused to part with his claim, this will not establish a conversion.

4. SAME—*when plaintiff claims as mortgagee.* If the plaintiff in trover claims title to an undivided half of a portable mill, under a chattel mortgage, and has never made any demand for one-half of the property, or for common possession as owner of a half interest, but has demanded the whole before his mortgage became due, and when he had no right of possession, he can not recover.

5. LEVY—*when a taking of possession necessary.* While, as against the intervening rights of purchasers and incumbrancers, complete possession in an officer levying upon personal property for taxes is necessary before the sale, yet, as to the party against whom the officer holds the warrant, or any one claiming under him by purchase before the levy or after the sale, possession in the officer is not essential to a valid sale by him.

APPEAL from the Circuit Court of Clay county; the Hon. JAMES C. ALLEN, Judge, presiding.

This was an action of trover against Forth, for the alleged conversion to his own use of the undivided half of a certain portable saw mill, alleged to have been, at the time of the conversion, the property of George Pursley.

The proof for plaintiff tends to show the following: The mill was bought in May, 1870, by Wm. Pursley and Wm. Jacks, and, in the spring of 1871, Wm. Pursley sold his

interest to Wm. Jacks. In August, 1871, Jacks sold the whole of the mill to Wm. Pursley, and, soon after, Wm. Pursley sold half of the mill to Wheeler. On the 16th of September, 1871, Wm. Pursley executed a chattel mortgage to George Pursley, upon the undivided one-half of the mill, and upon other personal property, to secure the payment by William to George of $1015, on the 16th day of September, 1872, and interest thereon. The mortgage provided that William should retain possession until the maturity of the debt, unless George should "feel himself unsafe or insecure," and, in that case, he should have the right to take possession and sell the property.

About the middle of October, 1871, Wm. Pursley offered to sell his half of the mill to George Pursley for $1000, and George said he would take it. On the 2d day of December, 1871, Charles Wheeler and George Pursley made a lease of the whole mill to Abbot and Falton for three months from that date, the rent to be paid in lumber. On the 4th day of December, 1871, George Pursley filed his mortgage for record.

On the 15th of December, 1871, a warrant for the collection of taxes from Wm. Pursley was issued to Wm. Songer, tax collector, which came to his hands on the 25th of the same month. Songer levied upon the mill by virtue of this tax warrant, and, having given due notice, sold the same at public sale, and Forth bid it off at $58, and paid that sum. At the time of the levy, the collector made no indorsement upon his warrant, nor did he take actual possession of the mill, but, on the day of the sale, the mill being in operation, he stopped it and made the sale, and turned the mill over to the purchaser. After this, the lessees, Abbot and Falton, paid rent to George Pursley for the use of the mill.

George Pursley testifies: "About a week after the mill was sold for taxes, I went to Forth and told him I had the money. He said he had a better thing, and would not let me have the mill. The mill is still on Forth's lot. * * * Wm. Jacks was present at the time. I offered Forth $100."

Wm. Jacks testified: "After the tax sale, George Pursley got me to go and see Forth, and see if he would take his

money back. He said he would not." And, again, he says: "The mill was busted at the time of the tax sale. A short time after it was sold for taxes, I *gave it up to Wm. Pursley.*"

Forth testifies: "George Pursley never demanded one-half of the mill of me. * * * George Pursley never talked to me about one-half of the mill. He was always talking about buying the whole of the mill. I offered him the whole mill for $800. I have put a good deal of repairs on the mill, and have sold it conditionally."

There are several witnesses who testify that George Pursley had said that he did not own the mill; that William wanted him to take it for the mortgage debt, but he refused.

Mr. H. H. CHESLEY, and Mr. BENJ. HAGLE, for the appellant.

Mr. B. B. SMITH, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

In actions of trover, it is essential that the plaintiff, at the time of the alleged conversion of the property, have had not only the right of property in the chattel, but the right to the immediate possession of the same. In this case, the only proof tending to show a conversion of the property by the defendant, is that in relation to a supposed demand made about a week after the sale of the mill for taxes, when the plaintiff swears the defendant "would not let me have the mill."

The mill was leased on the 2d of December, by plaintiff and Wheeler, to Abbot and Falton, for three months from that date, and this demand and refusal were before these three months had expired. The right of possession (if the right of property was in plaintiff and Wheeler) was in the lessees at this time. In such case, plaintiff could not maintain trover. In the 2d vol. of Selwyn's Nisi Prius, 1364, it is said, "where a person leased a house, with the furniture therein, to another for a certain time, and during that term the furniture was

seized by the sheriff, as the property of a former owner, it was held that the landlord could not maintain trover against the sheriff, because the landlord did not have the right of possession during the demise;" and reference is made to *Gordon* v. *Harper*, 7 T. R. 9, *Frazer* v. *Swansea Canal*, 1 A. and E. 354, and *Owen* v. *Knight*, 4 Bingh. N. C. 54.

The proof of right of property in the plaintiff in this case is not clear and satisfactory. The proof of a conversion is still less satisfactory. In fact, it is not shown, with any definite certainty, that the defendant in this case ever had the actual possession of this mill, or that he ever, in any way, used the same, or prevented plaintiff from using the same. It is shown that he claimed title under the tax sale, and that he refused to accept $100 and relinquish that claim, but it does not appear in whose possession the mill was at that time.

It is shown that, after the sale for taxes, these lessees continued to pay rent to the plaintiff, which would seem to indicate that the mill was in their possession after that.

Wm. Jacks, a witness for the plaintiff, swore that he, at one time, owned this mill, and he says: "A short time after it was sold for taxes, I gave it up to Wm. Pursley." In the midst of such confusion and contradictions in the testimony, we might be inclined to let the verdict stand, if the law of such cases had been plainly given to the jury, with no instructions tending to mislead; but the court instructed the jury as follows: "If you believe, from the evidence, that defendant and plaintiff were joint and equal owners of the mill, and defendant assumed exclusive ownership over said mill, against the plaintiff, excluding him from the possession, unless you believe, from the proof, that the defendant had a valid title by a tax sale, you should find defendant guilty." This is not the law of the case, under the proofs. If, at the time of defendant assuming exclusive ownership and excluding plaintiff from the possession, the mill was rented to Abbot and Falton, and they had the right of possession, such facts were not sufficient to require a verdict of guilty.

The third instruction was as follows: "If the mill belonged

to George Pursley up to the 15th of December, 1871, and Forth converted the same to his own use, and was exercising acts of ownership over it at the time of the commencement of this suit, you will find for the plaintiff." The suit, as appears from the date of the summons, was begun March 26, 1874. This instruction is plainly erroneous. It says, in substance, that, if the right of property was in plaintiff three years before the suit was begun, and the defendant, at any time, converted the property to his own use, and was, at the time the suit was brought, exercising acts of ownership, the verdict must be for the plaintiff, even if, at the time of conversion, the plaintiff had neither the right of property nor the right of possession.

The fourth instruction says: "If the mortgage read in evidence was given by the owner of the mill, and that the same was unpaid when the same became due, then the plaintiff has a right to take possession of the undivided one-half of the mill, under the mortgage, for the purpose of enforcing the collection of his debt; and if * * * the defendant had exclusive possession of the mill, and refused to surrender possession of the undivided half thereof to the mortgagee, and converted the same to his own use, you should find for the plaintiff." When it is remembered that the mortgage fell due in December, 1872; that the only evidence tending to prove a conversion relates to transactions in December, 1871, and that no demand for one-half of the mill, or for a common possession as owner of one-half thereof, was ever made, and that there is no evidence of any claim having been made after the mortgage debt fell due, and that the evidence tends to show that, from the 2d of December, 1871, until the 2d of March, 1872, the plaintiff was not entitled to the possession of any interest in the mill, it is plain that this instruction not only tended to mislead the jury, by introducing matters having no bearing upon the case as proved, but was affirmatively erroneous in ignoring the rule requiring the right of possession in plaintiff at the time of the supposed conversion.

The eighth instruction was, "that, before a valid tax sale

of personal property can be made, the collector must take possession of the property by virtue of his levy, and the possession must be complete, and if there is no such possession, the sale is invalid, and the purchaser takes nothing." While it may be the law, that, as against intervening rights of strangers as purchasers or incumbrancers, complete possession in the officer, before the sale, may be essential, yet, in this case, there is no proof of any purchase from Wm. Pursley after the levy and before the sale, and it is not perceived how the want of such possession, as against Wm. Pursley or any one claiming under him by purchase before the levy or after the sale, could affect the validity of the tax sale.

The judgment must be reversed, and the cause remanded for another trial.

Judgment reversed.

MECHANICS' SAVINGS INST'N OF ST. LOUIS, MO. *et al.*

v.

JAMES GIVENS *et al.*

1. ATTACHMENT—*judgments entitled to share in distribution of proceeds of property attached.* The statute that all judgments in attachment against the same defendant, returnable at the same term, etc., shall share *pro rata* in the proceeds of the property attached, either in the hands of the garnishee or otherwise, applies to a suit by attachment commenced within ten days of the same term to which the other writs are returnable.

2. PROCESS—*to what term returnable.* Where ten days do not intervene the commencement of a suit, whether by attachment or summons, and the first day of the next term of the court, the plaintiff has his election to have the process made returnable to the next term or to any succeeding term to be holden within three months, but if it is made returnable to the first term, the cause will be continued.

3. STATUTES—*construction.* Where it is practicable, a whole act or section will be read together and so construed as to make it harmonious and consistent in all its parts.

WRIT OF ERROR to the Circuit Court of Jefferson county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Judgments in attachment were rendered in favor of the several defendants, at the February term, 1875, of the Jefferson county circuit court, against James Givens. All the writs of attachment were levied upon the same property, and were all returnable at the February term, 1875, except those in favor of the Merchants' National Bank. The writ in suit of the National Bank had been made returnable at a former term, but the judgments in all the cases were pronounced at the same term. On the 6th day of February, 1875, the Mechanics' Savings Institution sued out a writ of attachment against the same defendant, returnable to the next term of the circuit court of Jefferson county, which was to be holden on the 8th day of the same month, which writ was levied upon the same property as were the several writs in favor of the other attaching creditors. Service not having been had in time in the latter cause, it was continued to the August special term, when final judgment was pronounced.

The several writs having been levied upon the same land, the Mechanics' Savings Institution claims the right, under the statute, to share *pro rata* in the proceeds of the sale of the lands attached, for the reason the writ of attachment in its favor was returnable to the same term of court at which judgments were rendered in all the other cases, but the motion entered for that purpose was overruled. That decision is assigned for error.

Mr. C. H. PATTON, and Messrs. POLLOCK & KELLER, for the plaintiffs in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Under the 37th section of the Attachment Act, all judgments in attachment against the same defendant, returnable at the same term, and all judgments in suits by summons, *capias* or attachment against such defendant, recovered at that term, or at the term when the judgment in the first attachment upon which judgment shall be recovered is rendered, shall share *pro rata*, according to the amounts of the several judgments, in the

proceeds of the property attached, either in the hands of the garnishee or otherwise. No controversy would have arisen in this case, had the writ of attachment been sued out more than ten days before the term of court at which the several judgments in favor of the other attachment creditors were rendered, notwithstanding no judgment was rendered in favor of plaintiff in error until the next succeeding term, to which the cause was continued for want of service in time. But the writ of attachment was issued only two days before the term of court to which it was made returnable, and that, it is insisted, is inhibited by the first section of the Practice Act.

It is a matter of doubt, whether that section of the statute has any reference to or was intended to regulate the practice in attachment cases. The sixth section of the present Attachment Act, which gives the form of the writ, is a literal transcript of the act of 1845 on the same subject. The form of the writ seems to indicate it was, in all cases, to be made returnable to the next succeeding term, without reference to the number of days that intervened the issuing of the writ and the convening of court, and such was the uniform practice under the former statute. Where less than ten days intervened, the cause had to be continued, as a matter of course. It would seem, the same construction ought to be adhered to, especially where the legislature has manifested no intention to change the practice that had prevailed for so many years under that statute.

But, conceding the first section of the Practice Act was intended to regulate the practice in attachment, as well as other civil cases, still, we think, under a fair construction, the writ was properly made returnable to the next term of court. That section, it will be observed, makes all process in civil actions returnable to the next term of court in which the action is commenced, and where less than ten days intervene the issuing of the summons and the next term of court, it shall be made returnable to the succeeding term, but the plaintiff may elect to have the summons made returnable at any term of court which may be held within three months after

the date of the writ. Construction can hardly make this latter clause plainer than it is. There is no ambiguity in it. A right of election is given plaintiff, where he can not have a trial at the next term of court, for want of service in time, to have the summons or other process returnable at any term to be holden within the next three months, no matter if the next term may commence on the next day. Obviously, if the summons is made returnable to a term that commences within ten days, the result will be, as a matter of course, the cause will have to be continued to a succeeding term, because no service can be had that will bring the party lawfully into court. Whether there is any ambiguity in the other clause of this section, clearly there is none in this latter provision. Construing the preceding clause to mean that, where less than ten days intervene, the summons shall be made returnable to *a succeeding* term, then force and effect is given to the whole, and each provision of the section. The only uncertainty is found in the second clause, and that is removed by the construction adopted.

Some incongruous phrases and expressions, and others of doubtful meaning, may be discovered in many acts of the legislature. This imperfection may arise from the hurried manner in which much of our legislation is enacted. Where it is at all practicable, the whole act or section should be read together, and so construed as to make it harmonious and consistent in all its parts. Construing the whole of the first section of the Practice Act together in the manner indicated, we find it entirely harmonious, and containing no conflicting provisions. It is the duty of the court to so construe all statutes as to make them consistent, and give full effect to what is the plainly expressed legislative will.

Under this view of the meaning of the statute, the attachment writ was properly made returnable to the next term of the court in which the action was commenced, notwithstanding less than ten days intervened. It was a term of court to be holden within three months after the date of the writ, and plaintiff had the right to elect to which term he would

make it returnable. Exercising the privilege of election, the statute saved to plaintiff the right to share *pro rata* in the proceeds of the property attached, with the other creditors who obtained judgments at that term of court.

The judgment will be reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE WALKER: I am unable to concur in the judgment rendered in this case.

NARCISSE PENSONEAU

v.

GERHARD BERTKE.

FORCIBLE ENTRY AND DETAINER—*what possession necessary to enable plaintiff to maintain.* In an action of forcible entry and detainer for the possession of a tract of timber land, the plaintiff proved that he had in cultivation two tracts of land, one adjoining the timber land and the other about a mile and a half from it; that fire wood for the use of both farms was cut from the timber land; that he had a deed for the timber land, and had paid taxes and cut timber on the land in dispute for twenty years: *Held*, this was sufficient evidence of possession to sustain an action of forcible entry and detainer.

WRIT OF ERROR to the Circuit Court of Washington county.

Mr. JAMES M. ROUNTREE, for the plaintiff in error.

Mr. WILLIAM WINKELMAN, for the defendant in error.

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

This was an action of forcible entry and detainer, to recover possession of eight acres of timber land. The plaintiff below recovered, and the defendant appealed.

The point made for the reversal of the judgment is, that the evidence does not show that the plaintiff was in the actual

possession of the land at the time of the entry by the defendant.

The evidence showed that plaintiff has cut timber and paid taxes on the land for twenty years; that he owned one farm about a mile and a half distant, and another tract of seventy-three acres, which he had in cultivation, which adjoined the eight acres; that fire wood was cut for the use of both these places from the eight acre piece, and that plaintiff held a warranty deed of the eight acres, made to him by Henry Lohman and wife, on the 6th day of October, 1851. This, we think, sufficiently showed actual possession. *Booth & Graham* v. *Small*, 25 Iowa, 178; *Clement* v. *Perry*, 34 id. 364; *Pearson* v. *Herr*, 53 Ill. 145; Ang. on Limitations, § 397, 400.

Defendant testified that he was the owner of the land, and had been in actual possession of it for about two years; that he had built a dwelling house thereon, and some stock pens, and had established a ferry landing thereon.

Defendant's statement that he was the owner of the land, is not to be taken as proof of the fact. The statement is but his conclusion, and is not the mode of showing title to real estate. He must be held, under the evidence, to have made entry into the land where it was not given by law, and so, under the statute, to have been guilty of forcible entry and detainer.

The judgment must be affirmed.

Judgment affirmed.

WILLIAM F. BALDWIN *et al.*

v.

MICHAEL SMITH.

1. LICENSE—*to keep dram shop subject to ordinances of town granting.* Although there may be no condition in a license to keep a dram shop granted by a town, nor any reference to any ordinances of the town, yet such license will be held to have been granted subject to such ordinances of the town as had a legal existence at the time it was granted, and such as were within the competency of the town authorities to enact.

2. SAME—*power to revoke does not authorize depriving licensee of use of his property by force.* Where an ordinance of a town provides that in certain cases the town council may revoke license granted by them to keep dram shops, and it shall be the duty of the town constable to immediately close up the grocery of the licensee, the town authorities have no power to oust the keeper of the dram shop from his premises by force, take and hold possession of the same, and thus deprive him of the use of his property.

3. DRAM SHOPS—*can not be closed by force.* Any ordinance or law which authorizes the authorities of a town to close a saloon or grocery by force, without having it first judicially declared a nuisance, and ordered to be abated, is unconstitutional.

APPEAL from the Circuit Court of White county; the Hon. TAZEWELL B. TANNER, Judge, presiding

Messrs. CREBS & CONGER, and Mr. JAMES MCCARTNEY, for the appellants.

Messrs. BELL & GREEN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was trespass with force and arms, brought to the White circuit court by Michael Smith, plaintiff, and against the town of Grayville and William F. Baldwin, the president, and Benjamin Batson and others, members of the town council, and Isaac H. Hamilton, constable of the town of Grayville, defendants.

The defendants pleaded the general issue, and several special pleas, to which latter demurrers were sustained, and the cause tried upon the general issue. The jury found for the plaintiff, assessing his damages at two hundred and twenty dollars, whereupon a motion for a new trial was made by the defendants. Thereupon, the plaintiff remitted seventy dollars, and judgment was rendered for one hundred and fifty dollars, to reverse which the defendants, except W. Wirt Gray and Henry Butler, appeal, and assign various errors.

It is unnecessary to consider all the errors assigned, or go into a critical examination of the special pleas adjudged bad, as the whole controversy is confined within a narrow compass.

It appears the plaintiff had been duly licensed, by the proper

authorities of the town of Grayville, to retail spirituous liquors —in other words, to keep a dram shop—for which he had paid two hundred dollars into the town treasury, and had "complied with the laws and ordinances."

There is no condition in the license, and no reference to any ordinance of the town, authorizing its revocation for cause, yet it must be held to have been granted subject to such ordinances of the town as had a legal existence at the time the same was granted, and such as were within the competency of the town authorities to enact.

An ordinance of the town, entitled "License, Groceries," is set up in one or more of the special pleas, on three sections of which, namely: sections two, three and four, the defense is based.

Section two provides for the execution of a bond by the applicant for a license, conditioned that he will keep an orderly house, and observe the conditions contained in section three, which provides that license should be granted only on the express condition that the applicant should keep an orderly house, permit no gaming or playing with cards, and should not sell, give, or otherwise dispose of to any minor under sixteen years of age, liquor of any kind. And by section four, on which section the controversy turns, it is provided, that the town council, being satisfied, upon complaint or otherwise, that the third section, or any clause thereof, has been violated, shall, in addition to the forfeiture and collection of the bond, revoke the license of such offender or offenders; and it shall be the duty of the town constable to immediately close up the grocery of such offender or offenders.

The town council, it would appear, having become satisfied, "by complaint or otherwise," that the third section of the ordinance, or some part thereof, had been violated by the licensee, entered into an investigation of the matter, having the plaintiff before them, who was examined as a witness, and they found him guilty, revoked his license, and ordered the town constable to close the saloon, which he did by turning

out the clerk then in possession, locking the doors and taking the key, thus assuming control over the premises.

Now, the only question is, had the town council, under this section of the ordinance, the power to do the acts, by and through the town constable, they admit, by their pleas, they did do?

We are satisfied they had no such power. Admitting they could revoke the license, and did revoke it, there their power ended. They had no right, *manu forti*, to oust the owner from the premises, and thus deprive him of the use and control of his property, nor was there any necessity for so acting. The revocation of the license was, virtually, closing the doors of the saloon as to the traffic in liquors. Should the keeper of the saloon, after the revocation, continue to sell liquor as under the license, he would be subject to indictment and punishment under the law.

The town council had no more power to authorize the town constable to do the act which he admits he did do, than to authorize him to imprison the supposed offender, at his discretion. The investigation by the town council amounts to nothing, as that was not a judicial tribunal, empowered to make such investigations, and condemn and punish. Such proceedings as we find in this record are violative of the elementary principles of our constitution and laws, which give to any man the right of trial by a jury, and in a court of competent jurisdiction. His guilt can not be inquired into by a town council, and their decree enforced by a town constable, with impunity. The party charged with a violation of the ordinance had a right to be heard in court, and to receive its judgment.

The defense being based on this section of the ordinance, and that being invalid, the demurrers to the pleas setting that up as a defense were properly sustained.

This opinion proceeds upon the ground that the charter of the town of Grayville conferred authority to pass the ordinance in question. The charter is not before us for examination, but, admitting the power, so much of it as empowered the

authorities to close the saloon by force must be held invalid, for the reasons given. Authority to revoke a license to sell liquor, does, on being executed, to all intents and purposes, close the saloon as to that traffic, but confers no authority to deprive a man, summarily, of his property or of its use.

We are satisfied, no defense to this action was set up in any of the special pleas interposed by any of these parties. The saloon should be adjudged a nuisance, before it could be abated. There must first be legal proceedings. *Earp* v. *Lee et al.* 71 Ill. 193.

As to the motion for a new trial, based upon the affidavits of two of the jurors, the case of *Smith* v. *Eames*, 3 Scam. 76–81, is decisive on this point.

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

Judgment affirmed.

THE AMERICAN CENTRAL INSURANCE COMPANY

v.

LOUIS B. ROTHCHILD.

1. INSURANCE—*construction of provisions of policy.* Where a policy of insurance provides that, in case of loss, the assured shall produce the certificate of an officer nearest to the place of the fire, etc., and there are several officers in the same immediate neighborhood, the certificate of any one of them will be a sufficient compliance with the requirement of the policy, and a distance of a few yards more or less from the scene of the fire, will not be regarded as a matter of any importance.

2. SAME—*what property is covered by policy on stock of goods.* A policy of insurance upon a stock of goods to be sold and replenished, covers as well the additions made from time to time after the insurance was effected as those on hand when the policy was issued.

3. INSTRUCTIONS. Where, in a suit upon a policy of insurance, the policy is set out according to its legal effect, and the performance of every material fact necessary to enable the plaintiff to recover is specifically averred, it is not improper for the court to instruct the jury that, if the facts alleged in the declaration have been proved, the plaintiff is entitled to recover, unless defendant has established, by a preponderance of the evidence, some one or more of the special defenses pleaded.

Writ of Error to the Circuit Court of Marion county; the Hon. Amos Watts, Judge, presiding.

This was an action brought by appellee against appellant, upon a policy of fire insurance, to recover for property destroyed by fire and covered by the policy sued on. One of the conditions of the policy was, that the insured, upon sustaining loss, should produce a certificate under the hand and seal of a magistrate or notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to assured, stating that he has examined the circumstances attending the loss, etc.

Messrs. W. Stoker & Son, and Mr. W. W. Willard, for the plaintiff in error.

Mr. Henry C. Goodnow, for the defendant in error.

Mr. Justice Scott delivered the opinion of the Court:

We will enter into no calculations to ascertain whether the office or residence of the officer who made the certificate of loss, as required by the 9th condition of the policy, was a few feet nearer or more distant from the exact point where the fire occurred, than that of another notary or justice. It is sufficient if it appears the certificate was made by an officer of the character designated residing in the same locality. That is all this condition in the policy requires, when given a common-sense construction. Where there are several officers residing in the same immediate neighborhood, all of whom are competent to make the certificate of loss, that of either of them will be a sufficient compliance with the conditions of the policy, and a distance of a few yards more or less from the scene of the fire will not be regarded as a matter of any importance whatever. In this case the contiguity of the officer is sufficiently proven. *Peoria M. and F. Ins. Co.* v. *Whitehill*, 25 Ill. 466.

The policy of insurance was set out in the declaration according to its legal effect, and the performance of every

material fact necessary to enable plaintiff to recover was specifically averred. It was not improper, therefore, for the court to state the proposition as it did in the first instruction, that, if the facts alleged in the declaration were proven, plaintiff was entitled to recover, unless defendant had established, by a preponderance of the evidence, some one or more of the special defenses pleaded.

Without approving the phraseology of the instruction, it was the assertion of the truth of a matter about which there could be no controversy. It was, if plaintiff had proven his entire case, and nothing was proven against it, he was entitled to recover.

The principle asserted in the fourth charge, viz: that a policy of insurance upon a stock of goods which was to be sold and replenished, covers as well the additions made from time to time after the insurance was effected, as those on hand when the policy was issued, is fully warranted by the former decisions of this court. *Peoria M. and F. Ins. Co.* v. *Anapow*, 45 Ill. 86; *Same* v. *Same*, 51 Ill. 283. In the form given, it was applicable to plaintiff's theory of the case, and if any modification of the doctrine stated was necessary to make it applicable to the facts of the case, as defendant understood them, it was for him to ask for it, and no doubt the court would have readily made such modification. Plaintiff, no doubt, believed his case, as proven, came within the general rule upon this subject, and he was not bound in the first instance to state exceptionable cases. That was a matter of defense.

The special defenses relied upon to defeat the action were all submitted to the jury under instructions sufficiently accurate to enable them to comprehend the issues involved. Upon all these special issues of fact, the evidence was quite conflicting, and much of it irreconcilable.

Whether plaintiff set on fire his storehouse, with a purpose to destroy the goods insured, was a question of fact fairly submitted as one of the contested points in the case. While it must be conceded there are some circumstances proven that cast suspicion upon the fairness of plaintiff's conduct, there

are other facts, about which there can be no controversy, that seem inconsistent with the theory of the case, that plaintiff set fire to his property to secure the insurance money. The same may be justly said in regard to the other special defenses attempted to be made.

Upon the whole case, we can not say the verdict is so much against the weight of the evidence as would justify a reversal of the judgment. One thing is apparent. From the time the loss occurred, it seems defendant set about adopting plans to defeat a recovery, indulging in all manner of technical objections not affecting the merits of the case, and very much damaging whatever real defense it may have had to the action. Had the company waived all these minor objections, and placed the defense in the first instance upon the ground plaintiff had destroyed his own property, to enable him to recover the insurance money, it would have given the defense now so persistently insisted upon, much more the appearance of sincerity.

On the trial, plaintiff's conduct and motives were severely assailed, and every act and every circumstance tending in the slightest degree to inculpate him, was pressed upon the attention of the jury with great earnestness and persistency, but the finding was against the defendant upon all the issues of fact made.

Under the uniform rule of practice that prevails, that, where no material errors appear in the instructions, and the evidence is conflicting, the verdict must be permitted to stand, unless it appears the jury must have so clearly misjudged as to the weight of the testimony as to do great injustice, we do not see how we can disturb the conclusion reached, whatever might have been our views of the case had it been submitted to us as an original question; nor does anything appear to justify the inference the jury must have been actuated by passion or prejudice.

The judgment will be affirmed.

Judgment affirmed.

ST. PATRICK'S ROMAN CATHOLIC CHURCH, ETC.

v.

LOUIS GAVALON.

1. CHURCHES—*how contracts by may be executed.* Where there is no evidence before the court as to the manner in which a church contracts debts and executes contracts, and it appears that there are trustees, it will be presumed, in the absence of proof, that the trustees are empowered to make contracts and incur indebtedness on account of the church property.

2. CHURCH TRUSTEES—*must act as a body, to bind the church.* Where the trustees of a church are authorized to execute contracts for a church, they should act as a body, or delegate the power to one of their number, or ratify and approve the act of one of their number acting for them, and unless they do so, the church, as a corporation, will not be bound. The unauthorized act of one of the trustees can not bind the church as a corporation.

3. Where the officiating priest of a church, who is a member and chairman of the board of trustees, employs a person to work for the church, without authority from the other trustees, and the act is not ratified by them, the church is not liable.

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

Messrs. CONLON & HITE, for the appellant.

Mr. T. QUICK, and Mr. J. B. MERRICK, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The court below overruled a motion for a new trial, and rendered judgment on the verdict, and thereupon defendant appealed to this court. The grounds relied on for a new trial were, that the verdict was not sustained by the proofs in the case, and of newly discovered evidence. The latter of these grounds is not urged in argument, and seems to have been abandoned. We shall, therefore, turn our attention only to the former.

It appears that the pastor of the church employed appellee, and he swears that it was on his own individual account. He swears that appellee was not employed by the church. On the

other hand, appellee does not deny that the pastor employed him. He says: "I worked for the St. Patrick's Roman Catholic Church of East St. Louis—well, I was really working for Father Zabel, for twenty dollars a month, and Father Zabel promised me twenty dollars a month; and he wanted me to work and do all the business about the church, serve the church, clean the church, and do all these things." This is his first statement, as contained in the record. But he states, in other portions of his evidence, that he kept the pastor's horse, went to the post office, to market, and on various errands for the priest. He also, during the time he was employed at twenty dollars a month, dug graves and filled them, for which the pastor received the pay. Appellee also worked the priest's garden. He made fires, swept the church and rung the bell, and performed various duties that witnesses testified belonged to the duties of sexton. He also performed other labor for the church, such as constructing a cistern, and working on the belfry of the church, and loaning it some money. Appellee also claims a considerable sum for digging graves in the grave-yard attached to the church, after he left the employment of the priest. But the latter says that he was to look to persons having graves dug for payment, and not to him or the church.

Appellee and the pastor differ widely in their understanding as to the state of accounts between them. The former claims that the church owes him $1010, whilst the latter claims the church owes him nothing, and that he only owes him thirteen dollars.

No evidence was before the court as to the manner in which the church contracts debts and executes contracts; but it does appear there were three trustees, of whom the officiating priest was one, and seems to have been the chairman or presiding officer—the "head," as stated by some of the witnesses. And we will presume, in the absence of evidence to the contrary, that these trustees were entrusted with the control of the temporalities of the church; that they were empowered to make contracts and incur indebtedness, on account of the church property. We can conceive of no other duties they could per-

form as trustees. It surely did not devolve upon them to govern the church, or in anywise participate therein, or to intermeddle with the spiritual affairs of the church.

If, then, this was the duty of the trustees, they could alone act; and to be valid and binding, they should act as a body, or delegate power to one of their number, or other person, or ratify and approve the acts of the member of the board acting for them, before the church, as a corporation, would be bound thereby. The unauthorized act of one of the trustees could not be held to bind the church as a corporation. This has been held as to directors of schools, and as to trustees of other churches, where they have given notes in their individual names for property applied to the use of the church. *Powers* v. *Briggs*, 79 Ill. 493; *Burlingame* v. *Brewster*, id. 515.

In this case, it would not matter that some of the labor was performed for the church, if the priest alone employed appellee, without express or implied authority from the other trustees, or the act was ratified by them.

We are strongly inclined to think, from the evidence in the record, that appellee did not regard his contract as being with the church, but with the priest in charge, individually. Appellee seems never to have called on the trustees for pay, nor to the priest in charge, who succeeded Father Zabel. On the contrary, he wrote twice to the latter at Cairo, where he was stationed, to procure the money he claimed to be due. Had he regarded the church as being his debtor, he would, doubtless, have demanded payment from its officers, and not from a priest whose connection with that particular church had ceased. He says he never demanded his money from the church, but, on the contrary, he seems to have several times demanded it of the priest, with whom he made the contract, and that, too, after he ceased to officiate for appellant. We are of opinion, that the evidence fails to show the church liable, and it, therefore, fails to sustain the verdict.

For the error indicated, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Mr. Justice Scott, dissenting:

The contention in this case is, whether plaintiff was in the employ of defendant, or of the witness Zabel. That question was made before the jury, who found against defendant on that issue. Upon this vital point in the case, the evidence is quite conflicting, and, indeed, it may be said to be irreconcilable. But there are some facts in the case, about which there can hardly be any real controversy, that tend to strengthen the theory of plaintiff, upon which he based his right to recover.

The defense insisted upon by defendant is, that plaintiff was in the personal service of Father Zabel, the priest in charge of the church. It seems to be conceded, the priest in charge is, in some sense, an agent of the church, and, in connection with its other officers, has charge of its temporal and business affairs. At all events, he assumed to act on its behalf, without objection from any one, and the society or church availed of the benefit of his acts. The money which plaintiff let the priest have was for the benefit of the church, and was so used. In the light of the testimony, it can not be said it was for the individual interest of the priest. He used it for the church, and it was obtained for that purpose.

The same may be said of the personal services rendered by plaintiff. They were largely on account of the church, and, indeed, almost exclusively the work he did was that which the society was obligated to do. What he did in the personal service of the priest, was of no considerable importance, and constituted but a small portion of his labors. The work plaintiff did in the cemetery was on account of the church, from which it must have derived an income, and of which, no doubt, the priest as financial agent rendered an account. Other services in and about the church were rendered on behalf of the society worshipping there, and there is no reason why defendant should not pay for them. *St. Patrick's Roman Catholic Church* v. *Abst*, 76 Ill. 252. In that case, as in this, the hiring was by the priest, as the agent of the corporation.

All the services performed were for defendant, and plaintiff

ought not to be driven to an action against the officiating clergyman for the value of his labor. It is not just either to the priest, who was but the agent of defendant, nor to plaintiff. Assuming, as I do, the proof warrants the finding of the jury that plaintiff was in the employ of defendant, I think the verdict found, as to the amount found, is fully sustained by the evidence, and the judgment ought to be affirmed.

Mr. CHIEF JUSTICE SHELDON: I concur in the foregoing opinion of Mr. JUSTICE SCOTT.

Mr. JUSTICE DICKEY: I also concur in the views of Mr. JUSTICE SCOTT.

ST. CLAIR COUNTY TURNPIKE COMPANY

v.

THE PEOPLE *ex rel.* JOHN B. BOWMAN.

1. PRIVATE CORPORATIONS—*construction of grants—when corporate rights cease.* Grants to private corporations are to be construed liberally in favor of the public, and strictly against the corporation; whatever is not unequivocally granted, is taken to have been withheld.

2. Where a charter was granted to a turnpike company for twenty-five years, with a proviso that the State might, at the end of that period, become the owner of the turnpike by paying the cost of its construction, and that in case the State failed to pay for the same at that time, the company should still own the turnpike, and exercise the franchises granted until the same was so taken and paid for by the State, it was *held*, that this simply authorized the corporation to hold and operate the road constructed by it, after the expiration of the twenty-five years, until such time as the State chose to become the owner by paying the cost of its construction, and did not authorize it, after that time, to use and enjoy other corporate privileges and rights granted to it by amendment to its charter, not connected with and necessary to the use and beneficial enjoyment of the road constructed by it, and not expressly extended by such amendment beyond the time fixed in the original charter.

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

Opinion of the Court.

This was a proceeding by information, in the nature of a *quo warranto*, for the purpose of determining the right of appellant to maintain a toll-gate on Dyke avenue, in the city of East St. Louis.

Appellant pleaded, in justification of its claim of right, its original charter and the several amendments thereto, an acceptance of the same, and, in general terms, that it had complied with the conditions and obligations thereby imposed upon it.

Appellee filed a defective replication to the plea, to which appellant demurred. On appellee's motion, the demurrer was carried back to appellant's plea, and the court held the plea defective, and gave judgment upon the demurrer, in favor of appellee, from which judgment an appeal was prayed and perfected by the appellant.

The opinion sufficiently presents the substance of the plea, for the comprehension of the questions discussed.

Mr. JOHN B. HAY, and Mr. M. MILLARD, for the appellant.

Mr. CHARLES P. KNISPEL, and Messrs. BOWMAN & HALBERT, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

In the view we take of this case, it will only be necessary to inquire whether the amendment to appellant's charter, of February 16, 1861, authorized it to maintain a toll-gate across the Bloody Island dyke, until the State should elect to purchase its road, as provided for by the 13th section of its original charter, or did the right terminate with the period provided by that instrument for the termination of the corporate life of appellant?

The original charter became a law on the 13th of February, 1847, and it provides, in the first section, that the corporation shall continue twenty-five years from and after the passage of the act, and the period is not extended by any of the subsequent amendments.

The second section of the amendatory act of February 16, 1861, is as follows:

"The St. Clair County Turnpike Company is hereby authorized to extend their road across Cahokia creek, using the bridge over said creek which connects the St. Clair County Turnpike Company with the dyke on Bloody Island, and over said dyke to its western shore, opposite the city of St. Louis; and shall keep the road on said dyke and bridge in good repair, and build a new bridge, if the present one should float away or become unsafe for traveling; but shall not be held responsible for any destruction of the dyke by high floods. And the said company is hereby authorized to erect a toll-gate on said dyke, or on or near said bridge, and collect the following rates of tolls: * * * * *"

If the first section of the original charter were alone to be considered in connection with this section, there could, of course, be no serious question as to the duration of the grant, since no more is pretended by the section than a grant of the franchise to keep a toll-gate to an existing corporation, and when the corporation ceased, the grant would necessarily revert. But the 15th section of the original charter is as follows:

"The State reserves the right to purchase said road at the expiration of said charter, by paying to said corporation the original cost of said road, laid out and expended in constructing the same, to be ascertained by examination of the books of said corporation, by commissioners to be appointed by the legislature; and in case of non-payment or redemption by the State, at the expiration of the charter, the said road, with all its appendages, shall remain in the possession of said corporation, to be used, controlled and possessed under the rights and restrictions in this charter contained, and may demand and receive tolls, as herein stated, until such time as the State shall refund said sums of money, the original cost of construction, and which right the State hereby reserves."

And the 17th section is as follows:

"The corporation hereby created shall be safe and secured for and during the term of the charter, and until the road shall be redeemed by the State, as provided, in all the rights, interests and privileges granted and intended to be conferred to said company by the strict letter and meaning thereof; the corporation complying strictly, clearly and fully on their part."

It is contended by the counsel for appellant that the effect of these sections is to vest a right in appellant to the continued enjoyment, not only of the property in the road and the franchises connected therewith, but also of all additional franchises granted to it, to be used and enjoyed in connection with those pertaining to the road, until the State shall elect to purchase the road. We are unable to yield our assent to the correctness of this position.

The familiar rule of construction applicable to grants to private corporations is, that they are to be construed liberally in favor of the public, and strictly against the corporation. Whatever is not unequivocally granted in such acts, is taken to have been withheld. Sedgwick on Stat. and Const. Law, 338–9.

It is absolutely granted, here, that the corporation shall exist for twenty-five years. It is contemplated that, at the end of that period, it shall cease to exist, and the State become the owner of its road, by paying what its construction cost; but in the event the State shall not elect to do so, it is granted that the corporation shall continue to own its road and appendages, and exercise the franchises with reference thereto, which it before enjoyed, until the State shall pay what the construction of the road cost. This neither expressly nor by necessary implication recognizes the continued enjoyment, after the expiration of the twenty-five years, of any franchise granted to the corporation, not connected with and necessary to the use and beneficial enjoyment of the road constructed by it.

The continuance of the corporation, in short, after the expiration of the twenty-five years, is simply, as against the State,

for the purpose of holding and operating the road constructed by it, for tolls, until it suits the State to take it at the stipulated price.

The bridge and dyke never became the *property* of the corporation, their *use* merely being granted to it, so that it can not be said that they form a part of the road constructed by the corporation, which the State, in electing to take its road, would have to pay for. The franchise of charging tolls for their use, is entirely distinct and separate from the franchise of charging tolls for the use of the road constructed by the corporation. It adds, it is true, to its revenues, and keeping the bridge or dyke in repair adds to its burdens, but this merely proves that it is an additional source of profit and loss, and the same could be said of a franchise to operate a railroad or a public mill, or any other like enterprise.

The fair construction, then, as we think, is, it was designed the corporation should have the use of the bridge and dyke, with the right to charge tolls thereon, until the period fixed for the termination of the corporation's existence, and the taking of control of its road by the State, and no longer.

The State, by its charter granted to the city of East St. Louis, in 1869, conferred power upon that municipality over this dyke, in common with all other public highways within the city limits, which is absolutely incompatible with its further exclusive control and use by a private corporation.

It follows that, in our opinion, the plea was bad, and the judgment of the court below on the demurrer is right.

The judgment is affirmed.

Judgment affirmed.

LOUIS HOUCK

v.

JOSHUA L. YATES.

1. MISSISSIPPI RIVER—*not a navigable stream according to common law definition.* Whilst the Mississippi river is a navigable stream in fact, and has been so declared and treated for years, yet it is not such a stream as is by the common law termed navigable.

2. SAME—*rights of riparian owner.* If the Mississippi river forms the boundary of land granted by the United States, the grantee becomes a riparian owner, and his grant extends to the center of the thread of the current.

3. SAME—*when considered the boundary line of land.* A meandered line run by the United States surveyor between the Mississippi river and a fractional quarter section of land, merely for the purpose of ascertaining the quantity of land in the fraction, can not be regarded as a boundary line, where no monuments are established, and where such line does not appear upon the plats in the United States land office, but in such case the river will be considered as the boundary line.

APPEAL from the Circuit Court of Alexander county.

Mr. H. K. S. O'MELVENY, and Mr. LOUIS HOUCK, for the appellant.

Mr. GEORGE FISHER, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This is an appeal from a decision of the circuit court rendered upon the following agreed statements of facts:

"Whereas, the above plaintiff has instituted a suit in ejectment against the said Louis Houck, for an undivided half of 300 acres of an island, called and known as Dickey's island, lying in the Mississippi river, on the Illinois side, and south of the west fractional half of the north-east quarter, and the north-west fractional quarter of section 5, township 17 south, range 1 west of the third principal meridian, in Alexander county, State of Illinois, which suit is now pending and undetermined in the Alexander county circuit court; and whereas,

the above parties are desirous of saving expenses and costs as much as possible;

"Now, therefore, it is agreed, on the part of the defendant, that the plaintiff, Joshua Yates, has a good and valid title in fee simple to the undivided half the west fractional half of the north-east quarter, and the north-west fractional quarter of section 5, township 17 north, range 1 west of the third principal meridian, in Alexander county, State of Illinois; that the land for which the plaintiff has sued in ejectment is situated and lying due south from the said fractions, and that on the plats of the United States survey the fractions on the south are bounded by the Mississippi river, and that the lines of said fractions, running south, extended to the center of the present channel of the Mississippi river, would embrace the land in controversy, and that neither party has any knowledge where the channel of the Mississippi river was at the time of the United States survey.

"It is agreed by the plaintiff that the island called Dickey's island first arose in the Mississippi river about 20 or 25 years ago; that it gradually increased in size, so that, now, it embraces some 600 acres, in all; that along the fractional sections described above, on the south, the United States surveyors ran a meandered line, as marked in red ink on the plat hereto attached, and marked diagram 'A,' and that the stars in the said red line show the stations, according to the United States surveyor's field notes; that between the said meandered lines of said fractional sections, and extending and running along the entire south side of said meandered line and the slough, there is a strip of land, varying in width from one-half a rod to three rods, and containing, in all, four or five acres, and that this four or five acres existed when the surveyors of the United States ran the meandered line, and was not taken in account by them in computing the amount of land in said fractions.

"It is also agreed that there is a slough between the strip of land so lying and situated south of the meandered line, which separates the island from the main land, and that this slough is about 500 feet wide, and that the slough is filled with

water about six months in the year, and that at ordinary high water the slough is navigable for steamboats, and that when the river is very low the slough is dry, but devoid of vegetation, but has clearly defined banks; and, also, that the said Houck has a house on said island, and a clearing of about eight acres, and that the island is covered with timber.

"It is further agreed between the parties hereto that diagram 'A' attached hereto gives a correct idea of the premises sued for, and the fractions as surveyed by the United States surveyor, title to the undivided half of which fractions, as surveyed by the United States surveyor, is hereby acknowledged to be in the said Joshua L. Yates in fee."

It is, first, urged that the Mississippi river is a navigable stream, and appellee's grant would extend no further than to high-water mark, and hence would not embrace the lands in controversy.

While it is true the Mississippi river is a navigable stream in fact, and has been so declared and treated for years, yet that it is not such a stream as is termed by the common law navigable, is beyond controversy.

At common law, as we understand the matter, only arms of the sea and streams where the tide ebbs and flows are regarded navigable. Streams above tide water, while they were in fact navigable, did not fall within the class of waters designated and recognized as navigable.

As early as 1842, this court held, in *Middleton* v. *Pritchard*, 3 Scam. 510, that the Mississippi was not a navigable stream, under the common law definition of navigable waters. That decision has been acquiesced in and adhered to from that time until the present, and we perceive no reason now for changing the rule announced.

If, then, the river forms the boundary of the land owned by appellee, acquired from the government, it necessarily follows that the grant extended to the center of the thread of the current of the river. He became a riparian owner, and, as such, his grant extended to the center of the current. As was said in the case cited, all accretions belonged to the riparian pro-

prietor, both by the common and the civil law. If, by the gradual washing away, his lands were diminished, that would be a loss incident to the purchase. If, on the other hand, by gradual deposits from the river, the stream receded, he would be entitled to claim the deposits so formed, and the boundaries of his purchase would thus be extended.

But it is insisted by appellant that the field notes in the land office show that a line was run between the river marked on the plat and the lands actually purchased by appellee, and this line forms the southern boundary of his lands, and not the river. Had any corner or monument been established to mark the southern boundary of appellee's purchase, by the government surveyors, such would have been conclusive. That, however, did not occur, but the river seems to have been left to mark the southern boundaries of the land. The plats in the United States land office show the river as a boundary.

But it is said the meandered line ran by the government surveyors along the fractional sections on the south, mentioned in the stipulation, should control as to the southern boundary of appellee's lands. Had corners been established, or government monuments erected, or plats made, showing it to be the intention that the meandered line should form the southern boundary of appellee's purchase, those facts would properly determine the extent of the grant; but that a meandered line, which does not appear upon the plats in the United States land office, and which was, no doubt, run for the sole purpose of ascertaining the quantity of land in the fraction, should have the same effect as a visible government monument, is a proposition which we do not feel inclined to sanction.

Indeed, it was settled in *Middleton* v. *Pritchard*, *supra*, and *Canal Trustees* v. *Haven*, 5 Gilm. 548, and subsequent cases, that a meandered line, which is run for the purpose of ascertaining the quantity of land in the fraction, can not be regarded as a boundary line.

If, in the original survey, the meandered line had been designed as the southern boundary of appellee's lands, the government plat, no doubt, would have indicated that fact,

and the strip of land between the meandered line and the river would also have been surveyed and platted. This, however, was not done. But the plat showing the river as the boundary of appellee's purchase, and the additional fact that the strip of land between the meandered line and the river was not surveyed or platted, would seem to leave no room for doubt that the river was intended for the southern boundary of appellee's lands.

We are satisfied the view taken by the circuit court of the facts was correct. The judgment will therefore be affirmed.

Judgment affirmed.

Illinois and St. Louis Railroad and Coal Co.

v.

Francis H. Cobb.

1. Trespass quare clausum fregit—*prior possession not always evidence of prior right.* In an action of trespass *quare clausum fregit*, prior possession is not always proof of prior right; that depends upon the nature of the possession. Temporary occupancy without claim of right does not tend to show prior right.

2. Where, in an action of trespass *quare clausum fregit*, both parties claim prior possession, an instruction that a prior possession by the defendant will defeat a recovery by the plaintiff should not be given, unless the nature of the possession required in such case is stated.

3. Where a plaintiff has recovered in an action of trespass *quare clausum fregit*, such recovery is *res adjudicata*, as between the parties, that plaintiff's possession before the trespass in that suit complained of was peaceable, and prior to defendant's, and of such a character as to entitle the plaintiff to retake it, if it could be done peaceably.

4. Same—*second suit after ouster and re-entry.* Where a plaintiff recovered in an action of trespass *quare clausum fregit*, against a railroad company, for entering upon land in his possession, and building a track thereon, and the defendant paid the judgment, and the plaintiff afterwards peaceably retook possession of the same premises, and the defendant again entered upon it, and rebuilt its track, it was *held*, that the peaceable retaking possession by the plaintiff was lawful, and that he was entitled to recover in another action of trespass for the subsequent entry by the defendant.

5. Same—*suit after re-entry and second ouster, and whilst wrongdoer is in possession.* In an action brought after ouster and before re-entry, the plaintiff can only recover for the ouster. Nor can he bring a second action for damages for the continuance of the wrongful possession by the wrongdoer, until he shall have made a re-entry; but, having re-entered, he has a right of action for the past intervening injury, which can not be taken away by a subsequent forcible ouster, and he may sue upon that right of action even after the second ouster, and when the wrongdoer is in possession.

Appeal from the Circuit Court of St. Clair county; the Hon. Horatio M. Vandeveer, Judge, presiding.

Messrs. G. & G. A. Kœrner, for the appellant.

Messrs. C. W. & E. L. Thomas, for the appellee.

Mr. Justice Dickey delivered the opinion of the Court:

This was a judgment in the circuit court in trespass *quare clausum*, against appellant, brought here by appeal. The errors assigned were considered at a former term, and judgment in this court was rendered, reversing the judgment of the circuit court and remanding the cause for a new trial. At this term appellee brings the record before us on a petition for a rehearing.

The opinion of this court, heretofore filed, was pronounced, upon the supposition that the premises in question were shown, by the proofs in the record, to be within the boundaries of a certain lease, under which the appellant claimed right to possession. A careful inspection of the maps embodied in the record, in connection with the testimony, shows that the proof is otherwise. Hence, some things which were said in the former opinion are inapplicable to this case. The petition for rehearing must, however, be denied. The judgment was properly reversed upon other grounds which are not affected by the misapprehension on this point.

On the 6th day of March, 1872, Cobb, the appellee, brought an action of trespass *quare clausum fregit* against appellant, The Illinois and St. Louis Railroad and Coal Company, for entering appellee's close, laying down a railroad track thereon,

and removing soil and sand therefrom. At the October term, 1872, this action was tried, and resulted in a verdict and judgment for the plaintiff for $600, which judgment appellant paid.

On the 6th day of March, 1873, (the high water of the Mississippi river having sometime previously covered the land in question and prevented the use of the railway track by appellant, appellee having re-entered the premises and repaired the fence which the company had originally broken down,) Cobb, on that day, brought another action of trespass against the company, to recover for all damages done by it since March 6, 1872—the time when the first action was brought.

On the same day, after this second action was begun, (March 6, 1873,) the company again broke down Cobb's fence, so repaired, at a point where it had been built across the railroad track, and as soon as the water had sufficiently subsided the company uncovered their railroad track, (which had, by means of the high water, been covered with sand,) and proceeded to use the same, and remove sand and soil from the premises in question.

During the summer of 1873 the water rose again, and submerged the premises, preventing the use of the railroad track, and the water, flowing into the sand pits made by the removal of sand by the company, washed away a large quantity of sand, and when the water had subsided, and at a time when the company was not making any use of the premises, and its servants were absent, the appellee again entered upon the premises, and repaired his fence sometime in August, 1873, and, claiming to be in possession, brought another action of trespass against the company for the damages since March 6, 1873—the time of the commencement of the second action.

These last two actions were, by agreement, consolidated, and tried together at the February term, 1875, and verdict and judgment was rendered for plaintiff for $5000 damages, from which judgment the company appealed to this court.

In addition to the above statement of the facts, as gathered from the record, there is evidence tending to prove that the premises in question is ground lying in front of a tract of land

known as Cahokia Commons. Cahokia Commons lie on the east bank of the Mississippi river. The line of this bank of the river, at this point, has undergone great changes, by reason of the action of the currents in the river. On the Map C, in evidence, is shown the line of this bank as it was in 1814, and as it was in 1853, and as it was in 1870. The line of 1853 is the most easterly of these lines, that of 1870 the farthest to the west, and that of 1814 is between these two lines, being farther west than the line of 1853 and not so far west as the line of 1870.

Between 1814 and 1853, the current of the river had worn away the east bank of the river, so that in 1853 the bank was far to the eastward of its line in 1814—perhaps the distance of half a mile. About 1853, the inhabitants, to whom Cahokia Commons belonged, under authority of an act of the legislature, laid out into lots a tract known as Survey 759 (constituting a part if not the whole of the Cahokia Commons), and leased many, if not all, these lots to different lessees, for a term of ninety-nine years, and among these leases was a lease of lot known as Lot 301, which leasehold estate in lot No. 301 appellant acquired and held before and during the transactions out of which this controversy has grown. Lot No. 301 lay, at the time of the lease, on the bank of the river, but the premises in question in this proceeding do not lie in front of lot 301, but in front of lots then lying on the bank of the river, and farther south than the most southerly point of lot 301.

It seems, from the proofs, that, by reason of artificial works constructed in the river at a point above these premises, a sand bar or little island began to form in the river some distance from the east bank, and in front of certain lots in survey 759, which lay farther south than lot 301. This sand bar or island seems, however, to have been east of the centre of the stream, and by the law, as ruled by this court, thereby became, in its several parts, a part of the lots, respectively, in front of which it was located. The island was an accretion to the land in front of which it formed, inasmuch as each of the lots bounded by the stream extended, by law, to the thread of the

stream. The evidence tends to show, that, in 1865 or 1866, Cobb took possession of the island, and not long after built a house upon it, in which he put a tenant, and claimed to be in possession as the owner of the whole island. At this time this island was evidently small, and the waters of the river bounded the possession thereof as distinctly as a fence could have done.

The island grew, by accretion, in breadth and length, extending further both up and down the river, until the north end of it extended along in front of lot 301, but still some distance from the bank of the river. The main bank of the river also extended westward by accretion, until the north end of the island, in about 1871, became connected to the main shore opposite it, on lot 301, and perhaps farther up the river. The proofs tend to show that this connection between the island and the main east bank gradually extended farther south, until that part of the island formerly occupied by Cobb's tenant house was also connected with the shore, leaving what had been the south end of the island a peninsula.

The proofs also tend to show, that, about 1868 or 1869, appellant began to use the west bank of this island (at a point farther south than the line of Cobb's fence, hereafter mentioned,) for the purpose of landing barges and repairing the same, and continued to do so from time to time, and that, in the summer of 1871, Cobb built a fence across the island, from the river eastward to the meeting of the accretions of the east part of the island with the accretions of the main land, and thence south on the east side of the accretions of the island, and thence west to the river, thus inclosing that part of the land on three sides by fence, leaving the west bounded by the river. Whether the company had any barges at this time on the west shore of what had been an island, at any point embraced in this inclosure, does not appear. Cobb swears that he fenced this inclosure for pasture. The proof tends to show that this inclosure of Cobb was undisturbed, and that Cobb had exclusive possession of the same until the 18th of January, 1872, and that, on that day, appellant, with a strong and violent hand, against the resistance of Cobb, forcibly broke down his fence and took

possession of the ground in controversy, and laid down a switch or railroad track across the then late line of Cobb's fence, extending into the inclosure, and began to remove sand and soil therefrom, and that on the 6th of March, 1872, Cobb brought the action of trespass first above mentioned, for damages for the ouster on January 18, 1872, and between that date and the time of that action, and in which, as above stated, Cobb recovered $600, which was paid.

At the trial of the last two actions, (in which the judgment now under consideration was rendered, and wherein Cobb recovered damages to the amount of $5000,) the plaintiff showed no paper title to the land in question, but merely evidence tending to show possession, with claim of ownership, from as early as 1867, and that he had never abandoned his claim.

The defendant (the *locus in quo* not being part of the lot 301, mentioned in the lease,) showed no paper title to the premises in question.

Neither party showing a paper title, the whole case must turn upon the question of the date and nature of the several possessions set up by the parties, respectively.

It is claimed by appellant, that certain instructions refused should have been given. On examination they seem to have been faulty to such a degree, that the circuit court properly refused them. In one it is said: "If the possession of defendant was prior to the said plaintiff putting up his fence, and plaintiff does not show any better or paramount title to the premises in question, he can not recover, and the jury must find for the defendant."

Had the legal proposition in the body of the instruction been right, the last member of the same is faulty in not qualifying the statement, "and the jury *must* find for the defendant," with the words "in such case," or some equivalent words. This, alone, is a justification of the refusal of the instruction.

But the body of the instruction ought not to have been given. It ignores entirely the evidence tending to show Cobb's possession and claim of right long prior to the building of the

fence. The court ruled right in refusing to take that question from the jury. It is faulty in not stating the nature of the prior possession which should have such potent effect. Mere prior possession is not always proof of prior right; that depends upon the nature of the possession. The temporary occupancy of ground, without claim of right, does not tend to show prior right.

Again, it had been *adjudicated*, as between these parties, in the first action, (in which Cobb recovered $600,) that Cobb's possession, which he held on January 18, 1872, and which was violated by the company, was a peaceable possession of the premises in question. If that possession was, on that day, good enough to maintain the first action, it was good enough to enable plaintiff to lawfully retake it, if it could be done peacefully.

In another of the instructions, for the refusal of which appellant complains, it was said: "The law is, that, if plaintiff was in possession when he brought his first action, * * * * and was wrongfully ousted by defendant, yet he must be in actual possession before he can bring another suit, and if he was not in actual possession at the time the suits in this case were brought, the jury must find for the defendant," etc. This is not the law. It is true, in an action brought after ouster and before re-entry, plaintiff can only recover for the ouster. Nor can he bring a second action for damages for the continuance of the wrongful possession of the wrong-doer until he shall have made a re-entry; but having re-entered, he has a right of action for the past intervening injury, which can not be taken away from him by a subsequent forcible ouster, and he may sue upon that right of action even after the second ouster, and when the wrong-doer is in possession.

It is insisted that plaintiff's re-entries were against the known will of the occupant, and one of them by trickery, and that the circuit court should have treated such re-entries by plaintiff as forcible and illegal, and therefore equivalent to no entries, and we are referred to the cases of *Reeder* v. *Purdy*,

41 Ill. 279, and *Comstock* v. *Henneberry*, 66 Ill. 212, as supporting this position.

In each of those cases the possession entered upon was a peaceable and lawful possession, not acquired by force.

In the case of *Reeder* v. *Purdy*, the possession violated was that of a tenant, peaceable and lawful.

In the case of *Comstock* v. *Henneberry*, the possession of Comstock, which was violated, was a possession which had been adjudged to him in a litigation to which Henneberry was a party in interest, and which had been given to Comstock by an officer of the law, under the judgment.

The general words used in the opinion in the *Purdy case* are qualified by the court in the latter part of the opinion, where examples are given, in which the court hold the rule would not apply.

The fair inference from both of these cases is, that the rules laid down there are not to apply to a peaceable re-entry by a party who has been put out by lawless force. To hold that a party who has, by lawless force, driven a weaker party from a peaceable possession, has thereby acquired a possession so sacred that the expelled party may not, if he can do so without a breach of the peace, re-enter, for the mere purpose of complying with a technical rule of law which prevents him from bringing an action of trespass until he has re-entered, would be carrying the rule to a length never contemplated and wholly unwarranted by any provision of law, whether statutory or common law.

These instructions were properly refused.

The damages are complained of as excessive. This position of appellant, we think, is well taken. We find no warrant in the evidence, as presented in this record, for the amount of damages allowed.

As this case must go before another jury, to be tried again, and perhaps upon other evidence, we forbear a discussion of the evidence in this record. Let it suffice that, in the judgment of this court, the evidence in this record did not warrant the jury in so great an estimate of the damages.

It was made a question here as to the competency of proof tending to show filling up, by the action of the waters of the river, of the cavities from which sand and soil had been taken or washed. This, we think, was proper, as showing that the effect was less injurious than it otherwise would have been. All facts bearing upon that question should go to the jury.

The rehearing is denied.

Rehearing denied.

CHARLES COX
v.
THE PEOPLE OF THE STATE OF ILLINOIS

1. CRIMINAL LAW—*solicitation to commit crime—when indictable.* Solicitations to commit crime are indictable, where their object is to provoke a breach of the public peace, or to interfere with public justice, or where perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought. But if the offense be not consummated, and if it be not of such a character that its solicitation tends to a breach of the peace, or the corruption of the body politic, the mere solicitation is not, of itself, indictable.

2. SAME—*attempt to commit incest.* A mere effort, by persuasion, to produce a condition of mind essential to the commission of the crime of incest, without any step taken towards the commission of the offense, is not an attempt to commit the crime, within the meaning of the section of the Criminal Code providing for the punishment of whomsoever attempts to commit an offense prohibited by law, and does any act towards it, but fails or is intercepted or prevented in its execution.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. MARSHALL W. WEIR, for the plaintiff in error.

Mr. CHARLES P. KNISPEL, and Mr. R. A. HALBERT, for the People.

Per CURIAM: The indictment contains two counts. In the first, the defendant is charged with incest; and, in the second, he is charged with an assault with intent to commit incest.

The verdict of the jury is: "We, the jury, find the defendant guilty of an attempt to commit incest with Caroline Rider, under the first count of the indictment, and assess his punishment at imprisonment in the penitentiary for the term of two years."

The crime of incest is punishable, if it be by a father cohabiting with his daughter, by confinement in the penitentiary, for any term not exceeding twenty years; and if it be by cohabiting between other persons, within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, by confinement in the penitentiary for a term not exceeding ten years. R. L. 1874, p. 376, §§ 156, 157.

And, by another section of the Criminal Code, "whoever attempts to commit any offense prohibited by law, and does any act towards it, but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished, where the offense thus attempted is a felony, by imprisonment in the penitentiary not less than one nor more than five years; in all other cases, by fine not exceeding $300, or by confinement in the county jail not exceeding six months." R. L. 1874, p. 393, § 273.

It is not claimed, nor is there any express provision made by the Criminal Code for the punishment of an attempt to commit incest, so that the defendant's case is brought within this section, if he is liable at all. The evidence shows, simply, an unsuccessful solicitation to commit the offense, and the question, therefore, is, does a bare solicitation constitute an attempt, within the meaning of the section?

Wharton, in discussing whether solicitations to commit crimes are independently indictable, in the 2d volume of his work on Criminal Law (7th Ed.), in § 2691, says: "They certainly are, * * * where their object is to provoke a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice, as, where resistance to the execution of a judicial writ is counselled, or perjury is

advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought. * * * But if the offense be not consummated, and if it be not of such a character that its solicitation tends to a breach of the peace, or the corruption of the body politic, the question whether the solicitation is by itself the subject of penal prosecution, must be answered in the negative." See, also, *Smith* v. *Com.* 54 Penn. St. 209; *Com.* v. *Willard*, 22 Pickering, 476.

We are of opinion that this is the better view of the law, although there are respectable authorities holding a different rule; and, reading the section quoted in the light of it, the words "whoever attempts to commit any offense prohibited by law, and does any act towards it," must be construed, in cases like the present, to mean a physical act, as contradistinguished from a verbal declaration; that is, it must be a step taken towards the actual commission of the offense, and not a mere effort, by persuasion, to produce the condition of mind essential to the commission of the offense.

We are, therefore, of opinion there was error, both in giving instructions at the instance of the People, and in refusing those asked by the defendant, for which the judgment should be reversed and the cause remanded.

Judgment reversed.

WILLIAM HAUSKINS

v.

THE PEOPLE OF THE STATE OF ILLINOIS

1. BASTARDY—*objections to insufficiency of proof on formal questions, must be made in lower court.* Where a complaint is made in a county in this State, charging that a person of such county is the father of a bastard child, and the return on the warrant shows that the defendant was found in that county, and the proof on the questions as to when the child was begotten or born, or where the defendant was found, is not fully called out before the jury, and no question is raised in the circuit court as to the sufficiency of the proof on these points, the objection will be too late when raised for the first time in the Supreme Court.

2. SAME—*appeal lies to circuit court—trial de novo.* The prosecutrix in a bastardy case can take an appeal from an order of the county court dismissing the proceedings, to the circuit court, and upon such appeal, the case will be tried *de novo* in the circuit court.

3. SAME—*proceedings do not abate on death of child.* The proceedings in a bastardy case are not abated by the death of the child, but the court should, where the evidence shows that the child was born alive, and was living when the proceeding was instituted, and died before the trial of the cause, make an order, in case the defendant is found guilty, for the payment by him of so much of the amount fixed by statute as shall have accrued between the birth and death of the child.

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

Messrs. METCALF & BRADSHAW, for the appellant.

Messrs. G. B. & F. W. BURNETT, for the People.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This is an appeal from a judgment rendered in the circuit court of Madison county, in a proceeding originally instituted before a justice of the peace, against appellant, under the Bastardy Act of the State.

It is first urged that the evidence fails to show that the child was born or begotten in the State of Illinois.

The first section of the Bastardy Act authorizes the prosecution to be commenced in the county where the woman may be pregnant or delivered, or where the person accused may be found. Revised Laws of 1874, p. 183.

The complaint was made before a justice of Madison county, in which it is charged that appellant, of said county, is the father of the child. The return upon the warrant shows that appellant was found in the county.

These facts are sufficient to give the court jurisdiction, and while the proof upon the formal question where the child was begotten or born, or where appellant was found, was not fully called out before the jury, yet, in the absence of any question being raised in the circuit court upon the sufficiency of the proof upon this point, we must hold that the objection, for the

first time raised in this court, comes too late. *Cook* v. *The People*, 51 Ill. 144.

The county court, before whom the appellant had been recognized to appear by the justice of the peace, dismissed the proceeding, from which judgment an appeal was taken to the circuit court by the prosecuting witness.

It is said no appeal could be taken from this order of the county court. The reason for this, however, is not apparent. The judgment of the county court was final. It terminated the litigation between the parties, and we perceive no greater reason for holding that an appeal would not lie from a judgment of this character, than from a final judgment in any other case. But it is contended it was the duty of the circuit court to either affirm the decision of the county court, or reverse and remand.

This question, however, was settled in *Holcomb* v. *The People*, 79 Ill. 409, where it was expressly held that, in a case of this character, an appeal could be taken to the circuit court, and a trial *de novo* be there had.

As the decision cited is conclusive of the question presented, further discussion of the point is not deemed necessary or important.

The main question, however, relied upon by appellant to reverse the judgment, is, that the death of the bastard child before verdict, abated the prosecution.

It appears, from the record, that the child was born on the 20th day of February, 1874, and died January 9th, 1876. The suit was commenced September 11th, 1875, but the trial and rendition of judgment occurred at the March term, 1876.

Upon the trial of the issue, the jury returned a verdict that appellant was the father of the bastard child, upon which the court entered an order requiring him to pay $100 for the first year after the birth of the child, and $40 for the second year; also, that appellant enter into bond, with security, for the payment of the money, and upon the payment of the sum of $140, and costs of prosecution, the defendant be discharged from further liability.

The 8th section of chapter 17, Revision of 1874, provides that, where the issue shall be found by the jury, against the defendant, he shall be required, by the judgment of the court, to pay $100 for the first year after the birth of the child, and $50 yearly for nine years succeeding said first year, and secure the payment of the money by bond, with security.

This section of the act makes no provision for an abatement of the action, for any cause, but it is claimed section 14 does. That section declares: "If the child should never be born alive, or, being born alive, should die at any time, and the fact shall be suggested upon the record of the said court, then the bond aforesaid shall from thenceforth be void."

It is clear that, if a prosecution was commenced before birth, and the child should not be born alive, the action would abate, and no judgment could be rendered against the defendant, except it might be for costs; but such is not this case.

That portion of the section which relates to a case where a child should be born alive, and subsequently die, does not profess to regulate or make any provision in regard to the money which has accrued between the birth and death of the child.

The bond referred to in the section evidently means the bond required to be given under section 8, and the clause that it "shall from thenceforth be void," no doubt, was intended to relate solely to the payment of such sum of money as would become due, under the order of the court, after the death of the child.

If we are correct in this, then the section does not embrace a case like the one under consideration, nor have we found any section of the act which, by a fair or reasonable construction, will prevent a recovery in a case like this.

It has been urged on behalf of appellant that, after the death of the child, the State no longer had an interest in the prosecution of the action. This may be true, and yet not affect the principle involved.

It has been well settled in this State that an action of this character is of a civil and not of a criminal nature, and the mother of the child has an interest therein, as well as the

people. *Mann* v. *The People*, 35 Ill. 467; *Pease* v. *Hubbard*, 37 ib. 257.

In the case last cited, which was an action by a mother of a bastard child, against an officer, for permitting a defendant, who had been arrested on a bastardy warrant, to escape, it was said: "Although it is a proceeding in the name of the people, yet the object is not the imposition of a penalty for an immoral act, but merely to compel the putative father to provide for the support of his offspring. In the event of his failure to perform this duty, it devolves upon the mother, and in case of her inability, the child becomes a public charge as a pauper. The plaintiff was clearly injured by the negligence of the defendant, because she is left liable to a burden from which it was the duty of the escaped prisoner to relieve her."

The principle announced applies with peculiar force here. The foundation of the action is not to punish a defendant for an immoral or unlawful act, but to compel a father to contribute to the support of his offspring.

During the two years the child was living, its care, custody and maintenance devolved upon the mother. Her action was pending to compel the father to perform a duty the statute had imposed upon him. Had the child survived, it is not pretended but the money the court required the defendant to pay would have gone to the mother to reimburse her for advances made during these two years she kept the child. In what manner the death of the child could change rights that had accrued and become fixed, it is difficult to perceive.

The statute required the defendant to pay a certain amount, for a certain number of years, for the purpose of supporting the child. The fact that the money had not been collected for the time the child had lived, did not, upon the death of the child, abate the action, or in any manner release the defendant from his liability for the support during the life of the child. This was the view taken of the case by the circuit court, and it was correct.

The judgment will be affirmed.

Judgment affirmed.

Rockford, Rock Island and St. Louis R. R. Co.

v.

John Delaney, Admr. etc.

1. Measure of damages—*for causing death by negligence.* In a suit by the administrator of a boy nine years of age, against a railroad company, for negligently causing the death of the intestate, it is proper for the jury, in estimating the damages, if the next of kin is the father of the boy, to take into consideration the value of the services of deceased, from the time of his death until he would have attained the age of twenty-one years, deducting what it would be worth to feed and clothe him during that time.

2. Negligence—*relative degrees of, matter of comparison.* In a suit by an administrator against a railroad company for causing the death of his intestate by negligence, the rule is, that the relative degrees of negligence of the defendant and intestate is matter of comparison, and that the plaintiff may recover although his intestate was guilty of contributory negligence, provided the negligence of the intestate was slight and that of the defendant gross, in comparison with each other; but if the intestate's negligence was not slight, and that of the defendant was gross, in comparison with each other, there can be no recovery.

3. Same—*age of deceased to be considered.* In a suit against a railroad company for causing the death of a person, the age of the deceased should be taken into consideration in passing upon the question of contributory negligence, and if the deceased was a child, it should be held responsible for the exercise only of such measure of capacity and discretion as, from its age and experience, it may be found to possess.

Appeal from the Circuit Court of St. Clair county; the Hon. William H. Snyder, Judge, presiding.

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

Mr. William G. Kase, and Mr. William H. Bennett, for the appellee.

Mr. Justice Scholfield delivered the opinion of the Court:

The plaintiff's intestate, a lad of nine years of age, was killed at a street crossing in East St. Louis, by a train of cars. On the trial in the court below, controversy existed whether the train by which the intestate was killed was, at the time, under

the control of appellant or of that of The St. Louis and Indianapolis Railroad Company, which was impleaded with appellant; but, since the finding of the jury on this point was not pressed in argument as ground of reversal, it will be unnecessary to refer to the evidence bearing upon it.

The court, at the instance of the plaintiff, instructed the jury, "that, as to the question of damages, they should take into consideration the value of the services of the deceased, from the time of his death until he would have been twenty-one years of age, deducting therefrom what it would be worth to feed and clothe him during that time, as proved."

The objection taken to the instruction, by appellant, is, that it does not lay down the correct measure of damages, because the damages contemplated by the statute under which the suit is brought, are the pecuniary loss which results to the next of kin, for the reason that they are next of kin to the intestate, and not the damages which result to the father from the loss of the services of his son.

We can not regard this as an open question. In *The City of Chicago* v. *Scholten*, 75 Ill. 468, we said: "Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship would warrant a recovery of nominal damages only; but where the deceased is a minor, and leaves a father entitled to his services, the law presumes there has been a pecuniary loss, for which compensation under the statute may be given. In such cases, the pecuniary loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation. No doubt the damages could be greatly enhanced by proof of the personal characteristics of the deceased. Evidence of his mental and physical capacity to be of service to his father in his business, his habits of industry and sobriety, where the deceased is old enough to have established a character, are all elements to be considered in assessing the pecuniary loss sustained."

And in *Gonant et al.* v. *Griffin, Admr. etc.* 48 Ill. 410, it

was held that the question of who, as between several persons claiming to be next of kin, is so in fact, and, therefore, entitled to the benefit of the judgment, when recovered, is to be settled by the court of probate; and it follows, that court must also determine the amount to which each of the next of kin, when ascertained, is entitled.

There was evidence tending to show negligence on the part of the defendant, and, also, on the part of the intestate. As to the preponderance of this evidence, it is unnecessary that we should, in the view we take of the case, express any opinion.

The court, among other things, instructed the jury, that "the defendant, in order to free itself from liability, must discharge every duty imposed upon it by law; and if the jury believe, from the evidence, that the defendant did not use all reasonable and lawful means and care to prevent the injury complained of them, then such omission, if it contributed to bring about such injury more than any negligence of deceased, renders the defendant liable, and they are bound to find for the plaintiff."

Waiving the obviously objectionable feature in this instruction, that it is not limited to the duties which the defendant is charged in the declaration with having violated, it is inaccurate as a statement of the law of contributory negligence, as recognized by this court, and was calculated to and may have misled the jury, and materially influenced them in the formation of the verdict which they returned. Other instructions, given at the instance of the plaintiff, likewise contain the same objectionable feature.

The rule of this court is, that the relative degrees of negligence, in cases of this kind, is matter of comparison, and that the plaintiff may recover although his intestate was guilty of contributory negligence, provided the negligence of the intestate was slight and that of the defendant gross, in comparison with each other; and, consequently, if the intestate's negligence was not slight, and that of the defendant gross, in comparison with each other, there can be no recovery. *Illinois Central Railroad Co.* v. *Benton*, 69 Ill. 174; *Chicago and*

Alton Railroad v. *Pondrom*, 51 Ill. 333; *Chicago, Burlington and Quincy Railroad Co.* v. *Dunn*, 52 Ill. 452; *Illinois Central Railroad Co.* v. *Baches, Admr.* 55 Ill. 379; *Illinois Central Railroad Co.* v. *Maffit*, 67 Ill. 431.

Of course, the age of the intestate is a proper element to be taken into consideration in the determination of this question; and, as was said in *Chicago and Alton Railroad Co.* v. *Becker, Admr.* 76 Ill. 32: "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."

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

Judgment reversed.

ELIZA KLEIN

v.

M. D. WELLS *et al.*

1. PRACTICE—*assessing damages.* Neither the court, nor the clerk under its direction, has power to assess damages in an action of assumpsit, whilst there is an issue of fact pending.

2. SAME—*where demurrer is overruled to one count, there is an issue of fact on another.* Where a demurrer to a special count on a promissory note is overruled, and the defendant stands by his demurrer, and the general issue is pleaded to the common counts, the correct practice is to enter judgment as by *nil dicit* on the special count, and empannel a jury to try the issues upon the common counts, and on that trial to submit the assessment of damages, under the judgment *nil dicit*, to the same jury.

WRIT OF ERROR to the Circuit Court of Clinton county; the Hon. AMOS WATTS, Judge, presiding.

Mr. G. VAN HOOREBEKE, for the plaintiff in error.

Mr. DARIUS KINGSBURY, for the defendants in error.

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

This was an action of assumpsit. The declaration contained a special count upon a promissory note, and the common counts. There was a demurrer to the special count, and the general issue was pleaded to the common counts. The court below overruled the demurrer, defaulted the defendant and assessed the damages and rendered judgment therefor, without in any way disposing of the issue on the common counts.

It was erroneous to assess the damages while the issue upon the common counts was undetermined.

The correct practice required the court, when the defendant stood by her demurrer to the special count, to enter a judgment as by *nil dicit* on that count, and then empannel a jury to try the issues of fact upon the common counts, and on that trial to submit the assessment of damages, under the judgment by *nil dicit*, to the same jury, so that there might be but one judgment. The court, or the clerk under its direction, had no power to assess the damages, while there was an issue of fact pending in the cause. *Keeler et al.* v. *Campbell*, 24 Ill. 287, directly decides this.

The judgment will be reversed and the cause remanded.

Judgment reversed.

WILLIAM W. WALLACE

v.

SARAH B. DIXON

PLEADING AND EVIDENCE—*the substance of the words charged in slander must be proved.* In an action for slander, the substance of the words charged must be proved. Proof of similar or equivalent words is not sufficient.

Statement of the case.

APPEAL from the Circuit Court of Monroe county; the Hon. AMOS WATTS, Judge, presiding.

This was an action for slander, brought by the appellee against the appellant. The declaration contained two counts. In the first count, the slanderous words charged to have been spoken by the defendant, were, "that Sarah B. Dixon, meaning plaintiff, was in the family way by James Wallace, meaning his son James Wallace, and that her mother, meaning Mrs. Ruth Dixon, had driven her, meaning Sarah B. Dixon, from her home, meaning her, the plaintiff's, home, living with her mother, Mrs. Ruth Dixon, for the reason of her, the plaintiff, being in a family way, meaning that plaintiff, being an unmarried woman, was pregnant with child, etc."

In the second count, the slanderous words charged to have been spoken by the defendant, were, "Sarah B. Dixon, meaning the plaintiff, was in a family way by James Wallace, meaning his son, and that her mother, Ruth Dixon, had driven her from her home, meaning her, the plaintiff's, home with her mother, Mrs. Ruth Dixon, and that his son, James Wallace, would support the child, when born, which would be a bastard, she, the plaintiff, then being sole and unmarried at the time, and has been ever since; and that his son, meaning James Wallace, would not marry her, meaning the plaintiff, thereby meaning, etc."

The evidence as to the words spoken was as follows:

Mrs. Sarah Dixon testified: "I know the defendant; I asked him last month, at Burk's, about the slander, and he said 'Yes, I said it. I will not deny it, but I want to advertise it as a lie, as I have since found out it was untrue.' He said 'he had told Fred. Jobush and Horace Varnum.' He said 'he had heard it, but could not give me his author at that time—he had forgotten who it was.'"

Horace Varnum testified: "I first heard of the slander in August, 1875, in Jobush's store. I called Mr. Wallace aside, and no one else being present, I asked him about the slander. He said 'he had heard that Sarah Dixon had had a child by

James Wallace, and that her mother had driven her off; that he had asked James, his son, about it, but James denied it; that he had told Fred. Jobush to find out about it, but that he could not give his author—he had forgotten the author, but he had heard it.'"

Fred. Jobush testified: "Mr. Wallace was at our store about the 15th of June, 1875, and I asked him for Bottom news. He said 'he had heard that Sarah Dixon had a child, and that her mother had asked her for the father, and, not finding from her who it was, had driven her from home; he had heard that his son James was implicated, and had asked James about it that morning, before getting up, and James had denied it.'"

Austin Varnum testified: "About a month ago, Mr. Wallace met me and told me of his trouble with Mrs. Dixon. It was after his interview with Mrs. Dixon, at Burk's. He said 'he had heard that Sarah Dixon had a child, and his son James was implicated; that James denied the charge, and that he had told Jobush to inquire about it.' Wallace said 'he had heard it, but could not give his author; could not then recollect who it was—had forgotten.'"

Jerome Dixon testified: "I met Wallace and asked him if he had said that Sarah Dixon was with child, and that my mother had driven her from home. He said 'he had heard so, but could not tell the author then; had forgotten who told him.' He said 'he heard his son James was implicated, but James had denied that to him, and that he had told Fred. Jobush to find out from James.'"

Upon this evidence, the jury found the defendant guilty, and the court rendered judgment upon the verdict, after overruling a motion for a new trial, from which judgment defendant appealed to this court.

Messrs. HENCKLER & TALBOTT, for the appellant.

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

Mr. Justice Breese delivered the opinion of the Court:

This was case, for slander, brought by Sarah B. Dixon, plaintiff, and against William W. Wallace, defendant.

There were two counts in the declaration, and the general issue and three special pleas were pleaded. A trial was had, and a verdict rendered for the plaintiff, for one thousand dollars, one half of which was remitted by plaintiff.

The point is made, on this appeal by the defendant, that the proofs do not sustain the charge in the several counts of the declaration, nor in either of them.

We have examined the declaration and the evidence in connection therewith, and fail to find the charge sustained. The substance of the words charged must be proved. Proof of similar or equivalent words is not sufficient, as this court has often held. *Slocumb* v. *Kuykendall*, 1 Scam. 187; *Sanford* v. *Gaddis*, 15 Ill. 228; *Baker et al.* v. *Young*, 44 id. 42; and other cases.

The allegations and proofs must coincide. Here, there is a wide departure, and the judgment must be reversed and the cause remanded.

Judgment reversed.

Edward M. West *et al.*

v.

The Madison County Agricultural Board.

1. Corporations—*when estopped to deny their own power.* Corporations will not be permitted to exercise powers that might be hurtful to the public interests, beyond those expressly conferred by their charters; but when a corporation has exercised powers germane and incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any definite power given, it will be estopped from denying it had authority to make such contract.

2. Same—*power to mortgage incident to power to purchase and hold real estate.* Where the law under which a corporation is organized authorizes it to contract and be contracted with, and to purchase, hold and sell prop-

erty, the power to mortgage its real estate, to secure money for the purposes of its organization, will be regarded as a necessary incident to the power to acquire and hold it.

3. Mistake—*in deed of corporation, will be corrected in equity.* Where the officers of a corporation, duly authorized to execute a deed of trust upon its property, undertake to do so, but execute it in their name for the corporation, instead of in the name of the corporation, equity has power to and will reform the deed, and make it conform to the agreement of the parties.

Appeal from the Circuit Court of Madison county; the Hon. William H. Snyder, Judge, presiding.

Messrs. Krome & Hadley, and Mr. John G. Irwin, for the appellants.

Messrs. Davis & Gillespie, for the appellee.

Mr. Justice Scott delivered the opinion of the Court:

The Madison County Agricultural Board is a corporation existing under the laws of this State, and is the owner of grounds upon which it held annual exhibitions. Under a resolution of the board, unanimously adopted by the directors at a meeting called for that purpose, the treasurer of the board was authorized to borrow an amount of money, not exceeding $2000, to be secured by trust deed upon the "fair grounds," for the purpose of building a new exhibition hall and reconstructing the amphitheater on its grounds. In pursuance of that resolution, the treasurer and president of the board borrowed of Edward M. West the sum of $2000, and, acting on behalf of the board, they undertook to execute to him a trust deed on the fair grounds owned by the corporation, to secure the money so borrowed; but the trust deed was executed in the names of the president and treasurer, on behalf of the board, and not in the name of the corporation. This bill is to correct that informality in the execution of the deed of trust, to foreclose the same, and, in default of payment of the sum due complainant, for a sale of the premises, on terms that should be equitable to the parties interested.

Whether the law under which the agricultural board was

incorporated expressly confers authority upon it to execute a deed of trust upon its real estate to secure borrowed money, or not, we think that power is incident to the corporation, and one it may rightfully exercise in furtherance of the objects for which the corporation was created. Authority is given in the general law, under which these agricultural boards are organized in the several counties, by which they may contract and be contracted with, may purchase, hold or sell property, and may sue and be sued. Accordingly, it would seem the power of a corporation to mortgage its real estate might be regarded as a necessary incident to the power to acquire and hold real property. *Aurora Agricultural and Horticultural Society* v. *Paddock*, 80 Ill. 263.

Corporations will not be permitted to exercise powers that might be hurtful to the public interests beyond those expressly conferred by their charters; but where a corporation has exercised powers germane and incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any definite power given, it will be estopped from denying it had authority to make such contract. Good faith to third parties who deal with such corporations, and who may have no accurate knowledge of the extent of their powers under their charters, demands the adoption of this salutary rule. *Chicago Building Society* v. *Crowell*, 65 Ill. 453.

The principle declared is conclusive of the case at bar. The money was borrowed to facilitate the objects of the corporation as declared in the general law, was used for the benefit of its property, and, no doubt, greatly enhanced its value and utility. It was for the promotion of the objects for which the corporation was created, and was therefore within its implied or incidental powers.

Equity possesses full power to reform the deed of trust to make it conform to the agreement of the parties. The deed was executed by the proper officers, for and on behalf of the corporation. In equity, it was the deed of the corporation itself. The demurrer admits these facts. The informality

insisted upon is clearly the mistake of the scrivener. Undoubtedly it was the intention the money borrowed for the use of the corporation should be made a charge upon its real estate. Hence the mistake that was inadvertently made by all the parties should be corrected, that justice may be done.

On its face, the bill shows a clear case for equitable relief, and it was error to sustain the demurrer, for which the decree must be reversed and the cause remanded.

Decree reversed.

St. Louis, Vandalia and Terre Haute R. R. Co.

v.

Francis B. Haller.

1. Town ordinance—*action will lie on providing for payment of damage by construction of railroad.* Where an ordinance of a town authorizing a railroad company to build its road on a street of the town, provides that the company shall be bound to pay all damages that may accrue to property owners on such street by reason of the construction of said railroad, an action will lie on the ordinance, against the company, in favor of any property owner whose property is injured by the construction of the road, either by depreciation in value or loss of business sustained during the building of the road and after its construction.

2. Same—*rights of parties measured by, in a suit on.* In an action against a railroad company upon an ordinance of a town permitting it to lay its track on a street of the town, and providing for the payment of damages by the company to property owners, the parties will be governed and their rights measured by the ordinance, without reference to the constitutional provision in regard to compensation for property taken or damaged for corporate purposes, or to the common law on the subject, as announced in *Moses* v. *P., Ft. W. and C. R. R. Co.* 21 Ill. 516, and *Murphy* v. *Chicago*, 29 Ill. 279.

3. Measure of damages—*to property by construction of a railroad.* In a suit under a town ordinance, providing for the payment of damages to property owners occasioned by constructing a railroad track, the difference in the value of the property caused by the construction of the road is the measure of damages, and this may be shown by a comparison of the sales of other property similarly situated before and after the construction of the road, or by the difference in its rental value, if held for the purpose of rent-

ing; but if not held for that purpose, then the difference in rental value would not be a criterion.

4. Evidence—*as to damage done to property by construction of a railroad.* In a suit against a railroad upon an ordinance whereby it is bound to pay all damages to property owners caused by the construction of its road, where there have been no sales of property of a character similar to that claimed to be injured, either before or after the construction of the road, from which the depreciation in value can be ascertained, it is proper to resort to evidence of the noise and jarring of the earth, and smoke and dust caused by passing trains, rendering the house, if a dwelling, uncomfortable, and injuring the furniture and walls of the house, as an aid to the jury in estimating the depreciation in value of the property.

5. Grants—*all grants by the public must be construed liberally in its favor.* The grant in a charter to a railroad company to run its road through a town can not, by any reasonable or fair intendment, operate as a grant of the use of the streets, or either of them, to the company.

Appeal from the Circuit Court of Fayette county; the Hon. H. M. Vandeveer, Judge, presiding.

Mr. R. W. Thompson, Mr. J. P. Van Dorston, and Mr. T. J. Golden, for the appellant.

Messrs. Moulton & Chaffee, for the appellee.

Mr. Justice Walker delivered the opinion of the Court:

This suit was brought under an ordinance adopted by the board of trustees of the town of Vandalia, authorizing appellant to locate and construct its road, on Main street, through the town. The ordinance was given in full in the case of *St. Louis, Vandalia and Terre Haute Railroad Co.* v. *Capps*, 67 Ill. 607. It contains, amongst others, this provision: "And, further, that the said railroad company are to be held bound to pay all damages that may accrue to the property owners on said Main street, by reason of the construction of said railroad."

In that case a construction was given to this provision of the ordinance. It was there held, that any person suffering damages by the construction of the road might recover for depreciation in the value of their adjacent property, the loss of business, and such like injury; that the language would not

be restricted to the injury inflicted whilst the road was being constructed, but would extend beyond, for loss of business afterwards.

In that case it was held, the action would lie on the ordinance; that the parties were competent to make it, and that it was of binding force. The actions in both cases being on the ordinance, they, of course, are governed by it, without reference to the provision of the constitution of 1870, requiring compensation to be made for property taken or damaged for corporate purposes, or by the common law, as announced in the cases of *Moses* v. *P., Ft. W. and C. R. R. Co.* 21 Ill. 516, and *Murphy* v. *Chicago*, 29 Ill. 279. Had appellant constructed its road without agreeing to pay damages to the property holders, then the question would have been presented whether the constitution had modified the rule announced in these cases, and, if so, to what extent; but that question is not before us for consideration. This action being based on the ordinance, it must be governed by it, and, hence, the numerous authorities to which appellant refers, have no application to its decision.

It will be seen, by a reference to it, that *Capps' case* has settled the legal questions presented by this record, with, perhaps, one or two exceptions.

It is insisted that the noise, the smoke, and the jarring of the earth by passing trains, are not elements to be considered in assessing damages. They all, no doubt, contribute largely to incommode the use of the building and render it less desirable for a residence, and, hence, must depreciate the value of the property. No one would pay as much for it with those positive inconveniences, as they would without them. With smoke and dust entering the house and settling on the furniture, tarnishing the walls and rendering the atmosphere unpleasant to breathe, no one would pay the same price as if free from these annoyances. So of the jarring sensation, especially when so severe as to breach the walls, and with noise rendering it exceedingly disagreeable to persons in ill health, and disturbing, if not preventing, sleep. Such evidence was, therefore,

proper, as one of the aids to the jury in estimating the damage sustained.

The loss or depreciation in the value of the property, produced by the construction of the road, is the true measure of damages, and that was the question before the jury for solution. What the property would sell for before and after the road was constructed, would be one of the modes of ascertaining the damages, if the price was shown to have been reduced by reason of the building of the road. But it would not be the only means of determining the question. So would its rental value be another, where the property was held for rent; but the latter mode would not be a proper criterion where it was not held for that purpose. If there was no other property of the same value or description in the place, which had been sold, then other modes would have to be resorted to than the proof of the sale of such property before and after the damage was done.

It might, in such case, be shown by witnesses who were acquainted with the value of other property in the same vicinity, of the same character, by comparison, although not similar in structure or in value. The law could never tolerate a rule that damages could not be assessed unless sales could be proved of property precisely similar, in all respects. To adopt such a rule would be to deprive a party of all right to recover in such a case, unless he could show a sale of precisely the same kind in all respects, both before and after the damage was done. It has never been intended to hold that such is the only mode of ascertaining the damage, but, simply, is one of the modes, and, perhaps, the most satisfactory, when evidence of that character is available.

In this case, as the evidence showed no other property had been sold, before or after the road was constructed, similar in cost, construction or situation, it was proper to resort to the character of evidence that was heard in this case, as affording the jury the best means of ascertaining the extent of loss actually sustained. It may be, that the anticipated construction of the road may have inflated prices of property, and that,

failing to realize the expected advantages it would confer, all property in the place may have receded, as the evidence tends to show it did. But we presume the jury made all proper allowances therefor, or the verdict would have been much larger. The testimony shows the reduction in the value of the property was probably much greater than the amount of the verdict.

It is urged, that the fee to the streets was in the town, and that, it being a municipal corporation and under the control of the legislative power of the State, the General Assembly had power to grant the streets to the use of railway companies, for the construction and operation of their roads, and that the General Assembly, in passing the charter of this company, granted them the use of this street by authorizing them to pass through the town.

By no reasonable or fair intendment can it be held that the grant of authority to run their road through the town, operated as a grant of the use of the streets, or either of them, to the company for the purpose. There is no language from which a grant can be inferred. If such had been the intention, it would, undoubtedly, have been manifested by the use of language usually employed to express such an intention. The language of this charter was, no doubt, intended to be understood in its usual and popular sense. We should do violence to this language if we should hold that it created such a grant. The rule that all grants made by the public must be construed liberally in their favor, would preclude the construction contended for, even if it were doubtful whether the grant contended for was intended. But, as before stated, we perceive no such intention, or even a doubt whether it was so designed.

After a careful examination of the entire evidence in the case, we are satisfied that it sustains the verdict, and that there was no error in the instructions as they were given to the jury.

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

Judgment affirmed.

Mr. Justice Scholfield took no part in the decision of this case.

MARENNUS SYMONDS *et al.*

v.

WILLIAM LAPPIN.

1. HOMESTEAD — *claim must be clearly shown.* In order to avail of the benefit of the Homestead law, it is incumbent on a defendant, in a suit to foreclose a mortgage, to allege, in his answer, such facts as certainly bring him within the protection of the law.

2. SAME—*right must exist when the mortgage is given.* Unless the right of homestead exists at the time a mortgage is given by the claimant, there is no necessity for its relinquishment, and an answer to a bill to foreclose a mortgage, which states that the land is occupied by the defendant as a homestead, and that he did not, by the mortgage, relinquish such homestead, but which does not state that the land was occupied as a homestead at the time of executing the mortgage, does not bring the question of the defendant's homestead right before the court.

APPEAL from the Circuit Court of Clay county; the Hon. JAMES C. ALLEN, Judge, presiding.

Messrs. CHESLEY & HAGLE, for the appellants.

Mr. B. B. SMITH, and Mr. GERSHORN A. HOFF, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellants bring this record here, and ask a reversal of the decree, upon the ground that the court erred in decreeing the foreclosure of a mortgage on property wherein they had a right of homestead, which they had not relinquished pursuant to the requirements of the statute in that regard.

Unless the right of homestead existed when the mortgage was executed, there was, obviously, no necessity for its relinquishment; and it does not follow, either as a logical or legal conclusion, that because the property was occupied by appellants as a homestead, when they answered appellee's bill to foreclose, it must have been so occupied when the mortgage was executed. To avail of the benefits of the Homestead law,

it was incumbent on them to allege, in their answer, such facts as certainly brought them within the protection of the law. We can not indulge in presumptions, not necessarily arising from the facts alleged, to aid them in this regard.

In the only answer filed, which was by the appellant Marennus, he admits the execution of the mortgage to secure the indebtedness charged in the bill, but alleges as follows: "That the said real estate, in said bill described, is the homestead upon which defendant and his family reside; that in and by said mortgage, defendant does not waive his right under the homestead laws, and that said mortgage debt is not for purchase money of said real estate." And this is all. When it became the homestead does not appear, and there is nothing but this answer in the record that relates to the question. The question of the homestead right of appellants, therefore, was not properly before the court, and we perceive no cause to disturb the decree, and it will be affirmed.

Decree affirmed.

WILLIAM R. ASHFORD

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

APPEAL—*from judgment of county court, for taxes.* An appeal from the judgment of the county court for delinquent taxes, lies either to the circuit or the Supreme Court, as the appellant may elect.

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

Messrs. WARREN & POGUE, for the appellant.

Messrs. HAMILTON, HODGES & BURR, for the appellee.

Per CURIAM: On the 24th day of May, 1875, an appeal was taken from the county court, on a judgment rendered for

certain delinquent taxes, to the circuit court of the county, which was by the last named court, at a term subsequently held, dismissed for want of jurisdiction.

The question is, whether §§ 192 and 193 of the chapter of the R. L. 1874, entitled "Revenue," (p. 890,) are repealed by §§ 122 and 123 of the chapter of the R. L. 1874, entitled "County Courts" (p. 344); or, may appeals be prosecuted either to the circuit or the Supreme Court, in the cases therein provided, as the appellant may elect?

The question is not an open one.

In *Fowler* v. *Pirkins*, 77 Ill. 271, it was held there was no necessary repugnancy between these sections, and that they might all consist together; and, therefore, that an appeal would properly lie from the judgment of the county court for delinquent taxes, either to the circuit or the Supreme Court.

The judgment of the circuit court dismissing the appeal must, therefore, be reversed, and the cause remanded.

Judgment reversed.

HUGH R. MORTON, Admr.

v.

MATTHEW RAINEY.

1. PARENT AND CHILD—*parent not bound to pay for service of child remaining at home, without express contract.* Where a child remains with its parent after majority, and in the same apparent situation as when a minor, in the absence of a contract, no recovery can be had for services rendered

2. CONTRACT—*when implied, to pay for services of child remaining with family after majority.* But where a minor of eleven years of age is taken into the family of his uncle, and remains there until he is of age, receiving his board, clothing and medical attendance from the uncle, and after he becomes of age, continues to reside with his uncle, but furnishes his own clothes and pays his own medical bills, these facts are sufficient to establish an implied contract on the part of the uncle to pay him what his services are reasonably worth.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. B. B. SMITH, for the appellant.

Mr. M. SHÆFFER, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a claim presented by Matthew Rainey against the estate of William Rainey, deceased, to recover for services rendered the deceased in his lifetime. The county court allowed appellee $350. An appeal was taken to the circuit court, where another trial was had, resulting in a judgment in favor of appellee, for $240.

The appellant, the administrator of the estate, brings the record here by appeal, and insists that the judgment was not justified by the evidence.

It appears, from the evidence contained in the record, that appellee, at the age of eleven years, was taken by the deceased, who was his uncle, into his family, and there remained, no contract having been made, until he was of age. During this time appellee labored for the deceased, and received his board, clothing and medical attendance.

After appellee became of age, he remained with the deceased for about five years; during this time, however, he furnished his own clothing, hired his washing and paid his own physician's bills. During about three months in each year he farmed some ten or twelve acres of the deceased's farm, on shares, and the rest of the time he was mainly occupied working on the farm for the deceased.

Two witnesses introduced by appellee testify that, for the nine months in each year, appellee's labor was worth from $9 to $10 dollars per month, and a third witness says it was worth from $5 to $6 per month, and the evidence of appellant tends to show the labor was worth less.

We are, however, satisfied, from all the evidence, that the amount allowed by the court was not larger than the evidence would justify.

It is, however, urged by appellant that, as no contract was proven, and as appellee remained with the deceased in the same apparent relation after he was of age as he did when a minor, the presumption arises that the parties did not contemplate the payment of wages for the services rendered.

Where a child remains with a parent after majority and in the same apparent situation as when a minor, in the absence of a contract, no recovery can be had for services rendered. *Miller* v. *Miller*, 16 Ill. 296.

But in this case the deceased was not the parent of appellee, and the rule that would ordinarily govern in a case of that kind, does not control the facts of this case.

But, conceding that the deceased occupied the relation of a parent to appellee during his minority, yet the proof clearly shows that, after appellee was of age, the relation that existed between the two previous to that time no longer existed.

While appellee, during minority, was provided by the deceased with clothing, medical attendance and all the necessaries furnished by a parent to a child, after his majority he provided his own clothing, paid for his washing, and in fact received nothing from the deceased except his board. Under such circumstances, the presumption that appellee was working as he did when a minor, is removed, and the facts are sufficient to establish an implied contract on the part of the deceased to pay appellee what his services were reasonably worth.

In our opinion, the evidence is sufficient to justify the judgment, and it will therefore be affirmed.

Judgment affirmed.

THOMAS W. WILLIAMS *et al.*

v.

BAYARD CHALFANT.

1. PRACTICE—*judgment erroneous as to all defendants if a part are not served.* It is error to render judgment against all the defendants, where it appears that no service has been had upon one; and if judgment is so rendered, it will be reversed as to all, as well those served as the one not served.

2. SERVICE—*by special deputy.* A return on a summons with the sheriff's name and the name of a special deputy signed to it, if sworn to by the special deputy, is sufficient.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. B. B. SMITH, for the plaintiff in error.

Messrs. RASER & GOODNOW, for the defendant in error.

Per CURIAM: This was a suit in assumpsit, brought against five defendants. The court below found that service of process had been had on all the defendants, and rendered judgment against them all. This was error, as the return of the summons shows that one of the defendants, James W. Robb, was not served with process; and the judgment, being an entirety, must be reversed as to all the defendants. *Rider et al.* v. *Alleyne*, 2 Scam. 474; *Brockman et al.* v. *McDonald*, 16 Ill. 112.

As to another of the defendants, Tucker, the sheriff, by indorsement in writing upon the summons, appointed John W. Wilson his special deputy to serve the same on Tucker. The deputy signed the return of his service on Tucker in this form:

"H. R. HALL, *Sheriff*,
JOHN WILSON, *Deputy*."

It is objected that this was not sufficient evidence of service by the sheriff. The return is accompanied with a certificate of a notary public that it was subscribed and sworn to before

him by Wilson, special deputy sheriff. This makes the return to be in conformity with the provision of the statute, in the case of a special deputy sheriff thus appointed to serve a particular summons. R. S. 1874, p. 990; *The Council of Village of Glencoe* v. *Owen*, 78 Ill. 382.

For error in rendering judgment against one of the plaintiffs in error who had not been served with process, the judgment is reversed and the cause remanded.

Judgment reversed.

LOUIS KAHN *et al.*

v.

EMMA B. WOOD

1. MARRIED WOMEN—*burden of proof in suit in reference to separate property.* In a suit by a married woman against a creditor of her husband, for seizing her separate property under a writ of attachment against her husband, the burden is on her to make satisfactory proof that the property seized was her separate property, owned by her under the conditions required by the law relating to the separate property of married women, to protect it from seizure and sale for the payment of her husband's debts.

2. Evidence that a married woman received property from her father at the time of her marriage, or that it was bought with money received from her father's estate, without proof as to when she so received it, is not sufficient to entitle her to recover in a suit against a creditor of her husband for seizing such property for the debt of her husband.

3. SAME—*money paid to husband by her consent becomes his.* Where the money to which a married woman is entitled from her father's estate is, by her consent, paid to her husband, and he has full control of it with her consent, and does what he pleases with it, the money becomes his.

APPEAL from the Circuit Court of White county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Mr. JAMES MCCARTNEY, and Messrs. JOHNSON & GRAHAM, for the appellants.

Messrs. CREBS & CONGER, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Certain personal property, claimed by appellee as her sole and separate property, having been seized and sold by virtue of a writ of attachment issued by a justice of the peace in a proceeding wherein appellants were plaintiffs and appellee's husband, Marcus B. Wood, was defendant, the present suit was brought to recover for the injuries she thus sustained.

The jury returned a verdict in favor of appellee for $198.40, whereupon she remitted $27 of the amount, and the court gave judgment for the balance, $171.40.

The burden was upon appellee to make satisfactory proof that the property, the seizing and selling of which is the subject of the suit, was her separate property, owned by her under the conditions required by the law relating to the separate property of married women, to protect it from seizure and sale for the payment of her husband's debts.

Appellee testified, in her direct examination, that the goods belonged to her individually; that part of them were given to her by her father on her marriage, and that the balance of them were bought with money received from her father's estate, but she does not state when she was married or when she received the money from her father's estate. We can not take judicial cognizance that she was married or received this money since the passage of the law, in 1861, vesting such property in married women, and if it was before that time, the property belonged to her husband, upon his reducing it to his possession.

But, again, in her cross-examination, she says: "When I received my money from my father's estate, it was, by my consent, paid to my husband. He had full control of the same, with my consent, and did what he pleased with it." If this be true, the money became his, for there is no pretense of an agency in this.

But, still again, she says: "My husband made some money of his own during the time, and may have purchased some of the articles with it." How many, and of what value, the ar-

ticles were, so purchased, we are not informed. For such articles she is clearly not entitled to recover, and yet, who can say they have not swelled the amount of this verdict?

For the insufficiency in the evidence in the respect pointed out, the judgment must be reversed and the cause remanded.

Judgment reversed.

LIZZIE E. LADEW

v.

WILLIAM L. PAINE *et al*

MARRIED WOMEN—*execution of mortgage.* Although a woman may be induced, by such undue influence on the part of her husband as amounts to coercion, to execute and acknowledge a mortgage upon her separate property, yet, if the mortgagee is in no way a party to the wrong done to her by her husband, and she, in the presence of the mortgagee and the officer taking her acknowledgment, professes to execute the mortgage of her own free will, and thereby induces the mortgagee to give up other adequate security, she can not afterwards be allowed to insist that the mortgage was executed by her against her will, and thus defeat its enforcement.

WRIT OF ERROR to the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This was a bill in chancery, brought by Lizzie E. Ladew, the wife of A. P. Ladew, seeking to set aside a mortgage given by her and her husband upon the St. Nicholas Hotel, in Bloomington, to Wm. L. Paine, to secure the payment of $518.55 and interest, mentioned in a promissory note dated October 3, 1870, and payable May 1, 1871. The property mentioned in the mortgage was the separate estate of the wife. The debt for which the note was given was the debt of George H. Ladew, the son of A. P. Ladew, and had been secured to Paine, the creditor, by a chattel mortgage upon the furniture of the hotel. This furniture, at the time of giving the chattel mortgage, was the property of George H. Ladew, and, at the time of the mortgage upon the hotel, the furniture was in the pos-

session of A. P. Ladew, who was then living in the hotel and keeping the same for the entertainment of travelers and lodgers.

The ground upon which the relief was sought was, the alleged undue influence of the husband of complainant, exercised upon his wife, with the knowledge and connivance of the defendant, Paine, by which it was claimed that complainant was compelled, against her own will, to execute the mortgage.

The mortgage was duly signed and sealed by complainant and her husband, and, by the certificate of a notary public, appeared to have been properly acknowledged by each of them. Answers and replications were filed and proofs taken. Upon final hearing upon the merits, the bill was dismissed by the circuit court, and the complainant brings the case here for review, and asks that the decree be reversed.

Messrs. HUGHES & MCCART, for the plaintiff in error.

Messrs. WELDON & BENJAMIN, for the defendants in error.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

A majority of the court are of opinion that the decree should be affirmed.

There can be but little doubt that the complainant was, in fact, induced to execute and acknowledge this mortgage against her own will, by undue influence exerted by her husband, amounting, in substance, to coercion. A majority of the court, however, after a very careful consideration of the proofs, are of the opinion that the evidence does not show that Paine, the grantee, was in any way a party to the wrong done to Mrs. Ladew, by the conduct of her husband. The certificate of the officer taking the acknowledgment, shows that she professed to execute the mortgage of her own free will. The testimony of Paine and of Mr. Thorn (the notary public) is, that she signed and acknowledged the mortgage in the presence of Paine and the officer, and that she professed to act freely and without

restraint, and did not, at that time, in any manner, indicate that she had objections of any kind to the giving of the mortgage. She knew that Paine, in accepting this mortgage upon the hotel, was surrendering a valid chattel mortgage, which was a good and adequate security. It was her duty, then, to have notified Paine, in some way, of her unwillingness to execute the mortgage in question. Having failed to do so, and having permitted (as a majority of the court think, from the evidence,) Paine to act upon the faith that she did execute the mortgage of her own free will, she can not now be allowed to insist upon this defense as against him.

The decree of the circuit court is, therefore, affirmed.

Decree affirmed.

The writer of this opinion can not concur with his brethren as to one very material fact in the case. He thinks the proofs show, satisfactorily, that Paine had full notice of the improper and undue control of the husband of the complainant over her in this matter, and that he had good reason to believe, and did believe, at the time when the mortgage was signed and acknowledged by the complainant, that it was not the act of her own free will.

He also thinks that the proof shows that the act of Mrs. Ladew, in acknowledging the mortgage, was induced by the then present fear of her husband's displeasure, and that to such a degree, that it was not of her own will, and should not be regarded as her act at all, and, hence, that she ought not to be estopped thereby. As this difference of opinion relates merely to questions of fact, confined, in their influence, to this case alone, it is not perceived that any good can be accomplished by a discussion of the evidence in detail.

WILLIAM A. HENSON

v.

JOHN W. WESTCOTT *et al.*

1. FRAUD—*as affecting subsequent purchaser from fraudulent vendee.* Where the owner of a farm in this State, upon the representation of a stranger that he owned a large tract of land and herd of cattle in Texas, executed to him a deed for his farm, in consideration of 160 acres of the Texas land and 200 head of cattle, to be conveyed and delivered on the arrival of the parties in Texas, and the parties started to Texas in company, and on the way, the stranger, in the presence and with the knowledge of his grantor, and without an objection on his part, sold and conveyed the Illinois farm to a third party, who paid for the same, it was *held*, that, although the representations as to the ownership of land and cattle in Texas by the stranger proved to be false and fraudulent, and of such a character as would entitle the original owner of the Illinois land to have the deed set aside, if the title still vested in such stranger, yet, as against the grantees who purchased from him with the knowledge and consent of the original owner, he was entitled to no relief.

2. VENDOR'S LIEN—*waived by encouraging purchase from his vendee.* If the vendor of land stands by and encourages and advises another to purchase the land from his vendee, without intimating that he has a vendor's lien, he will be deemed to have waived his lien as against such purchaser.

WRIT OF ERROR to the Circuit Court of Jefferson county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Mr. THOMAS S. CASEY, and Mr. W. J. KERR, for the plaintiff in error.

Mr. C. H. PATTON, for the defendants in error.

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

The bill in chancery in this case, filed by William A. Henson, sets out that complainant, in 1872, was the owner of and residing upon 240 acres of land in Jefferson county, in this State; that in September of that year, Asa W. Chambers came to the house of complainant; represented that he lived in Brazos county, Texas; that he owned several thousand head

of cattle and 1400 acres of land in that county, and claimed to be a relative of complainant's wife.

After tarrying with complainant for some time, Chambers made an overture to him for the purchase of complainant's farm, and proposed to complainant to give him 200 head of cattle and 160 acres of land in Brazos county, Texas, for his said land in Jefferson county; that complainant accepted the proposition, and, in October, 1872, made to Chambers a deed of complainant's land in Jefferson county, for the consideration expressed in the deed, of $1500, and Chambers gave to complainant an obligation to pay him 200 head of stock cattle on or before the first day of May following, and a bond for a deed of the 160 acres of land in Brazos county, Texas, to be selected by complainant anywhere in the 1400-acre tract; that Chambers was to go with complainant to Texas; that soon after, complainant, his wife and Chambers started for Brazos county, Texas, by way of St. Louis; that they stopped in St. Louis, and while there, Chambers sold the land in question to the defendants, John W. and William B. Westcott, for $900 in goods; that when complainant got ready to start from St. Louis, Chambers represented that it would be better for him to go with the goods, and so complainant went on his way alone, to Brazos county, Texas. When he arrived there, he found that Chambers had no cattle or land there, and that no such man was ever known to have been in the county, and that every representation made by Chambers was false and fraudulent.

The bill charges that the Westcotts had notice of the circumstances of the fraud practiced by Chambers, and that they were participants therein. The prayer of the bill was, that the respective deeds from complainant to Chambers, and from the latter to the Westcotts, might be declared fraudulent and null, and be canceled, and for general relief.

The Westcotts answered, that they were merchants in St. Louis; that they knew nothing of the fraudulent conduct of Chambers; that they were before wholly unacquainted with him; that complainant recommended the trade with him; that

they bought the land in good faith, and deny all participation in any fraud.

Upon final hearing, the court below dismissed the bill, and the complainant appealed.

The proof shows plainly enough the perpetration of a base fraud by Chambers upon the complainant, and were the land yet in the hands of Chambers, the title to relief as against him would be clear. But the Westcotts are the holders of the land as purchasers from Chambers for a valuable consideration paid, and to entitle to relief as against them, they must be connected with the fraud of Chambers, or be affected with notice of the equity of complainant. The evidence entirely fails to involve the Westcotts in any complicity with the fraud of Chambers, and no more can be pretended as against them than that there were circumstances of suspicion which were sufficient to put them on inquiry. The evidence in this direction was not of a strong character, and it was fully overcome by complainant's own conduct in encouragement of the trade made by the Westcotts for the land.

The evidence shows that complainant and Chambers were in St. Louis some four days, from Saturday to Tuesday. During this time, the trade was made between Chambers and the Westcotts of the land for $1000 in goods, and the goods actually delivered to Chambers. Chambers and complainant both went to the store of the Westcotts, and the trade was there negotiated and consummated in the presence of complainant, an abstract of the title being exhibited as showing a good title to the land in Chambers, and complainant actually received himself some $40 or $50 of the goods by order of Chambers. Under such circumstances, complainant being present, and himself witnessing the purchase being made by the Westcotts of the land, they, the Westcotts, were not put upon inquiry, but the complainant was put upon disclosure; it was for him to have made known any claim of interest he had in the land, and not have allowed innocent purchasers to part with their property for it, without declaring his objection, if any he had.

Waiving the consideration of complainant's words of actual

encouragement of the purchase of the land for the goods, as testified to by the defendants, complainant himself testifies: "I made no objection to the trade. I still hoped Chambers would comply with his contract." This conduct of acquiescence in the purchase made by the Westcotts must effectually estop complainant from all claim of equitable relief against them. 1 Story Eq. Jur. § 385.

It is insisted that there was here a vendor's lien for the unpaid purchase money, which complainant was entitled to have enforced, it appearing the Westcotts had notice the purchase money was not paid.

It was said by this court, in *Cowl et al.* v. *Varnum*, 37 Ill. 185, that this lien arises from principles of equity, independent of any express contract, upon the mere supposition of the intention of the parties, and whenever, from any circumstance, the court can infer that the vendor did not rely upon the lien for his security, the courts have treated it as waived.

From what has already been said, it must be manifest that, under the circumstances of this case, there are no principles of equity which would favor the assertion of this vendor's lien against the Westcotts. Complainant did not intimate to them that he had a vendor's lien upon the land. Had he done so, we can not suppose they would have parted with property for the land, of its full value, as they testify, and so the complainant must have known. We must regard that the complainant, by his conduct, waived his vendor's lien, or else consider him as liable to the imputation of a fraud upon the Westcotts in allowing them to part with their goods for the land upon the supposition that they were getting a good title thereto, without disclosure to them of his vendor's lien. In his own language, he made no objection to the trade; he still hoped Chambers would comply with his contract.

We think, from the circumstances, it may be inferred that, as against the Westcotts, the complainant did not rely upon the vendor's lien for his security, and that it is to be treated as waived.

The decree must be affirmed.

Decree affirmed.

GEORGE W. HALL *et al.*

v.

CATHARINE BARNES.

1. CHANGE OF VENUE—*discretionary with the court where counter petition is filed.* Granting or refusing a petition for a change of venue where there is a counter petition, is discretionary with the court, and unless the court abuses the discretion, its action is not the subject of review in the Supreme Court.

2. EVIDENCE—*order in which it may be introduced.* It is competent for the plaintiff, in an action for causing the intoxication of her husband, to testify to the fact of intoxication and damage sustained by reason thereof, before proving that the defendant caused the intoxication in whole or in part, although, in order to a recovery, she must prove the latter fact in some way, either by her own or other testimony.

3. DEGREE OF EVIDENCE—*in suit for selling to husband of plaintiff, preponderance of evidence is sufficient.* Whilst an action by a wife for causing the intoxication of her husband is a penal one, and the material allegations in the declaration must be fully proved, yet it is not necessary the evidence should exclude all reasonable doubt. It is sufficient if there is a preponderance of evidence, and this may result from circumstantial as well as from direct evidence.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. T. E. MERRITT, and Mr. W. WILLARD, for the appellants.

Mr. B. B. SMITH, and Mr. M. SCHÆFFER, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellee brought this action against appellants, under the 5th section of the "Act to provide against the evils resulting from the sale of intoxicating liquors in the State of Illinois," in force July 1, 1872. Judgment was given on the verdict of the jury for appellee, for $300, to reverse which this appeal is prosecuted.

The first point argued by appellants is, the court erred in overruling their petition for a change of venue. Appellee

presented a counter petition, supported by affidavits, and it was then discretionary with the court to grant or deny the petition for the change, as to it should appear to be according to the right of the case. (R. L. 1874, p. 1094, § 4.) It does not appear the court abused this discretion, and it is, therefore, not the subject of review.

It is next insisted, the court should have excluded the entire testimony of appellee, because it is irrelevant. We do not think so. She testified to the repeated intoxication of her husband, and to the consequences resulting to her and her family therefrom, and it was competent as a basis for other evidence showing that such intoxication was caused in whole or in part by appellants. It is never required that the evidence of each witness shall go to every material point in the case. Evidence is competent which tends to prove any material point in issue, and the court may, in its discretion, permit evidence of the fact of intoxication, and its effect upon the plaintiff, by one witness, before the defendant's connection therewith is proved, and afterwards allow other evidence to be given, tending to show that the defendant caused such intoxication in whole or in part, by other witnesses. It is, undoubtedly, necessary there should be evidence connecting the defendant with the intoxication first given in evidence; but this may be given after as well as before the introduction of such evidence of intoxication, and either by the same witness or by other witnesses.

Upon the remaining point, we regard the evidence sufficient as to the loss of means of support in consequence of drunkenness, caused by appellants.

While it is true the action is penal, and the material allegations in the declaration must be fully proved, yet it is not necessary the evidence should exclude all reasonable doubt. It is sufficient if there is a preponderance of evidence, and this may result from circumstantial as well as direct evidence.

We are unable to say the finding of the jury is clearly and palpably against the weight of the evidence, and, believing there is no error in the record, the judgment must be affirmed.

Judgment affirmed.

The Cairo and St. Louis Railroad Company

v.

The Wiggins Ferry Company.

1. Forcible detainer—*complaint need not show that plaintiff was ever in possession.* Whilst, in an action of forcible entry and detainer, it is necessary for the plaintiff to aver and prove he was in possession of the premises, and his possession was invaded by the defendant, it is sufficient, in an action of forcible detainer, if the complaint shows the relation of landlord and tenant to have existed, that the time for which the premises were let has expired, and that the tenant persists in holding the premises after demand made, in writing, for the possession thereof.

2. Same—*description of premises.* Any description by which the premises can be readily identified and located, is all that is required in a complaint in an action of forcible detainer.

3. Landlord and tenant—*effect of holding over by tenant, after termination of lease.* A tenancy from year to year can not be inferred from the mere fact of holding over by the tenant; the landlord must, in some manner, recognize the tenancy, and the mere fact that he takes no steps, after a lease expires by its own terms, to regain the possession, can not be regarded as an act from which an inference of a new tenancy can be drawn.

Appeal from the City Court of East St. Louis.

Messrs. Searls & Millard, for the appellant.

Mr. H. P. Buxton, and Mr. William C. Ellison, for the appellee.

Mr. Justice Craig delivered the opinion of the Court:

This was an action of forcible detainer, brought by the Wiggins Ferry Company, against the Cairo and St. Louis Railroad Company, to recover possession of certain premises, claimed to have been let on the 10th day of May, 1873, for the term of eight months. To the complaint, the defendant filed a general demurrer, which the court overruled. The defendant abided by the demurrer, and the court rendered judgment in favor of the plaintiff, for possession of the premises described in the complaint.

Opinion of the Court.

It is alleged, in the complaint, that on or about the 10th day of May, 1873, the following described premises, in the city of East St. Louis, to-wit: So much of a certain right of way and railroad embankment, used by the Cairo and St. Louis Railroad Company for railroad purposes, as lies upon lots 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, of block 8, of the Ferry Division of East St. Louis, of said county and State, and also so much of said right of way and railroad embankment, used by said railroad company as aforesaid, as lies upon lots 13 and 14, and the south one-third of lot 12 of block 12 of the said Ferry Division, and also so much of the said right of way and railroad embankment, used by said railroad company as aforesaid, as is located between the southern boundary line of said block 12 and the western bank of Cahokia creek, running in a curve from said line of said block, in a southerly and southeasterly direction, to the bank of said creek, now let by the said Wiggins Ferry Company to the said Cairo and St. Louis Railroad Company, for the term of eight months, and no longer, without any reservation of rent of the said premises; that the said time has expired, and the lease terminated by its own limitations on the 10th day of January, A. D. 1874, pursuant to the terms of the agreement under which said premises were held as aforesaid, and that since said termination as aforesaid, the said Cairo and St. Louis Railroad has been in possession of said premises, without the consent and against the will of the said Wiggins Ferry Company; that on the 4th day of October, A. D. 1875, and after the determination of said lease, the said Wiggins Ferry Company demanded of the said Cairo and St. Louis Railroad Company possession of the said premises, and served a notice of such demand, in writing, on the said Cairo and St. Louis Railroad Company, by delivering a copy thereof to and leaving the same with F. A. Hued, agent of said Cairo and St. Louis Railroad Company, the president thereof not being found in this county, which said demand was served by John DeHaan, properly authorized by said Wiggins Ferry Company to serve the same, and with the return thereon is hereto attached and made a part of this

complaint. Said tenancy has terminated by limitation as aforesaid, and said Wiggins Ferry Company is now entitled to the possession of said premises, and said Cairo and St. Louis Railroad Company wilfully, and without force, holds over such possession after the determination of the term for which said premises were let as aforesaid, and after said demand in writing; wherefore said Wiggins Ferry Company prays a summons in pursuance of the statute.

It is first urged, by the defendant, that the complaint is defective in this, that it does not state or show that the plaintiff was ever in the possession of the premises, or that the defendant received the possession from the plaintiff.

In an action of forcible entry and detainer, as has been held in *Thompson* v. *Sornberger*, 59 Ill. 326, and other cases in this court, it is necessary to aver and prove that the plaintiff was in possession of the premises, and that the possession was invaded by the defendant; but in an action of forcible detainer, it is sufficient if the complaint shows the relation of landlord and tenant to have existed; that the time for which the premises were let has expired, and that the tenant persists in holding the premises after demand made in writing for the possession thereof. *Smith* v. *Killeck*, 5 Gilm. 293; *Dunne* v. *Trustees of Schools*, 39 Ill. 578.

From the complaint in this case, it appears that the premises were let by the plaintiff to the defendant, on the 10th day of May, 1873, for the term of eight months; that the term expired and the lease terminated on the 10th day of January, 1874; that since that time the defendant has held the possession, without the consent and against the will of the plaintiff; that after the lease expired, demand in writing was made for possession.

The statute prescribes no particular form for a complaint, but the substance of all that is required by the statute and the decisions *supra*, where the essential elements of a good complaint were considered, seems to have been incorporated in the complaint, and we must hold it sufficient.

It is also urged by the defendant, that the holding over after the expiration of the lease, created a tenancy from year to year or month to month, and a notice of sixty or thirty days was necessary to terminate the tenancy. The tenancy set out in the complaint contains none of the elements of a tenancy from year to year. The leasing was for a definite term, and, after it expired, the defendant held over, without, however, the consent of the plaintiff. A tenancy from year to year can not be inferred from the mere fact of holding over; the landlord must, in some manner, recognize the tenancy. If, after the lease expired, the landlord should agree upon a term, or receive rents, or recognize the party holding over as his tenant, these and kindred facts might be regarded as facts from which a tenancy might be created. But the mere fact that the landlord takes no steps, after the lease expires by its own terms, to regain the possession, can not be regarded as an act from which an inference of a new tenancy could be drawn.

The tenancy set out in the complaint seems to fall clearly within the provision of section 12, chap. 80, Revised Laws of 1874, p. 659, which declares that, when the tenancy is for a certain period, and the term expires by the terms of the lease, the tenant is then bound to surrender the possession, and no notice to quit or demand of possession is necessary.

It is next claimed by the defendant, that the premises are not described with reasonable certainty. The description, by the numbers of the lots, location and the manner in which they are used, would seem to be as definite and certain as if the premises had been described by metes and bounds. Any description by which the premises could readily be identified and located, is all that could be required. That has been given, and we consider it sufficient.

It is said, the court erred in rendering judgment without hearing evidence to support the averments in the petition. The demurrer interposed by the defendant admitted the truth of all the material averments in the complaint, and evidence to sustain them was not required.

If, upon overruling the demurrer, the defendant had interposed a plea of the general issue, then the plaintiff would have been compelled to have introduced evidence to sustain the complaint; but the defendant saw proper to abide by its demurrer, and it is now too late to complain that facts were not proven which were admitted in the record.

As we perceive no substantial error in the record, the judgment will be affirmed.

Judgment affirmed.

FRANCIS M. ALLHANDS

v.

THE PEOPLE *ex rel.* Charles A. Lukens.

TAXATION—*must be equal, and not imposed upon a part for the benefit of the whole.* A county treasurer, in answer to an application for a *mandamus* to compel him to pay over to the treasurer of a school district in his county certain taxes levied by the school directors on the property of a railroad company, which he had collected, set up that the township in which the school district was situated subscribed a certain sum to aid in the construction of the said railroad, and that, by the provision of the act of the General Assembly of April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," he was required to pay into the State treasury all the taxes collected by him in the town in which the school district was situated, for any purpose whatever, on the assessments of railroads, etc., and that said town had issued bonds to the railroad company for the amount of its subscription, and that the same, with a considerable amount of accruing interest, remained unpaid: *Held*, that, as it did not appear that the town and school district were territorially the same, the answer was insufficient; that to allow such defense would be, in effect, to tax a part for the benefit of the whole, which is not admissible under the present constitution.

APPEAL from the Circuit Court of Vermilion county; the Hon. OLIVER L. DAVIS, Judge, presiding.

Mr. E. S. TERRY, for the appellant.

Mr. D. D. EVANS, and Mr. C. M. SWALLOW, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This is an appeal from an order of the court below, awarding a peremptory *mandamus* against the appellant, as county collector of Vermilion county, commanding him to pay to the relator, as township treasurer of township 23 north, range 12 west, certain taxes levied by school district No. 9, in that township, on the property of the Lafayette, Bloomington and Mississippi Railroad Company, which he has collected and has in his hands.

The defense interposed by the appellant is, that the town of Grant, in Vermilion county, in which said school district No. 9 is situated, subscribed $100,000 to aid in the location and construction of the Lafayette, Bloomington and Mississippi railroad, and that, by the provisions of the act of the General Assembly approved April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," he is required to pay into the State treasury all the taxes collected by him in the town of Grant, for any purpose whatsoever, on the assessments of railroads in the town, for whose use the debt was incurred, including all property of the railroad whatsoever, etc.; and there is also the further allegation that the town issued bonds to the railroad company for the amount of the subscription, and that the same, with accruing interest to a considerable amount, remain unpaid.

We are unable to perceive that there is any difference in principle between the question thus presented and that decided in *Sleight et al.* v. *The People*, 74 Ill. 47, since it is not alleged that district No. 9 and the town of Grant are, territorially, the same.

If the defense should be allowed, the individual taxpayer in district No. 9 would have to pay as much more, *pro rata*, to raise the same amount of revenue for school purposes, as would thus be withdrawn from that fund. The effect is, practically, to impose on the school district the payment of so much of the debt of the town—in other words, to tax a part for the

benefit of the whole, which, on the principle announced in *Sleight et al.* v. *The People*, *supra*, is not admissible under the present constitution.

The judgment is affirmed.

Judgment affirmed.

Illinois Mutual Fire Insurance Company

v.

William Archdeacon *et al.*

1. Insurance—*effect of adjustment of loss.* An adjustment of a loss made and entered in writing on a policy of insurance by the insurance company, with a full knowledge of all the circumstances, like other cases of admissions, has the effect to relieve the assured from proving his loss in detail, and to enable him to recover the adjusted amount without further proof.

2. Same—*amount of adjustment can be recovered under common counts.* Where a loss has been adjusted between an insurance company and a policy-holder, and the amount found due the assured on account of his loss indorsed on the policy, the law implies a promise on the part of the company to pay the amount of the adjustment, and it can be recovered under the common count upon an account stated.

3. Same—*recovery on adjustment not affected by limitation in the policy.* In such a case, the suit is upon the new promise, and not upon the policy, and is not affected by any clause in the policy limiting the time within which a suit thereon may be brought.

Writ of Error to the Alton City Court; the Hon. Henry S. Baker, Judge, presiding.

Mr. Levi Davis, for the plaintiff in error.

Mr. Charles Wise, for the defendants in error.

Mr. Justice Craig delivered the opinion of the Court:

This was an action brought to recover the amount of loss which had been adjusted between the insured and the Illinois Mutual Fire Insurance Company, and indorsed upon the back of a policy of insurance held by appellees.

The declaration contained only the common counts, including one upon an account stated.

The policy under which the loss occurred contained the following clause: "It is expressly covenanted by the parties hereto, and one of the conditions hereof, that no suit or action against this company for the recovery of any claim under and by virtue of this policy shall be sustained in any court of law or chancery, unless commenced within the term of one year next after any claim shall occur; and if such suit or action shall be commenced against this company after the end of one year next after such loss or damage shall have occurred, the lapse of time shall be taken and admitted as conclusive evidence against the validity of the claim thereby attempted to be enforced, any statute of limitations to the contrary notwithstanding."

The policy also provided, that all lawful claims shall be due and payable 60 days after the adjustment of the loss.

The property insured was destroyed by fire in the month of October, 1871.

On the 6th day of December of the same year, the loss was adjusted by an agent duly authorized by the company for that purpose, and the following indorsement was written upon the back of the policy:

"Chicago, *December* 6, 1871.

Claim allowed under the within policy, for three thousand dollars, being total loss on proofs submitted.

A. S. Barry,

Adjuster Illinois Mutual Fire Ins. Co."

It is not claimed, on behalf of the insurance company, that the adjustment of the loss was made under or through any misapprehension of the facts, or that fraud or mistake occurred, but it is conceded that the adjustment was in all respects fair, and that the amount of loss, as agreed upon between the adjuster and the insured, was honestly due under the provisions of the policy.

But it is claimed the action should have been brought upon the policy, and should have been brought within twelve months

after the loss; that the adjustment does not take the case out of the limitation clause of the policy.

The solution of the question presented will, therefore, depend upon the legal effect of the contract adjusting the loss, as reduced to writing and signed by the company on the policy.

In Phillips on Insurance, sec. 1815, the author says: "An adjustment of a loss made and in writing, with a full knowledge of all the circumstances, and intended by the parties to be absolute and final, is binding, no less than other settlements of accounts and demands."

Parke, in his work on Insurance, Vol. 1, page 266, says: "It has been determined that, after an adjustment has been signed by an underwriter, if he refuses to pay, the owner has no occasion to go into proof of his loss, or any of the circumstances respecting it. This, it is said, has been the invariable custom upon the subject, which seems to be perfectly just, as the underwriter has, under his hand, expressly admitted that the plaintiff has sustained damage to a certain amount."

Starkie, in his work on Evidence, Vol. 3, sec. 1168, lays down the rule, that an adjustment is a written admission of the amount of the loss as settled between the parties and indorsed upon the policy.

The effect, then, as in other cases of admission, is to relieve the plaintiff from proving his case in detail, and to enable him to recover the adjusted amount without further proof.

Where a loss has occurred, and the insured and the company meet and settle, and agree upon the amount of the loss, which is then indorsed upon the policy, the very nature of the transaction would seem to imply that the adjustment should be final and binding, unless fraud or mistake has occurred.

The insurer and the insured both being competent to contract, mutually adjust the differences between them, agree upon a balance, which is indorsed on the policy, and nothing further remains to be done by the insured under the policy, and nothing further is to be done on the part of the company

except to pay over the balance which has been agreed upon and struck.

Can not an action be maintained to recover a balance thus struck, without bringing suit upon the policy?

In *The Farmers' and Merchants' Insurance Co.* v. *Chesnut*, 50 Ill. 112, where the loss had been adjusted and a promise made to pay the same, it was expressly held that an action would lie upon the contract and new promise, and the one year limitation clause in the policy had no application to the contract upon which the action was brought; that, where the company had adjusted the loss and agreed to pay the loss as adjusted, such was a waiver of the provision in the policy requiring an action to be brought within one year.

The only difference between the case cited and this one, is, in the former, a promise to pay the loss as adjusted was proven, while here none was shown, but that can not affect the principle involved, as the law will imply a promise to pay.

We understand the rule to be, that the acknowledgment by a defendant that a certain sum is due, creates an implied promise to pay the amount. Chitty's Pleading, Vol. 1, page 358.

By the terms of the adjustment, there was found due appellee a certain sum, which was indorsed on the back of the policy. While the company did not, in express terms, promise to pay the amount, yet, under the agreement, which was signed by the company, that a definite amount was due, the law will imply a promise to pay.

If, then, the loss was adjusted and a balance struck, can it be recovered under a count in the declaration on an account stated?

The answer to this will be found in Chitty on Pleading, Vol. 1, page 358, where the author says: "The present rule is, that, if a fixed and certain sum is admitted to be due to a plaintiff, for which an action would lie, that will be evidence to support a common count upon an account stated."

From this it follows that the action, predicated, as it was, upon the new contract, was not barred by the one year clause

in the policy. The contract of adjustment waived and abrogated that provision. After the adjustment, the rights of the parties became fixed. No affirmative act was required on the part of appellees, to protect their rights. The insurance company was indebted to them in a definite and fixed sum of money, which it was bound to pay, and nothing short of the time prescribed by the general limitation laws of the State would bar their action.

The judgment will be affirmed.

Judgment affirmed.

AMOS ATKINS
v.
LEWIS W. MOORE, use, etc.

1. REPLEVIN BOND—*suit on by sheriff.* A suit brought by a sheriff upon a replevin bond may, like any other suit by one having the legal right of action, as respects the defendant, be brought for the use of whatever person the sheriff chooses, and it is not necessary that the one for whose use the suit is brought should have any interest or connection otherwise with the subject of the suit.

2. MEASURE OF DAMAGES—*in suit by one having special property.* In an action on a replevin bond, a party having a special property in the articles replevied is entitled to recover, as against a stranger having no interest therein, not merely to the extent of his special interest but the full value of the property, and the excess beyond his special interest he will hold in trust for the general owner.

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

Messrs. GILLESPIE & HAPPY, for the appellant.

Messrs. DALE & BURNETT, for the appellee.

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

This is an appeal from a judgment against the principal and one of his sureties, upon a replevin bond.

The replevin bond was given to Lewis W. Moore, sheriff, in a suit of replevin, brought by Amos Atkins against Thomas Byrnes. The present suit on the replevin bond was brought in the name of Lewis W. Moore, late sheriff, etc., for the use of William Cool.

It is insisted, first, that, under the statute, the suit could be brought in the name of the sheriff, for the use of only the defendant in the replevin suit, and that it can not be brought for the use of a person not a party to the replevin suit, and that, even if it could be, the interest of such person and his connection with the bond must be set forth in the declaration.

All that there is of the statute on the subject is, that the sheriff, or plaintiff, in the name of the sheriff to his own use, may maintain an action on the bond.

We see nothing in this to interfere with the general rule, that the party in whom is the legal right of action may, as respects the defendant, bring his suit for the use of whatever person he likes; that it is no concern of the defendant for whose use the action may be brought, and that it is not necessary that the one for whose use a suit may be brought, should have any interest or connection otherwise with the subject of the suit. There is no force in this objection.

It is next insisted, that the court erred in the rejection of evidence.

William Cool was examined as a witness on the trial of the cause, and testified that Thomas Byrnes, the defendant in the replevin suit of Atkins against Byrnes, was acting as his agent under the distress warrant alluded to in that case; that Byrnes had possession of the mules when they were replevied by Atkins; that they were worth $300, and were, at that time, his property, whereupon he was inquired of by defendant's counsel how much was the amount of his lien against the mules, and, on objection taken, the court excluded the question. This is assigned as error.

So far as appears from the record, Atkins was a mere stranger, having no interest in the mules. In such case, it would be immaterial how much was the amount of Cool's lien upon

the mules. Having a special property in them, he, as against a stranger, would be entitled to recover, not merely to the extent of his special interest, but the full value of the mules, and the excess beyond his special interest he would hold in trust for the general owner. *Broadwell* v. *Paradice*, 81 Ill. 474. Cool, in his testimony, speaks of the distress warrant as one alluded to in the replevin suit of Atkins against Byrnes. On reference to one of the pleas in that case, we observe that Byrnes sets up that, as bailiff under a distress warrant issued by Cool, he took the property as a distress for $230 rent due from one William A. Skeen to Cool.

Atkins, who was examined as a witness in the present suit, testifies, that when the mules were replevied by him under his chattel mortgage, he placed them in the possession of Byrnes, and that Byrnes, as his (Atkins') agent, went on and sold the mules, under said chattel mortgage, at public auction, for the sum of $225, they being bid in by him, Atkins. Had it appeared that this was a valid chattel mortgage, given by Skeen to Atkins, then, if Cool held the property as a distress for rent due from Skeen, the inquiry as to the amount of Cool's lien would have been material, as Atkins would be the general owner, and, as against the general owner, Cool's recovery would be limited to his special interest—the amount of rent due him. *Warner* v. *Matthews*, 18 Ill. 83. But it does not appear that the chattel mortgage was given by Skeen, or any one having any interest in the property. The chattel mortgage itself does not appear in the record, and the above general mention of it by Atkins is all that appears in regard to it in the record.

We find no error, appearing by the record, in the exclusion of the evidence.

It is claimed, that the amount at which the property sold for at public auction under the chattel mortgage, was the true criterion of its value. This would be but evidence tending to prove value. It would not be conclusive evidence of value.

Finding no error, the judgment is affirmed.

Judgment affirmed.

RAWLEIGH RALLS

v.

ISABELLA RALLS, Admx. *et al.*

1. SPECIFIC PERFORMANCE—*proof must be clear.* Applications for a specific performance of a contract are addressed to the sound legal discretion of the court. It is not a matter of course that it will be decreed because a legal contract is shown to exist, and the proof on which the right is based must be clear.

2. CHANCERY—*disposition of cross-bill for partition, when original bill for specific performance and partition is dismissed.* Where a complainant files a bill, alleging a partnership, by verbal contract, between himself and the ancestor of the defendants, in real estate, the legal title to a portion of which is in himself, to another portion in the defendants, and of the balance in the complainant and defendants as tenants in common, and asks for a specific performance of the contract and partition of all the land, and the defendants deny the partnership, and file a cross-bill for that portion of the land the title to which is in common, it is proper, in the absence of clear and satisfactory proof to sustain the allegation of partnership, to dismiss the original bill, but the cross-bill should be retained, and partition decreed according to the legal title of the parties.

APPEAL from the Circuit Court of Randolph county; the Hon. AMOS WATTS, Judge, presiding.

Mr. WILLIAM HARTZELL, and Mr. SILAS L. BRYAN, for the appellant.

Mr. JAMES M. DILL, and Mr. JOHN MICHAN, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, in the circuit court of Randolph county, exhibited by Rawleigh Ralls, complainant, and against Isabella Ralls, the widow and administratrix, and the heirs at law of James Ralls, deceased, for the specific performance of a contract alleged to have been made with James Ralls, in his lifetime, for the conveyance of certain lands in the bill described.

There were answers to the bill, and a cross-bill filed by the defendants, to which there was an answer and replication duly filed.

The cause was heard on the pleadings and proofs, and the court dismissed both the original and cross-bills, and gave judgment for costs against complainant, to reverse which he appeals.

The doctrine of strict performance has frequently been discussed in this court, and the rule established that applications for such purpose are addressed to the sound legal discretion of the court; and it is not a matter of course that it will be decreed because a legal contract is shown to exist, and the proof on which the right is based must be clear.

The deceased, James Ralls, and the complainant were brothers, living within one-fourth of a mile of one another, and engaged in farming. Lands were acquired by them as separate property, the titles taken to one or the other, as the right might be. As we understand it, the whole quantity of land owned by these parties, and the subject of this controversy, was four hundred and thirty-three acres, the title to some of it in the name of complainant, and of some of it in the name of the deceased, James Ralls, and some of it acquired in their joint names.

It is alleged that, in 1846, the brothers formed a partnership, by which it was agreed all their lands should be held in common; that, in 1870, a division was made of the tract; that the north part, containing two hundred and twenty acres, was allotted to complainant, and the south part, containing two hundred and thirteen acres, to James, but that no deeds were executed.

It appears, by this division claimed by complainant, sixty acres of land, the title to which was in James, comes to complainant, the title to which James had acquired in his own right eight years before the alleged partnership, namely: in 1838. This is the subject of contention. The widow and personal representatives of James Ralls deny that any of the lands owned by them individually ever became partnership

lands, or held as such, and they contend that allotting this sixty acres to complainant would be an unequal and unjust division. Keeping in view the rule, as announced so often by this court, that, in a proceeding of this nature, the proof must be clear, we have looked into this record, and fail to find proof sufficiently plain and clear to justify the conclusion that the individual lands of these parties were ever held as partnership property. It is true, they were in partnership in the farming business, but the evidence that the lands were held in common is by no means satisfactory; it is too conflicting and uncertain to be the basis of a decree the effect of which would be to take from these defendants, who are said to be, the most of them, infants, a valuable property.

It is alleged a final partition of the lands held as tenants in common was made by the parties. That, in law, would be good, provided it was followed by a several possession, and equity would establish it by decree; but of this, the evidence is not clear and satisfactory.

We think the court decided correctly in dismissing the original bill.

As to the cross-bill, that shows that some of the lands described in complainant's bill belonged to complainant and James, jointly, as tenants in common; and it alleges they owned, as such tenants, a large amount of other real estate, and the prayer is, that partition be made of all these lands so held. Though there is much other redundant matter in the cross-bill, the object and scope of it was, to have partition made of the lands owned in common by these parties. This, parties so situated have a clear right to demand; and, as the court had possession and control of the subject, it would be well to adjust the whole matter in this suit, rather than to compel the institution of a new suit for the same purpose. The court had jurisdiction of the persons and of the subject matter, and should have retained the cross-bill for the purposes sought by it.

We are of opinion the decree dismissing complainant's bill

should be affirmed, but reversed as to the cross-bill. The cause will be remanded to the circuit court, for further proceedings consistent with this opinion.

Decree affirmed in part.

STEPHEN H. BOWMAN

v.

THE PEOPLE, for use of Robert Hoxsey.

1. EXECUTION—*what is subject to levy and sale.* The purchaser of land at an execution sale acquires no interest in the land before the expiration of the time allowed for redemption, which is liable to be levied on and sold on an execution against him.

2. Where land has been sold by a sheriff on an execution against the owner, and a certificate of purchase given to the purchaser, and afterwards, and before the time of redemption expires, the interest of the purchaser in the land is sold, on an execution against him, the purchaser at such second sale takes nothing, nor will the sheriff be authorized, in case of a subsequent redemption from the first sale, to pay the redemption money to the purchaser at the second sale.

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

The principal facts in this case are not controverted, and may be briefly stated:

On the 8th day of November, 1872, an execution was sued out upon a judgment which Lewis W. Moore, late sheriff of Madison county, who sued for the use of Robert Hoxsey, had obtained against Henry C. Massey and others, directed to the sheriff of Jersey county to be executed. That execution was subsequently levied upon certain lands belonging to Henry C. Massey, one of defendants in the execution, and such proceedings were had that on the 28th day of December, 1872, the sheriff sold the lands, and the same were purchased by Robert Hoxsey, the beneficiary plaintiff in the execution, for

Statement of the case.

the sum of $1036.49, to whom the sheriff issued the usual certificate of purchase, which was afterwards recorded in the county where the lands are situated.

On the 19th day of July, 1873, the sheriff of Jersey county, by virtue of an execution issued upon a judgment which Henry O. Goodrich obtained in the Macoupin circuit court against Robert Hoxsey and William C. Sherly, levied upon the interest of Robert Hoxsey in the same lands he had purchased at the sheriff's sale on the execution against Massey. On the 16th day of August, 1873, the sheriff, having given the usual notice prescribed by law, sold all the right, title and interest of Robert Hoxsey in and to these lands, and the same were purchased by Henry C. Massey, the former owner, for the sum of $480.65, to whom the sheriff issued the usual certificate of purchase, in which it was recited the purchaser would be entitled to a deed for the lands, unless redeemed within fifteen months. The latter certificate, like the former, was recorded in the proper county.

On the 27th day of December, 1873, Henry C. Massey redeemed these lands from the sale to Robert Hoxsey, by paying to defendant, as sheriff, for that purpose, the sum of $1140.13, and received a certificate of redemption. The sheriff, however, immediately paid the money back to Massey, taking his receipt for it, and this action is brought on defendant's official bond as sheriff, to recover the amount of the redemption money.

All matters of defense that could be properly pleaded, by agreement were given in evidence under the plea of *non est factum*, and, on the trial, the court to whom the cause was submitted, without the intervention of a jury, found the issues for plaintiff, and rendered judgment in his favor for the amount of the redemption money, and interest, from which judgment defendant prosecutes this appeal.

Mr. W. R. WELCH, and Mr. A. A. GOODRICH, for the appellant.

Messrs. WARREN & POGUE, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

But a single question arises on this record, viz: whether a purchaser of real estate at an execution sale has such an interest in the land itself, before the expiration of the period allowed by law to the judgment debtor to redeem, as is subject to levy and sale.

Under our statute, "all and singular the lands, tenements, real estate" of the judgment debtor are liable to be sold on execution. The term "real estate," as used in the statute, is defined to include "lands, tenements, hereditaments, and all legal and equitable rights and interests therein and thereto, including estates for the life of the debtor or of another person, and estates for years and leasehold estates, where the unexpired term exceeds four years." Chap. 77, secs. 3 and 10, R. S. 1874.

Unless the interest of the purchaser of lands at an execution sale comes within this definition of "real estate," or some clause thereof, it is plain that interest is not subject to levy and sale on execution. The certificate itself is not liable to be seized under execution, and sold as tangible property. At most, it is but evidence of what the officer has done under the execution, and of the purchaser's bid, and what rights, under the law, he will be entitled to—that is, if the land is redeemed he will receive back the amount of his bid, with interest, at a rate fixed by statute, and if not redeemed he will be entitled to a deed for the land. Such certificates are assignable under our statute, and are no more subject to levy and sale on execution than a judgment of a court of law.

What interest does a purchaser of lands at a sheriff's sale obtain in the land itself before the expiration of the period of redemption? Does that interest, whatever it may be, come within any definition given of real estate? We think it does not. It is not expressly defined, and if it is comprehended at all in the statutory definition, it must be by the indefinite words, "all legal and equitable rights and interests therein and thereto." But we are of opinion it is neither a legal nor equi-

table estate in the land itself before the lapse of the period allowed the judgment debtor for redemption. Previous to that time he has no absolute right in the premises. At most it is a mere inceptive interest in the soil, but, being contingent, it may never become an absolute title to the estate. Perhaps the most accurate definition that can be given is, it is a bid for the land under judicial authority, that may or may not become an interest in the soil. Should the land be redeemed after the death of the creditor, the money would go to his personal representatives, and not to his heirs; but if it is not redeemed, and the bid becomes an absolute purchase, it would go to his heirs, and not his personal representatives. It is, therefore, an unascertainable and undefinable interest, and it can not be known, before the expiration of the period of redemption, whether it will be personalty or realty.

It can not be said to be a legal estate in the purchaser, for the legal title to the land still remains in the judgment debtor until the bid becomes absolute by the lapse of time. Should an injury be inflicted upon the estate, it could only be redressed by the judgment debtor. A purchaser at a judicial or execution sale has no such interest in the land bought as would enable him to maintain any action in regard to it, until after the maturity of his title; nor is it an equitable estate in the land, according to any definition given of an equitable estate. It is apprehended an equitable estate is one, although lacking the characteristics of a legal estate, that the owner may enforce in a court of chancery. What right has a buyer at an execution sale in the land that he can enforce before the expiration of the time allowed for redemption? Absolutely nothing. He can not intermeddle with it without subjecting himself to an action. Under the forms of the law, he has bid so much for the debtor's property, and it is optional with the debtor whether he will pay the money or allow the bidder to take the land. The bidder has no election in the matter. It is not in his power to enforce any interest in the land in any court. It seems to us it is illogical to say he has acquired, by his bid, a "legal or equitable right or interest therein and thereto" the land bought.

It is neither the one nor the other. Like a married woman's inchoate right of dower in the lifetime of her husband. She may or she may not have an estate in the lands of her husband. Such estates, so contingent and uncertain, have never been regarded as property that was liable to be sold on execution.

But, conceding the proposition the buyer at an execution sale has an equitable, contingent interest in the land bought, this court has expressly ruled that a contingent, uncertain equitable title can not be sold on an execution at law. *Baker* v. *Copenbarger*, 15 Ill. 103. Obviously, it is for the reason it can not then be known, with any degree of certainty, what the officer is selling. The case at bar affords a most apt illustration. What did Massey buy at the sale under the execution against Hoxsey? Did he buy the land? Certainly not the land, for he redeemed it from the prior sale, and that left no interest whatever, either contingent or otherwise, in the former purchaser under the execution against himself. Did he buy the redemption money? The sheriff did not propose to sell that. It was not then in existence, and it could not then be known that it ever would be.

There can be but one rational answer to these inquiries. The officer sold nothing, and the bidder obtained nothing. The pretended levy and sale was a mere nullity. It will be observed the sale to Massey was with redemption. The execution debtor had twelve months, and his creditors three months thereafter, to redeem from the sale. But what was there to redeem? Hoxsey, the judgment debtor, had then no shadow of an interest in the lands. They had been redeemed under the forms of the law from the sale to him, and had become as much the property of Massey, the former owner, as if they had never been sold under the execution against him. Nor could the judgment debtor, or his creditors, redeem the redemption money, for it had never been sold, and was not in the possession of the sheriff, so that neither Hoxsey nor his creditors could redeem it, had they desired the privilege. It had been paid over to Massey.

The absurdity of the whole proceeding is made manifest by a mere statement of the uncontroverted facts. Massey owed Hoxsey over $1100, for which his land had been sold, and bought in by his creditor, under the execution. Subsequently, Hoxsey's interest in the lands he had bought in satisfaction of his debt, was levied upon and sold on an execution in favor of Goodrich, for less than $500, and Massey, the former owner, became the purchaser. Within the period allowed by law, Massey redeemed his lands from the sale to Hoxsey, and, by virtue of his purchase under the Goodrich execution against Hoxsey, claimed and obtained from defendant the money paid to him, as sheriff, to redeem the land. Thus it is seen he has now his land back free from all incumbrances, also the money paid to redeem it, and it has cost him a sum less than $500.

Our opinion is, Massey obtained no title whatever, either to his own lands or the money paid to redeem them from the former sale, under the pretended sale on the Goodrich execution. This view of the law, we think, is sustained by the decisions in this court and elsewhere, so far as we have been able to find any bearing on the question involved. *Baker* v. *Copenbarger*, *supra*; *Hatch* v. *Wagner*, 15 Ill. 127; *Den* v. *Steelman et al.* 5 Hal. (N. J.) 193; *Kidder* v. *Orcult*, 40 Maine, 589; *Jackson* v. *Willeard*, 4 Johns. 41; *Wilks* v. *Farris*, 5 Johns. 335; *Hagerman* v. *Jackson*, 1 Wend. 502.

Some of the cases cited are not altogether analogous, and others were decided with reference to local statutes, but all of them, in a greater or less degree, sustain the principle we are endeavoring to maintain, and the reasoning is illustrative of the case in hand.

In *Den* v. *Steelman*, *supra*, it was expressly ruled, that a purchaser of lands at sheriff's sale, in that State, has not, previous to the making and delivering to him of a deed for such lands, such an interest therein as can be levied upon and sold by virtue of an execution against the lands of the debtor.

In *Jackson* v. *Willeard*, *supra*, Ch. J. KENT delivering the opinion of the court, it was declared that lands mortgaged can not be sold on execution against the mortgagee before a fore-

closure of the equity of redemption, though the debt be due and the estate of the mortgagee has become absolute at law. And by a parity of reasoning, we may reach the conclusion, lands sold upon execution, before the expiration of the period allowed the debtor for redemption, are not liable to be resold on execution, as the property of the purchaser. Until the lapse of that period, he has no absolute estate, and absolutely no interest that attaches to the land. Indeed, the purchaser himself could sell no interest in the lands. All he could do would be to assign the certificate, and that, as we have seen, is not subject to levy and sale on execution.

Reference has been made to the case of *Page* v. *Rogers*, 31 Cal. 293, which holds, a purchaser of lands at execution sale has such an interest therein as is subject to levy and sale, even before the expiration of the time allowed for redemption, but we think the cases cited rest upon the sounder and better reasoning, and conform more nearly to the analogies of the law. They are more in harmony with the decisions of this court, so far as the question has been incidentally discussed.

The cases of *Morrison* v. *Turetz*, 7 Watts, 437, *Slater's Appeal*, 28 Penn. State R. 169, *Stephens' Appeal*, 8 Watts & Sergeant, 186, and other cases in that court, simply hold, a purchaser of lands at sheriff's sale has such an inceptive interest in the soil as may be bound by a judgment, and which, when perfected by payment and conveyance, gives the incumbrancer, by relation, the benefit of his security to the extent of the whole estate. Had the sheriff, in this case, brought the money into court, and had the contention been as to the proceeds, as was the case in *Stephens' Appeal*, *supra*, some of the cases cited would be more in point.

But no authority can be found anywhere for the action of the sheriff in paying the redemption money directly to Massey, to whom he may have thought it equitably belonged. Whether the judgment was a lien upon the proceeds, was a judicial question, and one the sheriff had no authority to determine. The utmost he could do, in such a case, would be to bring the

money into court, where it could be safely kept until the parties claiming it could litigate, in some appropriate mode, their respective rights.

The judgment will be affirmed.

Judgment affirmed.

BERNARD H. STEINKEMEYER

v.

THOMAS GILLESPIE.

MORTGAGES—*upon equitable legal title—priority of equities.* A party, having a bond for a deed for a tract of land, upon the payment of the purchase money, sold the same, and took notes of the purchaser, and a mortgage on the land to secure their payment. The purchaser then sold to a third party, and took his notes, and a mortgage on the land to secure their payment. These mortgages were assigned to different parties. Whilst matters stood thus, the owner of the legal title gave notice to the holder of the bond that, unless the purchase money was paid by a given time, he would declare a forfeiture. When the day of forfeiture arrived, no one else having paid the purchase money, the assignee of the second mortgage paid it, and had the land conveyed to the holder of the bond, and took a deed of trust from him to secure the money thus advanced, as well as the notes secured by the second mortgage which he held. These notes not being paid, he sold the land under his deed of trust, and had it bid in by one who acted for him, and who reconveyed the land to him, no money passing between them in the transaction. Prior to this sale, the holder of the first mortgage had foreclosed it, making only the two assignees of the bond parties. Upon a bill filed by the party claiming title under the deed of trust, to set aside the title under the decree of foreclosure of the first mortgage, as a cloud upon his title, there being no evidence that the original owner had any power to declare the forfeiture of the contract, as he threatened, it was *held*, that there was nothing in the facts shown which cut off the lien of the first mortgage, or that would prevent the assignee of the second mortgage from redeeming from such first mortgage; that the lien for the money advanced to pay the bond was the first and highest lien, and that the holder of the first mortgage had no claim to the title, but simply to have the amount secured by his mortgage paid, and that the bill should be dismissed without prejudice.

APPEAL from the Circuit Court of Jefferson county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Mr. P. E. HOSMER, Mr. DANIEL HAY, and Messrs. MASON & GORDON, for the appellant.

Mr. W. H. MOORE, and Mr. SILAS L. BRYAN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The Illinois Central Railroad Company being the owner of the 80 acres of land in controversy, they sold it to one Heseman, and gave him a bond for a conveyance on the payment of the purchase money. Heseman sold and assigned the title bond to one Krote, and took back a mortgage on the land to secure the purchase money, or at least $2100 thereof. Krote, after he purchased, sold and assigned the bond to Wrise, and took a mortgage on the land to secure $2000 of the price. After this had been done, Heseman sold his claim against Krote, and assigned the mortgage given by him, to appellee. Appellant purchased the note and mortgage given by Wrise to Krote. Thus, Gillespie became invested with all the claim held by Heseman, and Steinkemeyer became invested with all of Krote's claim, and Wrise held the bond for title incumbered with the mortgage given by Krote to Heseman, and his mortgage given to Krote.

Whilst matters were thus situated, the railroad company gave notice to Wrise that, if the balance of the purchase money due on the sale of the land should not be paid by the 1st of April, 1870, they would rescind and declare the bond given to Heseman at an end and the contract forfeited. Appellant waited until the 29th of March, and none of the other parties interested having paid the railroad company, he paid them $912, the balance due them on the purchase, and had them convey to Wrise, who held their bond, and had it surrendered to the company. Wrise thereupon executed a deed of trust to appellant to secure the payment to him of the purchase money thus advanced, and to secure the notes given by Wrise to Krote, which were then held by appellant.

Wrise failed to pay these several sums, and appellant sold the land under the trust deed, when it was purchased in by

one Holton, who afterwards conveyed the land to appellant, and he thus became invested with all claims to the land, except that held by appellee, who held under the notes given by Krote to Heseman.

Prior to this time, appellee had, by bill against Krote and Wrise, foreclosed his mortgage, and purchased the land at master's sale, under a decree, for $702.20, and received a conveyance from the master; and, to set that conveyance aside, appellant filed his bill to relieve his title of this cloud, insisting that Holton's purchase of the fee at the trustee's sale cut off and extinguished all of appellee's claims to the land; but the court below refused the relief and dismissed the bill, and complainant, to reverse that decree, appeals to this court.

It appears that appellant purchased the notes and mortgage from Krote, under the belief that Wrise was the owner in fee, although, as the title was on record, he is chargeable with notice that he was not, and that he only held the title bond, and of Krote's mortgage to Heseman; and, whilst appellant occupied the position of a junior mortgagee of the contract of sale, Heseman, or appellee, his assignee of the senior mortgagee of the contract, had no claim on him of any kind. There were no equities existing which required appellant to protect appellee's title. Appellant was required to perform no act or to pay any money to the railroad company to preserve appellee's claims. They each held a claim liable to be extinguished should the railroad company declare the contract forfeited, and sell to another, if they possessed such power. Appellee, to preserve his rights, was bound to pay them the purchase money due on the land, and so was appellee to preserve his. The time for its payment had expired, and the company had given notice to Wrise that, if the money was not paid by the 1st of April, they would declare the forfeiture. He paid the money, and had the title conveyed to Wrise, and took from him a trust deed to secure Wrise's notes due him, and the money he had advanced to pay for the land.

It appears that appellant procured Holton to purchase for him at his sale under the trust deed, and had Holton to con-

vey to him, Holton paying nothing on his purchase, and appellant paying nothing when Holton reconveyed to him. This, then, shows such a sale as Wrise could, on a proper bill filed, have set aside, and the deed canceled.

Nor did appellee's foreclosure cut off or in anywise affect appellant's title, as he was not made a party to his bill. He only made Krote and Wrise parties to his bill. Appellant, before the foreclosure, had purchased the notes and mortgage to Krote from Wrise, and Krote then had no interest whatever in the land, and Wrise's interest was incumbered by the mortgage held by appellant, as well as the mortgage held by appellee, given by Krote to Heseman.

It is alleged and proved that the railroad company had given notice that they would declare a forfeiture, if the money should not be paid by the 1st of April, 1870; but it nowhere appears that the company, by the terms of their bond, had legal authority to declare the contract at an end. Hence, the conveyance by the company can not be regarded, under the decision in the case of *Christman* v. *Miller*, 21 Ill. 227, as a forfeiture, and a rescission of the contract by the railroad company.

On the bill, and proofs under it, we fail to see that appellant has shown that he has done any act that has cut off appellee's lien on the land, for whatever may be due on his mortgage; or why appellant should not redeem from it, as a lien prior to his claim under the Wrise mortgage. It is manifest that his lien for the purchase money, paid to the company, is the first and highest lien, and were he to pay appellee what is due him under the Krote mortgage, he would hold the land free from all incumbrance. Appellee can, in no event, have any other claim than to have his money paid to him. He has no claim to the title, but simply to have his money.

Appellant having failed to make out a case, the bill should have been dismissed without prejudice.

The decree of the court below will, therefore, be modified to that extent, and be affirmed in all other respects.

Decree modified.

VALENTINE BRIEGEL

v.

JOHN MOELLER.

1. MISTAKE—*as to relative interest of grantees in a deed, will be corrected in equity.* Where two persons purchase land of a third, one of the purchasers to take two-thirds of the land and the other one-third, but, by mistake, the seller conveys to them jointly, without specifying in the deed the portion that each is entitled to, and, afterwards, the one who purchased one-third conveys his interest in the land to the other, describing it as one-third thereof, a court of equity will correct the mistake in the deed, or compel a conveyance of the one-sixth, or difference between one-half, conveyed to him by mistake, and the one-third conveyed as all his interest.

2. PARTIES—*to a bill to reform a deed.* Where the owner of land conveys all the interest he has to two purchasers, but makes a mistake as to the interest which each of the grantees is to take in the land, such grantor is not a necessary party to a bill in equity to correct such mistake.

APPEAL from the Circuit Court of Monroe county; the Hon. AMOS WATTS, Judge, presiding.

Mr. WM. WINKELMAN, for the appellant.

Mr. THOS. QUICK, and Mr. E. P. SLATE, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The complainant in the court below, and appellee here, claims title to certain lands (through various mesne conveyances, unnecessary to be set forth in detail), which John A. Frank and wife conveyed to Adam Briegel and Valentine Briegel, on the 15th day of June, 1841. He claims that, in fact, Adam was the owner of two-thirds, and Valentine the owner of one-third of the land, but that the deed of Frank and wife, through mistake, did not disclose this fact, but assumed to convey the land to them jointly, as tenants in common.

The bill seeks a correction of this mistake, and to remove the cloud upon appellant's title thereby occasioned, and also contains a prayer for general relief.

On the 7th of February, 1843, Valentine Briegel conveyed to Adam Briegel his undivided interest in the land, describing it as one-third; and appellant claims, in right of him, the difference between the undivided half conveyed by Frank's deed, and the undivided third conveyed by this deed, being the undivided one-sixth of the land.

The evidence very fully and satisfactorily shows, that when Adam and Valentine purchased of Frank, Valentine was only to have an undivided third of the land, and that they acted upon this understanding subsequent to the purchase; and when Valentine subsequently conveyed to Adam his undivided interest, described in the deed as one-third, it was supposed and intended this was all the interest he had in the land.

Appellant, therefore, has, in equity, no claim to the land; and the court below properly decreed against him.

The point is made that the decree corrects a mistake in the deed of Frank and wife, who are not made parties; and it is insisted they are entitled to a hearing, and that, in no event, can there be a decree correcting the mistake in the deed, as to Frank's wife.

The decree is, in form, not strictly accurate, but, since equity regards the substance rather than the form, there should be no reversal on that ground.

The effect of the bill and the decree is to charge appellant as trustee of a constructive trust, and to compel him to execute the trust, by conveying the legal title which he holds in fraud of his *cestui que trust.*

Frank and wife having conveyed all the interest they had in the land to Adam and Valentine Briegel, it was a matter of no possible concern to them or their heirs how Adam and Valentine subsequently held or divided the land, or what future disposition should be made of the title.

The controversy is solely between the claimant in the right of Adam Briegel and the claimant in the right of Valentine Briegel, and the relief sought, and, in effect, obtained, is by the one against the other.

Frank and wife, and their representatives, having no interest

in the land to be affected by the decree, were unnecessary parties. We think it better, however, in affirming the decree, to modify it so as more accurately to conform to the case proved; and, therefore, direct that it be modified by striking out so much as relates to the correction of the deed of Frank and wife, and inserting that appellant be required to convey, by deed of quitclaim, his interest in the land to appellee, within twenty days from the service of notice that the decree has been so modified; that in default of his so doing, the master in chancery execute and deliver such deed; and that appellant be perpetually enjoined from asserting any claim of title or right of possession to said land inconsistent with the decree.

In the view we have taken of the case, the rule contended for, that a court of equity has no power to compel a married woman to correct a mistake in a deed, has no application.

We think the decree for costs was proper under the general prayer of the bill. Appellant, by making claim hostile to that of appellee, under an inequitable title, rendered the proceeding necessary, and is properly chargeable with costs.

Decree affirmed, with directions to the court below.

Decree affirmed.

TOWN OF NEW ATHENS

v.

C. W. THOMAS *et al.*

1. CORPORATIONS—*bound by implied contracts.* Corporations can be bound by contracts made by their agents, though not under seal, and also on implied contracts, to be deduced, by inference, from corporate acts, without either a vote or deed in writing.

2. Where attorneys, at the request of a town council, addressed a meeting of the citizens, and explained the terms upon which the holders of bonds of the town proposed to cancel them, which proposition was accepted by the meeting, and the attorneys directed to prepare an ordinance for the purpose of consummating the settlement, which they did, and the town council afterwards adopted the ordinance, and the bonds were taken up in

pursuance thereof, and the whole matter adjusted with the assistance of the attorneys, it was *held*, they were entitled to recover pay from the town for their services.

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

Messrs. KŒRNER & TURNER, for the appellant.

Mr. R. A. HALBERT, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by C. W. & E. L. Thomas, a law firm, in the circuit court of St. Clair county, against the town of New Athens, to recover for professional services claimed to have been rendered for the town, whereby it was released from a bonded indebtedness of $40,000, under a compromise effected by the plaintiffs with the creditors of the town.

A trial of the issue involved, before a jury, resulted in a verdict and judgment in favor of the plaintiffs, for $1000, to reverse which, the town has taken this appeal.

It is not claimed that the court failed to properly instruct the jury in relation to the law involved, or that error occurred in the admission or exclusion of evidence, but the only ground of error relied upon is, that the verdict was not warranted by the evidence.

Appellant does not deny that the services were rendered, nor is the amount charged a question controverted, but the town claims that appellees were not employed by the town in its corporate capacity, to render the services.

It is true, in the first instance appellees were employed by certain citizens and tax-payers of the town to institute proceedings to test the legality of the bonds, and a written contract in regard to the fees to be paid appellees for services was executed by the parties.

Under this contract certain suits were commenced and prosecuted, and while the litigation resulted in favor of the town, yet the desired object was not attained.

Other suits were contemplated, but in the meantime appellees received propositions from the bondholders for a compromise. At the request of the president of the town, appellees, at a public meeting composed of the citizens of the town, addressed the meeting, and fully explained the proposition that the bondholders were willing to accept, in lieu of the bonds then held for $50,000, bonds to be issued in the sum of $10,000.

At this meeting, the proposition was accepted, and appellees were directed to prepare an ordinance, to be adopted by the town, to carry out the proposed settlement.

The ordinance was prepared, and adopted by the legislative department of the town. A vote of the people was had, under the ordinance prepared, and the whole matter was adjusted.

After the compromise was concluded, the common council of the town passed an ordinance allowing appellees $500 for their services. This they declined to accept in full, but instituted this suit to recover the value of the services rendered.

The usual manner in which a city or incorporated town contracts or binds itself for the payment of money for labor or services rendered, is by ordinance or resolution adopted by the common council of the incorporation.

In other words, an incorporated town speaks, acts and becomes bound for the performance of obligations, by its ordinances or resolutions adopted by the legislative branch of the incorporation.

But Chancellor KENT, in his Commentaries, Vol. 2, sec. 291, in discussing the manner in which corporations may contract, says: "That corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts, to be deduced, by inference, from corporate acts, without either a vote, or deed, or writing, is a doctrine generally established in the courts of the several States, with great clearness and solidity of argument."

To the same effect is *Peterson* v. *The Mayor of New York*, 17 N. Y. 449, and the cases there cited.

It is not claimed but the common council of the town had ample power to employ appellees by adopting a resolution for that purpose, nor is it claimed that the services rendered were not in the interest of, and greatly for the benefit of the town.

Assuming, then, that the town had power to employ counsel, and that the services were in fact rendered, and that the town availed itself of the benefit of the services of appellees in the adjustment of its indebtedness with the bondholders, the inquiry then is, whether the acts of the town proven in evidence were sufficient to establish the fact that the employment and services rendered were ratified by the town in its corporate capacity.

The address delivered to the citizens of the town by appellees was made by request of the town council, through its president. The ordinance under which the compromise was effected was drafted by appellees by request of the president of the town, and adopted by the common council. Indeed, each and every step taken by appellees in the adjustment of the matter in controversy, was with the full knowledge, approbation and consent of the president and common council of the town.

Can the town now be heard to say, after it has received the benefit of appellees' labor and skill in its behalf, and after it has recognized the employment by various corporate acts, that appellees were not employed?

To so hold, would neither be just nor in harmony with the current of authority on the subject.

We are satisfied the various acts of the town, from the time the negotiation for a settlement commenced, until it was finally consummated, may be regarded as a sufficient ratification of the employment to authorize the verdict of the jury.

In the prosecution of the suits, appellees were acting under the contract of employment entered into by certain citizens; but after the suits were terminated, and the negotiations for a compromise commenced, appellees, in their evidence, expressly state they were acting for the town, and these were the services for which a recovery was had.

So far as the record shows, the questions involved were fairly submitted to the jury, and we perceive no sufficient reason to disturb the judgment, and it will therefore be affirmed.

Judgment affirmed.

JAMES LEAMON *et al.*

v.

ROBERT G. MCCUBBIN *et al.*

1. DISTRIBUTION TO HEIRS—*as to personal property.* The personal estate of a person dying intestate, whilst it descends to and is to be distributed amongst his heirs, after the payment of debts, must pass through due administration, under the direction of the proper court.

2. PARTIES—*heir can not sue on note payable to his ancestor.* The heirs of a person dying intestate can not maintain a suit, in their own name, upon a promissory note payable to him.

APPEAL from the Circuit Court of Jasper county; the Hon. J. C. ALLEN, Judge, presiding.

Messrs. BROWN & GIBSON, for the appellants.

Mr. J. M. HONEY, for the appellees.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This was an action of assumpsit, by appellees, against appellants. Plaintiffs, in their declaration, allege that appellants made their promissory note in 1861, for a specified sum, payable to Phœbe McCubbin, at four months from that date; that the note remained unpaid; that Phœbe McCubbin died intestate in 1870, leaving plaintiffs her only heirs at law; that, at her death, she was not indebted, and there were no claims against her estate, save her funeral expenses, which plaintiffs have paid, and that no administrator of the estate has been appointed.

Defendants pleaded *non assumpsit.* The trial was by the court by consent. At the trial, plaintiffs read the note in evi-

dence, and there was no other evidence. The court found the issue for plaintiffs. Defendants excepted to the finding, but judgment went upon the finding, and defendants appeal.

The judgment can not be sustained. It is insisted by appellees that, "under our statute, the title to all property, real and personal, vests in the heirs of an intestate, after payment of just debts," and hence the appointment of an administrator was not necessary to the maintenance of an action on this note, and that the heirs may sue in their own name. The general words of our statute were never intended, and should not be construed, as changing entirely the mode of collecting and distributing the personal effects of estates of deceased persons. The statute says: "Estates, both real and personal, of proprietors dying intestate, after all just debts and claims against such estates are fully paid, shall descend to and be distributed in the manner following: First, to his or her children, * * * in equal parts." Of course the personal estate is to "descend to and be distributed" to the heirs; but in what manner is this distribution to be effected? Through due administration, under the direction of the proper court. This language merely designates the ultimate rights of parties, and was never designed to interfere with the ordinary and approved mode of collecting debts due the estate, through an administrator.

Even were the law as insisted upon, the proof in this case fails to make out a case. There is no proof of the allegations of the death of the payee of the note, or that she died intestate, or that the debts were all paid, or that plaintiffs were the only heirs at law.

The judgment is reversed.

Judgment reversed.

Mr. JUSTICE BREESE: I concur in the last branch of the opinion.

SUSANNA HUDSON *et al.*

v.

MARY HADDEN.

ERROR *in admitting, not cause for reversal where the other evidence is sufficient.* Although the court may err in admitting evidence on the hearing of a petition for partition, yet if there is enough evidence, aside from that improperly admitted, to sustain the decree rendered, it will not be reversed.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. S. L. BRYAN, and Mr. B. B. SMITH, for the appellants.

Mr. T. E. MERRITT, and Mr. H. C. GOODNOW, for the appellee.

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

This was a petition for partition of two parcels of land, one of 18½ acres, the other of 36 acres, filed January 21, 1876, by Mary Hadden against Susanna Hudson and Samuel Sweet.

The petition set out that the said Mary and Susanna were the owners of the land in fee simple in equal parts, deriving title as follows: that Malinda Hudson died seized of the lands in fee, October 1, 1858, leaving surviving her the petitioner, Benjamin Hudson, her daughter and son, to whom, as her sole heirs at law, the lands descended; that on the 26th of July, 1872, Benjamin Hudson died, leaving his widow, Susanna Hudson, and no children, surviving him, having in his lifetime made a will giving all his real estate to his wife, Susanna; that Samuel Sweet then lived upon the land as a renter.

The answer admitted the allegations of the petition, except that petitioner was a joint owner with Susanna Hudson of the lands described in the petition, which the answer denied, as also that the petitioner had any interest in the lands described in the petition, and set up that Malinda Hudson, the ancestress as aforesaid of the petitioner and Benjamin Hudson, died

seized not only of the lands described in the petition, but of something more than double the quantity of land described therein, which descended to the petitioner and said Benjamin in common, and that they subsequently made partition between themselves of all the lands which descended to them from said Malinda, and made deeds to each other for their respective parts; that petitioner deeded to said Benjamin all her right and interest in the lands described in the petition; that they entered upon the enjoyment of their respective portions; that the said Benjamin occupied the lands described in the petition, and paid taxes thereon for nearly seventeen years before his death.

The court below, upon hearing, decreed partition as prayed for, and the defendants appealed.

While there is considerable evidence which tends to show that there was a partition made between the parties, as set up in the answer,—such as the payment of taxes ever since 1858, by Benjamin Hudson and Susanna Hudson, on the lands described in the petition, and their separate occupancy of the same—the surveying out of the 18½-acre tract, and the sale and conveyance of the east half of it by the petitioner to Samuel Sweet in 1866, and his occupancy of it ever since—the repeated inquiries made by Benjamin Hudson of petitioner if she still had the deed to him of his half of the lands, and her repeated declarations that she had made a deed to him once, and would not make him another,—still, we are not ready to say, in view of the whole evidence, that it satisfactorily establishes the fact of such partition.

There is no direct evidence of the making of any partition. There is no evidence of any deed from Benjamin Hudson to the petitioner; we see no evidence of her separate occupancy of any portion of the land.

The witness, Soloman Siple, testified that Benjamin Hudson, in his lifetime, and Mary Hadden, the petitioner, came to him, at which time he was a justice of the peace, and wanted him to make a deed for the division of these lands; that he made some deeds, but they were never signed by the parties;

that the arrangement for the division, for some cause, fell through, and was never consummated; that since the commencement of this suit he examined his papers and found their deeds filled out, but they had never been signed or acknowledged.

We think this to be the reasonable explanation of the circumstances, that the parties had contemplated a partition, and took steps toward it, but never actually consummated it. Although the court erred in admitting some portions of the evidence of Mary Hadden and her husband, there was enough evidence besides to sustain the decree.

The decree will be affirmed.

Decree affirmed.

NANCY FRYE

v.

ALEXANDER PARTRIDGE.

1. VENDEE—*bound by valid agreement of his vendor as to use of land.* Where a person purchases real estate with full notice of a valid agreement between his vendor and the original owner, concerning the manner in which the property is to be occupied, he will be bound to abide by the contract under which the land was conveyed.

2. SAME—*equity will restrain violation of terms on which land is conveyed and to be used.* Where the owner of land lying on both sides of a river, across which he is operating a ferry, conveys to another a portion of the land, but, for the purpose of protecting his ferry from opposition, provides in the deed that neither the purchaser, nor his heirs or assigns, shall establish or authorize the establishment of a common ferry-boat landing on the land conveyed, without permission from the grantor, such provision is obligatory on the assignee of such grantee, and a court of equity will, at the suit of a devisee of the original owner, enjoin the establishment of a ferry landing on such land.

3. SPECIAL LEGISLATION—*authorizing establishment of ferry at a particular place.* An act, the title of which is "An act to authorize the establishment of a ferry across the Illinois river," and which is limited in its application to one ferry, and that one located at a definite place, is a special act, and is, therefore, unconstitutional.

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

Messrs. STARR & CONGER, for the appellant.

Messrs. PUTERBAUGH, LEE & QUINN, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Nancy Frye against Alexander Partridge, to enjoin him from using and operating a ferry across the Illinois river, near the city of Peoria, and within a mile and a half of a ferry operated by her.

The cause was heard upon the bill, answer, replication, and a stipulation of the parties in regard to the facts. The court, upon the hearing, dissolved the injunction and dismissed the bill. To reverse the decree rendered by the circuit court, the complainant in the bill has brought this appeal.

It appears, from the stipulation containing the facts as agreed upon by the parties to the record, that in January, 1849, Lewis & Mathis owned, in fee, frac. sec. 3, and the north half of sec. 10, in township 26, range 4 west, in Tazewell county, and a part of sec. 26, township 9 north, range 8 east, in Peoria county, the two tracts forming the banks and lying on opposite sides of the Illinois river, some three miles above the city of Peoria. Lewis & Mathis had, for several years, operated a public ferry across the river where their lands were situated, but they had no license from any source. At the same time, Lewis owned an eight acre tract in south-east frac. quarter of sec. 10, in Tazewell county, which was the ferry landing on the Tazewell side.

On the 22d day of January, 1849, Lewis sold and conveyed the eight acre tract, by general warranty deed, to Coleman J. Gibson, but, for the purpose of protecting his ferry from opposition, he inserted the following clause in the deed: "It is expressly understood, in this contract or deed, that Coleman J. Gibson, of the second part, and his heirs and assigns, are not to establish or authorize the establishment of a common ferry-

boat landing on such land, to ply between there and the opposite shore, without having permission from the said Lewis, of the first part, or his heirs or assigns."

In April, 1853, Lewis & Mathis sold and conveyed these lands and ferry to Smith Frye, and he, on the 15th day of February, 1855, procured from the legislature a charter, which authorized him, his heirs and assigns, to establish and maintain, for a period of fifty years, a ferry across the river, from the lands purchased of Lewis & Mathis.

Section 2 of the charter is as follows: "That the privilege hereby granted shall continue and be extended for the period of fifty years, and that no other ferry shall be established within one and one-half miles of the ferry established by this act, by the county court or courts of either of the said counties of Peoria or Tazewell, during the period aforesaid, nor by any other authority except that of the General Assembly of this State, nor by the said General Assembly unless the public good shall require the same."

Smith Frye expended large sums of money in building boats, making roads and embankments, and the ferry has been in constant operation to the time of filing the bill. The appellant derived title by devise from Smith Frye, now deceased.

It also appears, that on the 24th day of January, 1874, the legislature passed an act which refers to the provisions of the charter granted to Smith Frye, and declares that "it is made to appear to the General Assembly that the public good requires the establishment of another ferry across the Illinois river, south of said ferry, within less than one and one-half miles thereof. Therefore,

"SEC. 1. *Be it enacted, etc.*, That full power and authority is hereby given to the county board of each and all the counties that are or may be concerned in the establishment thereof, at any place within the said distance, in such manner and upon such conditions as is or may be provided by law with reference to granting ferry rights, and to confer any and all powers upon any persons or corporations that shall establish such ferry that

might have been conferred if said exclusive right had never been granted."

It also appears, that appellee purchased of Walter Gibson, who inherited from Coleman J. Gibson, the eight acre tract, and, under the provisions of the act of Jan. 24, 1874, he proposed to obtain license from the county boards of Peoria and Tazewell counties, and operate a ferry, from the land so purchased, across the river, within a half mile of the ferry of appellant.

As appellee claims title to the eight acre tract under the deed from Lewis to Coleman J. Gibson, the first question to be considered is, how his rights and the rights of appellant are affected by that clause in the deed prohibiting the use of the land for a ferry-boat landing, for the purpose of operating a ferry from the land to the opposite shore of the river.

Whether the covenant contained in the deed is one that will run with the land, upon which an action at law might be maintained, is a question that it will not be necessary to consider or determine; but the real question presented is, whether the covenant or contract contained in the deed can be enforced in a court of equity against a subsequent purchaser, under a chain of title from Coleman J. Gibson, with notice of the covenant in the deed under which Gibson obtained title.

A brief reference to a few leading authorities in England and this country, will clearly settle the principle involved.

In *Tulk* v. *Maxhay*, 2 Phillips, 776, where A, being seized of the center garden and some houses in Leicester Square, conveyed the garden in fee to B, and B covenanted, for himself and his assigns, to keep the garden unbuilt, open, etc., on a bill brought to restrain a grantee of B from enforcing the covenant, it was said: "That this court has jurisdiction to enforce a contract between an owner and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. The owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a square garden;

and it is now contended, not that the vendee could violate the contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for any owner of land to sell part of it without incurring the risk of rendering what he retained worthless. It is said, the covenant being one which does not run with the land, this court can not enforce it; but the question is, not whether the covenant runs with the land, but whether the party should be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. * * * * That the question does not depend upon whether the covenant runs with the land, is evident from this: that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

In that case, the original owner brought his bill against the assignee of the grantee in the original conveyance, while in the case under consideration the bill is brought by a grantee of the original owner; but that fact can not, in a court of equity, affect the principle involved, as the appellee succeeded to all the rights of the original grantor, in equity, even if she did not at law.

In *Mann* v. *Stephens*, 15 Sim. 377, the bill was brought by an assignee of one part of the premises against an assignee of another portion, and the same principle was announced. See, also, *Western* v. *McDermott*, Law Rep. 1 Eq. 499; *Whatman* v. *Gibson*, 9 Sim. 196.

The same question has been before the courts in Massachusetts, and the doctrine announced in the English cases was fully sustained.

In *Parker* v. *Nightingale*, 6 Allen, 341, it was said: "A court of chancery will recognize and enforce agreements concerning the occupation and mode of use of real estate, although

they are not expressed with technical accuracy, as exceptions or reservations out of a grant, not binding as covenants real running with the land. Nor is it at all material that such stipulations should be binding at law, or that any privity of estate should subsist between parties, in order to render them obligatory, and to warrant equitable relief in case of their infraction. A covenant, though in gross at law, may, nevertheless, be binding in equity, even to the extent of fastening a servitude or easement on real property, or of securing to the owner of one parcel of land a privilege, or, as it is sometimes called, a right to an amenity in the use of an adjoining parcel, by which his own estate may be enhanced in value, or rendered more agreeable as a place of residence."

See, also, *Whitney* v. *Union Railway Co.* 11 Gray, 359; *Jewell* v. *Lee*, 14 Allen, 150; *Badger* v. *Boardman*, 16 Gray, 559; *Gilbert* v. *Petelor*, 38 Barb. 488.

Appellee purchased with notice of the agreement in the deed under which his grantor derived title, as the deed had been upon record for many years, and it can not be claimed he was misled or in any manner deceived, and, under the authorities cited, it is within the power of a court of equity to enforce the contract upon which, alone, Lewis, the original owner, parted with the title to the land, and compel appellee to abide by its terms and conditions.

It would be a strange doctrine, indeed, to hold that an owner of real estate could not convey a part, and restrict its use in such a manner as not to impair or lessen in value the portion retained.

We are aware of no restriction upon the right of an owner to convey upon such terms and conditions as he may see proper, and as may be acceptable to the grantee, except that the right should be exercised with proper regard to public policy, and that the conveyance should not be made in restraint of trade.

When a vendee purchases with full notice of a valid agreement between his vendor and the original owner, concerning the manner in which the property is to be occupied, it is but a reasonable and equitable requirement to hold him bound to

abide by the contract under which the land was conveyed. We are, therefore, of opinion, that the provision in the deed prohibiting the use of the eight acre tract for ferry purposes, is obligatory upon appellee, and it was within the power of a court of equity to enjoin him from using the land in a manner and for a purpose actually prohibited by the terms of one of the deeds which is a link in the chain of title under which he holds the land.

It is, however, claimed, that the agreement in the deed is in restraint of trade, contrary to public policy, and void.

If the argument is a good one, it would apply as well to Lewis, the original owner, had he retained the eight acre tract, and we are aware of no principle that would require him to part with his land so that it might be used in some particular manner, which, in the opinion of some, might be regarded for the interest of the public. Whenever this land is needed for the use of the public, it can be condemned under the power of eminent domain, and the rights of appellee and all others in the property taken and used for the public, upon making compensation. This will fully answer the demands of the public, and, at the same time, protect the private citizen in the free enjoyment and use of his property, in the manner that to him may seem best for his own interest.

The record discloses another serious objection to the right of appellee to use and operate the ferry.

The constitution prohibits the legislature from chartering or licensing ferries or toll bridges by local or special laws. The title to the act under which appellee predicates his right, would seem to indicate that the act was special. It is in the following language: "An act to authorize the establishment of a ferry across the Illinois river." But when an examination is made of the law itself, there can not be a doubt but its object and purpose is special. It is not only limited in its application to one ferry, but that one is located at a definite place. The counties concerned are authorized to act. These counties are Peoria and Tazewell, as the river is the line between the two, and the ferry is to cross the river at a designated place.

If the act had directly authorized the counties of Peoria and Tazewell to establish a ferry across the Illinois river within a half mile of appellant's ferry, it would have been no less objectionable as a special or local act than the act is as framed. There is no feature in the act general in its application, but its whole scope and purpose are special.

The object and intent of the constitution was, to remove from the legislature the power to charter, license or establish ferries, either directly or indirectly, except by general law. We are, therefore, of opinion, that the act in question is in direct conflict with the constitution.

Other questions have been discussed, but it will not be necessary to consider them.

For the errors indicated, the decree will be reversed and the cause remanded.

Decree reversed.

Mr. Justice Breese: I do not concur in this opinion.

Mr. Chief Justice Sheldon dissents.

Henry O'Brian *et al.*

v.

Abraham B. Fry.

1. Chancery—*when sworn answer is evidence, effect of.* In so far as matter in a sworn answer is responsive to the bill, it will be held to be true, unless contradicted by two witnesses; but as to new matter, set up as matter of defense, and not in denial of any allegation of the bill, the answer is not evidence at all.

2. Decree of foreclosure—*should not order surrender of immediate possession.* On a bill to foreclose a mortgage, it is error to decree that the possession of the mortgaged premises shall be surrendered to the complainant, before a master's sale consummated, by a deed, after the lapse of the statutory time for redemption.

Statement of the case.

3. Same—*should only require payment of money by the debtor.* On a bill against a husband and wife to foreclose a mortgage executed by them to secure a note given by the husband alone, it is error for the court to decree that the defendants are indebted, and order them to pay, etc. The decree should not require the wife to pay the debt which her husband alone owes.

Writ of Error to the Circuit Court of Jefferson county; the Hon. James M. Pollock, Judge, presiding.

This was a bill, brought by Fry, to foreclose a mortgage given by plaintiffs in error to secure the payment of notes given by Henry O'Brian to Fry.

The answer set up a failure, in whole or in part, of the consideration for which the notes were given, but does not deny the making of the notes and mortgage.

Plaintiffs in error also filed a cross-bill, seeking to cancel the notes and mortgage upon the supposed facts set up in the answer. The cross-bill was answered, replications filed, and the cause brought to a hearing March 15, 1872. The only evidence, other than the notes and mortgage, was the deposition of one witness, who directly contradicted the material allegations in the answer and the cross-bill of the O'Brians.

Upon the hearing, the court found that Henry O'Brian was indebted to complainant; that he gave the notes, and that he and his wife made the mortgage; that default was made by defendants in the payment; that there was due to complainant *from defendants* the sum of $555.33, and decreed "that the said *defendants* do pay" to complainant, within sixty days, * * the said sum * * * and costs; that, in default of this, "defendants are hereby required to surrender immediate possession;" * * * and the decree appoints a commissioner, with full power to sell and convey, and that he proceed to sell * * * to satisfy said debt and costs, * * * for cash, * * * and that said commissioner, in default of redemption of said lands, do convey the same to the purchaser, and that said commissioner do report his proceedings under and by virtue of this decree to this court, at its next term, and that this case stand continued for report.

At the March term, 1873, report was made by the commissioner, which was approved by the court, showing a sale of the premises on June 15, 1872, to Abraham B. Fry, and thereupon it was "ordered by the court that the cause go off the docket."

The language of the record as to the hearing is, "this cause coming on for hearing on bill, *allegations*, exhibits and proofs" —making no special mention of the answers, or of the cross-bill, or of the replications.

To reverse this decree, Henry O'Brian and his wife, Mary, on the 7th of April, 1876, sued out a writ of error, and bring the record to this court for review.

Mr. T. S. Casey, and Mr. C. H. Patton, for the plaintiffs in error.

Messrs. W. & E. L. Stoker, for the defendant in error.

Mr. Justice Dickey delivered the opinion of the Court:

It is insisted that the findings of the court are not supported by the proofs, and, in that connection, it is suggested that the testimony of one witness can not avail against the sworn answers of two defendants, equal (as suggested) to the direct testimony of four witnesses. This position can not be sustained. In so far as matter in a sworn answer is responsive to the bill, it must be held to be true, unless contradicted by two witnesses; but in so far as matter stated in an answer is new matter—about which the bill does not call for any answer, matter set up (not in denial of any allegation of the bill) as matter of defense—the answer is not evidence at all.

In this case, the complainant alleged the making of the notes and mortgage, and the failure to pay, and called on defendants to confess these allegations. The defendants admit these allegations to be true, but affirmatively allege other matter, showing that these notes ought not to be paid. As to this other matter, the sworn answers are not competent as proofs, and the burden of proof as to them rests on the defendants.

No proof was offered in support of these allegations, and hence the finding of the court on this record was right. It was, however, error to decree that the immediate possession of the mortgaged premises should be surrendered, in a case like this, to the complainant, before a master's sale fully consummated, by a master's deed, after the lapse of the statutory time for redemption. *Aldrich* v. *Sharp*, 3 Scam. 261; *Bennett et al.* v. *Matson*, 41 Ill. 343.

Although the mortgagee is entitled to possession, under his mortgage, after condition broken, still it would be a vicious practice to permit a decree for a sale of the mortgaged premises to provide for putting complainant in possession between the date of the decree and the day of sale. By our laws, the defendant is entitled to the possession between the day of sale and the making of the master's deed. The amount of the debt fixed by the decree would be unsettled by the use of the property between the time of the decree and the day of sale. Such a practice can not be sanctioned.

It was also error to make a decree *in personam* against Mary O'Brian, the wife, that she should pay complainant, within sixty days, the amount of the mortgage debt, which the record shows was the debt of her husband only. These are errors, in substance, for which the decree must be reversed.

It is objected that the record does not show that the hearing was upon the "answers," and that the cross-bill was not disposed of. These are mere irregularities in form. Undoubtedly an order should have been made disposing of the cross-bill, and when the record undertook to recite in detail the pleadings considered at the hearing, the answers, regularly, should have been mentioned.

The judgment of this court is, that, in so far as the decree of the circuit court found that there was any amount due to complainant from Mary O'Brian—the sum of $555.33, or any amount whatever—and in so far as said decree ordered that she should pay to complainant that sum, or any amount of money, and in so far as said decree required said defendants, or either of them, to surrender to complainant the immediate

possession of the mortgaged premises, the same shall be and the same is reversed, at the costs of defendants in error, and in all else said decree is affirmed.

The writer of this opinion thinks that the decree should be wholly reversed, and at another hearing the plaintiffs in error should have an opportunity to prove, if they can, the sworn statements contained in their respective answers, but the majority of the court hold otherwise.

Decree affirmed in part.

ARTHUR HARSHA

v.

JOHN W. MCHENRY.

WRIT OF ERROR—*when it will not lie.* An order sustaining exceptions to the report of a commission of surveyors in a proceeding instituted under the act to provide for the permanent survey of lands, approved March 25, 1869, is not a final order, upon which a writ of error will lie.

WRIT OF ERROR to the Circuit Court of White county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Messrs. POLLOCK & KELLER, and Messrs. MCDOWELL & MCCLINTOCK, for the plaintiff in error.

Messrs. CREBS & CONGER, for the defendant in error.

Per CURIAM: This was a writ of error, sued out to the circuit court of White county, to bring before us for review an order of that court sustaining exceptions to a report made by a commission of surveyors appointed in a proceeding instituted under the act to provide for the permanent survey of lands, approved March 25, 1869.

It appears, from the record, that, at the November term, 1874, of the court, the court sustained exceptions to the commissioners' report, and thereupon the petitioner asked leave to amend his petition, which the court allowed, and the cause

was continued, and, at the April term, 1875, of the court, the proceeding was, on motion of the petitioner, dismissed.

This, in our opinion, ended the case. The order sustaining the exceptions was not a final order, necessarily operating to defeat the further prosecution of the proceedings, for it was competent for the petitioner to still have the report referred back to the commissioners for correction, or to have new commissioners appointed. See Laws of 1869, Sess. Acts, p. 242, § 4. And a writ of error does not, therefore, lie.

The writ of error is dismissed.

Writ of error dismissed.

JO ROBINSON

v.

WILSON K. BROWN *et al.*

1. PRACTICE—*rendering final judgment with plea unanswered.* Although it is irregular to proceed to final judgment against a defendant while any one of the pleas remains unanswered, yet, by going to trial in such a case without demanding to have the pleas answered, he waives the objection, and can not assign the want of replications as error in the Supreme Court.*

2. JUDGMENT—*against a portion of several defendants.* A finding by the court that one of several defendants has been adjudged a bankrupt, and rendering judgment against the other defendants, and not against him, is virtually a judgment in his favor.

3. PRACTICE IN SUPREME COURT—*plaintiff can not assign error which does not affect him.* A plaintiff in error can not assign an error committed against his co-defendant in the court below, when his rights are not affected thereby.

4. EVIDENCE—*record of judgment.* It is not necessary to prove that the record book of a court is such record, when offered in evidence in such court. The court will take judicial notice of its own record books, and they prove themselves when offered in evidence in such court.

5. LEVY—*on real estate not a satisfaction.* A levy upon real estate is not, like a levy upon personal property, a *prima facie* satisfaction of the execution.

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*See *Richeson* v. *Ryan et al.* 15 Ill. 13, and cases there cited.

6. RECORD—*of court can not be changed at subsequent term.* A court has no power to change its judgment in any material respect at a subsequent term.

7. SALE ON EXECUTION—*former levy not ground for setting aside.* The fact that a levy on real estate was made under an execution issued on the original judgment, and not disposed of, is not a sufficient reason for setting aside a sale under a subsequent execution issued upon a revival of the judgment by *scire facias*.

WRIT OF ERROR to the Circuit Court of Saline county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. ALFRED C. DUFF, for the plaintiff in error.

Mr. H. H. HARRIS, for the defendants in error.

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

This was a *scire facias*, to revive a judgment rendered at the August term, 1859, of the circuit court of Saline county, brought by Wilson K. Brown against John S. Eubanks, William G. Sloan, Moses P. McGehee and Jo Robinson, to the November term, 1874, of said court.

The defendants were all served except Eubanks.

At the return term, Sloan pleaded bankruptcy, *nil debet*, and *nul tiel record*. Robinson filed pleas of *nil debet*, *nul tiel record*, partial and full payment. A demurrer was sustained to the pleas of *nil debet*, and overruled to the other pleas. There do not appear to have been any replications filed to these latter pleas, but the record shows that the parties, by agreement, submitted the issue in the cause to the court, and after hearing the evidence, the court rendered judgment against the defendants, Robinson and McGehee, for $67.82, the amount remaining unpaid of the original judgment for $283.05, with interest, after having deducted the sum of $270, which had been made on execution. Sloan was found to be a bankrupt, and that he had been adjudged to be such under the general bankrupt law.

Robinson appealed to this court.

It is insisted that the court below erred in proceeding to final judgment while any one of the pleas remained unanswered.

Although this was irregular, it was held, in *Bunker et al.* v. *Green*, 48 Ill. 243, that, by going to trial in such a case, without demanding to have the pleas answered, the defendants waived the objection, and could not assign the want of replications as error in this court, especially when it did not appear, as here, that any injury resulted therefrom. It is objected, too, that the court erred in not making any disposition of the case as to the defendant Sloan, and in not defaulting McGehee, who had failed to plead. In finding that Sloan had been adjudged a bankrupt, and not rendering judgment against him, there was virtually a judgment in his favor. The plaintiff in error, Robinson, can not assign errors committed against a co-defendant, where his rights, as in this case, are not affected by the error. *Greenman et al.* v. *Harvey*, 53 Ill. 387.

There is nothing in the objection that the court admitted the former judgment in evidence without proof being made that the same was the record of a judgment. The judgment was read in evidence from the record book of the same court hearing the cause, of which the court took judicial notice, and it proved itself.

We perceive no foundation for the objection that the judgment was for a greater amount than was remaining due.

Objection is taken to the form of the judgment, it being for $67.82, with an order that execution issue therefor. As a judgment reviving a former judgment, it might have been in a more approved form, but we regard it as substantially sufficient. Taking the entire record, it appears sufficiently that the judgment was one of revival of a former judgment, and that it was not an independent, original judgment.

It is claimed, further, that the judgment was erroneous, because there had been a levy of an execution upon the original judgment on real estate, which levy had not been disposed of.

A levy upon real estate is not, like a levy upon personal

property, a *prima facie* satisfaction. *Gregory et al.* v. *Stark et al.* 3 Scam. 611; *Gold* v. *Johnson*, 59 Ill. 63. The subsisting prior levy did not form a bar to the revival of the judgment.

There was a motion made by Robinson, at a subsequent term of the court, to change the judgment and to set aside a sale under an execution thereon, of certain real estate which had been made to one Mitchell. The overruling of this motion is assigned as error. The court had no power, at a subsequent term, to change the judgment in any material respect. *Cook* v. *Wood*, 24 Ill. 295.

There were various extrinsic alleged reasons for setting aside the sale, which rested solely upon the unsworn statement contained in the motion, being unsupported by any showing whatever of evidence. One ground of the motion was, the subsisting levy on real estate which had been made under the prior execution on the original judgment. However that might have been as ground for staying proceedings under the subsequent execution and levy until the previous levy had been disposed of, it was not sufficient reason for setting aside the sale which had already been made under the subsequent levy. *Gold* v. *Johnson*, *supra*. We find no error in overruling this motion.

The judgment will be affirmed.

Judgment affirmed.

ROBERT T. BROCK *et al.* Admrs.

v.

ALLEN M. SLATEN.

1. CLAIMS AGAINST ESTATE — *allegation and proof must correspond.* Where a claim filed against an estate is for money due under an alleged specific contract between the claimant and the deceased, proof of the admissions of the deceased of obligations or undertakings, on his part, to the claimant, other and different from the claim filed, will not sustain the claim, and it should not be allowed on such proof.

2. SAME—*should be closely scrutinized.* A claim filed by a grandson against his grandfather's estate, for a large amount, on account of an alleged agreement by the grandfather to pay him for changing his residence, should be closely scrutinized by the jury passing upon the same, and all the facts and circumstances should be carefully weighed and considered.

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

Messrs. WARREN & POGUE, for the appellants.

Messrs. SNEDEKER & HAMILTON, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

It appears, from this record, that, at the August term, 1875, of the county court of Jersey county, sitting in probate, Allen M. Slaten presented a claim against the estate of Isaac N. Piggott, deceased, represented by Robert T. Brock and Mary Jane Brock, his administrators, of which the following is a copy, and which was then filed:

Estate of I. N. PIGGOTT,
To A. M. SLATEN, *Dr.*

To amount due A. M. Slaten on a contract made by said I. N. Piggott with said A. M. Slaten, to remove with his family to the city of East St. Louis, in the county of St. Clair, in the State of Illinois, and that he, said Piggott, would compensate A. M. Slaten therefor, in the year A. D. 1873,—$1200.

The claim being resisted by the administrators, a trial was had before the judge, resulting in a judgment in favor of Slaten against the estate for the sum of eleven hundred and twenty-five dollars, in the seventh class, and that the plaintiff pay the costs.

The administrators appealed from this judgment, to the circuit court, and, during the pendency of the cause, the court permitted the plaintiff to file an additional account, to embrace a claim for interest, to the amount of one hundred and twenty dollars.

The defendants then filed an account, on behalf of the estate,

against the plaintiff, made up of a large number of items, and amounting, in the aggregate, to two thousand seventy-five dollars and sixty cents.

The cause was submitted to a jury, the trial resulting in a verdict for the plaintiff for one thousand three hundred and twenty dollars. Various reasons were assigned, on a motion duly entered, for a new trial, which the court denied, and rendered judgment on the verdict.

The deceased, Isaac N. Piggott, died at the house of one of his daughters, in the city of St. Louis, in the State of Missouri, on the 11th of February, 1874, at the advanced age of eighty-one years. The plaintiff, and claimant, is a grandson, and seems, up to the fall of 1873, to have been a pet of his aged grandfather, whom, being a man of wealth, he was disposed to advance in life, and, no doubt, in those garrulous moments which occur to most aged men, the old gentleman had declared what great things he was to do for this grandson. It does not appear, by anything in this record, that the grandson was in any business whatever. The first we hear of him was as a resident of the town of Otterville, in the county of Jersey, contemplating the establishment there of a soap factory. His grandfather, being the owner of an interest in the city of East St. Louis, then quite a prosperous town, and promising, from its position, great future advancement, and desirous, no doubt, of having his property there improved and attended to, he himself being too far advanced in years to give it the necessary care and attention,—prompted as well by a desire to aid his grandson as his own interests, it can not be questioned, if we credit the testimony of Hammison, Fogue and plaintiff's father, John W. Slaten, old Dr. Piggott, when on a visit to Jersey county, in September, 1873, did make propositions to his grandson to abandon his proposed enterprise at Otterville and come to East St. Louis with his family. These witnesses do not concur as to the precise terms of the proposition, or as to the extent and character of the inducements offered. Fogue says Dr. Piggott called on him in East St. Louis, in October, 1873, and asked him to make estimates for building a store-

house with residence above—a two-story building; that he wanted to build it for his grandson, whom he expected there to reside with him. The estimate was made as to the cost, except the soap factory—that, they "lumped off." The doctor said he wanted to get Mack Slaten to come there—that he would have to offer him inducements—was going to build the building for his grandson—expected to make his home with his grandson in East St. Louis, and have his grandson assist him in his business—witness did build the building, and Mr. Slaten was there—have seen him go in and out—can't say whether he made his home there or not.

Hammison says he had a conversation with Dr. Piggott during the fall of 1873—saw him on the street and talked with him—he wished witness to see Mack Slaten, and tell him what he would give him to move to East St. Louis—have been negotiating with him to move down, and live with him as long as he lived—tell him, said the doctor, "I will give him all my interest in my land at the mouth of the Illinois river. In addition to that, I will build, upon one of my lots in East St. Louis, a house big enough for both families to live in—I will make him a warranty deed, to be good at my death." Witness delivered the message. This occurred, as we understand the witness, at Otterville, in Jersey county, at the time John W. Slaten alludes to in his testimony. Mr. Slaten says, at the September term, 1873, of the Jersey circuit court, Dr. Piggott was there, with whom he had three different conversations in relation to his son, and he offered various inducements. The doctor offered to give plaintiff five acres of ground about five or six miles from East St. Louis, on the line of the Belleville railroad, near Centreville station, and one-fourth of an acre of the land that had been cut through to drain the sloughs, for the purpose of situating the soap factory. On the 1st of November, 1873, witness was in East St. Louis, and went out with them to Centreville. The old gentleman told his grandson to select his ground, and he selected five acres near the bluff, and half an acre of slough. A change, however, was made, Dr. Piggott saying that the tract at the bluff

was too small to divide, and that he had made arrangements to buy an acre of a man to whom he had sold. We understand no selection was then made.

The witness further says, in the conversation at Jerseyville, Dr. Piggott wished to remove from where he lived, and was to build a house in East St. Louis suitable for both of them. In that conversation, the doctor said he was to give Mack fifty dollars a month to attend to his business whilst he was getting the factory up, and upon his removal, that house to be Mack's. There was no dimension, size or price set to the building. As to the soap factory, the doctor said he would let him have the ground along Cahokia creek, and thought it would be better if Mack would accept the change. Witness further testified that the doctor and his wife were to have rooms in the house he was to build, and Mack was to have it at the time of the doctor's death. Mack was to have, besides, fifty dollars a month, and his expenses for coming down and attending to the doctor's business.

It appears, from the testimony of this witness, that Dr. Piggott lived in East St. Louis, and his wife in the city of St. Louis with one of her daughters. He also said the doctor made Mack a deed for the lot he held, in trust, the consideration expressed therein being $8380, and the doctor said Mack had paid for it, but he is ignorant when or how Mack got the money to make the payments—said Mack received papers the doctor handed to him—he also made a deed to Mack for the Camden lots, which we understand to be the land at the mouth of the Illinois river—there were twelve lots.

It seems it was the intention of A. M. Slaten, called by the witnesses Mack Slaten, to go into the business of soap making at Otterville, in Jersey county, in company with one William T. Noble, a resident of that place, and he is sworn and examined as a witness to sustain plaintiff's claim of a contract with his deceased grandfather. Noble states he had several conversations with Dr. Piggott, in East St. Louis, which place he visited several times to see about the soap-making enterprise. He testifies, in the first conversation he had with the

doctor, in the last of October or first of November, 1873, the grandfather and grandson then living in East St. Louis, in the house built for the doctor, into which they were moving, the doctor told witness he had got Mack down there, and was going to do well by him—was going to build him a house and set him up in business making soap.

We think this testimony clearly establishes the proposition that overtures had been made by Dr. Piggott to his grandson, and inducements held out to him to remove from Otterville to East St. Louis, but no two of the witnesses concur as to the nature of those inducements. They are stated differently by the several witnesses, and they, neither of them, establish plaintiff's claim as he himself alleges it. In his declaration, or account, filed with the probate court, he claims under a specific contract, made by the deceased with him, to pay him one thousand two hundred dollars, in consideration the plaintiff would remove with his family to East St. Louis in the year 1873. This is the substance and ground work of the claim, and it is apparent no witness establishes it, and, on the principle that the allegations and proofs must correspond, the plaintiff has failed in his action.

But considering it as true that the nature of the inducements held out to plaintiff was as stated by the witnesses, we think it is proved Doctor Piggott, in his lifetime, carried them all out and performed them substantially.

If we take Fogue's version as the true one, we have his authority for saying the doctor carried out his promise—he built the house, and the grandfather and grandson occupied it.

If we take Hammison's version, the same is the result. The doctor did convey to plaintiff the land at the mouth of the Illinois river; he did build a house upon one of his lots in East St. Louis, big enough for both families to live in, the old gentleman having his rooms in it, and living with his grandson's family, warmed by the same heating stove, and taking their meals at the same table, as we should infer from the testimony.

If the version of plaintiff's father is to be received as the

true one, then it is so wholly different from the claim presented by the plaintiff as to forbid its allowance. He says plaintiff was to have fifty dollars per month for attending to the doctor's business; he was to have ground on which to erect a soap factory; he was to build a house suitable for both of them; that the doctor and the old lady would have rooms in the building, and at the time of the doctor's death, Mack was to have the house—none of these is claimed by the plaintiff in his account filed.

The father, John W. Slaten, states distinctly, on cross-examination, that Dr. Piggott told Mack if he would go down there (East St. Louis,) and attend to his business, he would give him fifty dollars a month and pay the expenses of moving his family, and would give him five acres of ground on the bluff that was on the south-east side of the slough that runs down there. This was the whole contract.

The testimony of Noble is mainly relied on to prove a specific acknowledgment of indebtedness by Doctor Piggott to his grandson, of twelve hundred dollars. This is not made a part of plaintiff's claim, and therefore could not be recovered in this action. But taking it as an item of account, is it not strange and incomprehensible that plaintiff himself should not, in his testimony, have even alluded to it, and furnished some information of the transaction out of which the indebtedness arose? He never, at any time, claimed that his grandfather was indebted to him on any other contract than on the one he set out in his claim before the court of probate. Then he gives us to understand that, to remove with his family to East St. Louis, his grandfather was, by contract, to pay him, as compensation, twelve hundred dollars. We have seen, none of the witnesses, Fogue, Hammison or J. W. Slaten, testify to any such thing, nor does Noble. He states distinctly that, at a saloon on or near Broadway, in the city of St. Louis, he had an interview with Dr. Piggott, to which he was invited by the doctor, at which the doctor said he was to furnish plaintiff money to go into the soap business—his share needed to go into business; that he owed plaintiff twelve hundred dollars, which he

would pay as soon as witness returned from the south, and that it ought to have been paid before. This witness is positive this conversation took place in this saloon on December 31, 1873. About this he can not be mistaken. This is the precise date, the very day on which this acknowledgment was made, if made at all, and so the plaintiff charges, as he claims interest from that day, namely, from January 1, 1874, as his account filed shows. Now, there can be no doubt, from the testimony of Dr. J. I. Piggott, who was with him at a Christmas dinner, December 25, 1873, that he was then in his eighty-first year, and very feeble; so feeble that they had to assist him up and down stairs, and continued to sink until February 11, 1874, when he died; was there every day or two after Christmas until he died; don't think he was out of his house after Christmas.

Howard Y. Lane, a son-in-law of Dr. Piggott, testifies that the doctor was taken sick on the 24th of December, 1873, and died on the 11th of February, 1874; was making his home with witness, and came down stairs to dinner on the next day (Christmas), and was helped up stairs, and never went out until he was carried out, a corpse. His daughter, Mrs. Brock, states, the 24th day of December was the last day he was out of the house, until he was carried out, a corpse; he died on the 11th of February, 1874.

This testimony is uncontradicted, and clearly shows that, on the 31st of December, 1873, the deceased, Dr. Piggott, could not have had this interview in a beer saloon on Broadway, about which Noble testified, and the same must be a mistake. If such an acknowledgment was made at that time by the doctor, it is very strange the plaintiff did not make it the groundwork of his action. It would have been a simple account for money due and unpaid, for, by Noble's statement, this twelve hundred dollars had no relation whatever to the removal of plaintiff to East St. Louis, and did not grow out of any one of the contracts supposed to be testified to by the other witnesses.

This is a claim, and a large one, against the estate of a dead

man, in whose lifetime not a whisper of it is heard, and to which the plaintiff then made no pretensions. It is almost impossible, if such a claim really existed, that the plaintiff should not have mentioned it to some one; that his father should not have known something about it; that the plaintiff himself should have been willing to establish it by his own oath, or at least that he should have been able to supplement Noble's testimony by showing out of what the indebtedness arose—of what items it consisted.

There is not the slightest proof in this record that plaintiff, prior to his removal to East Louis, was ever in a position to render his grandfather any valuable services, or loan him money, or be useful to him in any way, and it is in proof, after he moved to East St. Louis, he was in the employment of his grandfather not more than one month, for which, according to the testimony of his father, J. W. Slaten, he was to receive fifty dollars.

We have gone thus fully into the testimony on behalf of the plaintiff, for the purpose of showing that the jury did not weigh well all the circumstances of the case, and too readily yielded to the demands of a living claimant.

The jury seemed to have ignored all the claims set up by the administrators, as just credits, such, for instance, as the check on the Continental Bank for fifty dollars, which, we understand, was drawn by Dr. Piggott, in favor of plaintiff, and indorsed by him, for fifty dollars, on which he received the money. If the check was drawn by Dr. Piggott, and indorsed as stated, the presumption is, it was a gift, or a payment of some indebtedness. There is no proof it was a gift to plaintiff, and the reasonable inference is, it was paid on account of their dealings, whatever they may have been, and for which the estate was entitled to credit. The second instruction given on this point for plaintiff was erroneous, and should not have been given. So of the deed for the lot for the consideration of one thousand three hundred and eighty dollars. The date of that deed is November 27, 1873, at which time it is quite evident plaintiff had not the means to pay for it, and

the manner in which he obtained possession of it, and sent it to Belleville for record, does not appear so well from the testimony of Brock. If plaintiff did pay for this lot, we are constrained to believe, from all the testimony, it was conveyed to him by the doctor in fulfillment of his promise to aid him if he would remove to East St. Louis; that one dollar was ever paid for it in money, there is not a particle of evidence to show; nor is it shown plaintiff had any resources he could draw upon for money.

The jury trying this cause do not seem to have regarded with much favor any of the claims set up by the administrators as proper credits against the plaintiff's claim. Though sworn to by a disinterested witness, Brock, who, though the son-in-law of deceased, had no claim to a distributive share of the estate, the jury preferred relying on the testimony of the plaintiff, he deposing in his own interest, and claiming against a dead man. We should think a jury, in all such cases, would be disposed to place most reliance on a disinterested witness. They can not be too cautious in scrutinizing claims of this nature. They are daily made, and juries should be careful, and weigh well all the facts.

We have examined this record with care, and, excluding Noble's testimony, there is nothing satisfactorily proved in this record to satisfy us the estate of Isaac N. Piggott is indebted in the sum of thirteen hundred and twenty dollars, or in any other sum, to the plaintiff, and that the judgment he has obtained for that sum is unjust, and ought to be reversed. We do not think the case has been fully explained to the jury, and well understood by them. Some explanation should be given of the time when and how, on what account, the deceased owed his grandson the twelve hundred dollars testified to by Noble. Some explanation should be given of the time when, and the manner in which plaintiff paid his grandfather one thousand three hundred and eighty dollars for the lot in East St. Louis, and on what consideration he received from his grandfather the Moss note for ninety-three dollars, and the Veitsh note for forty-six dollars.

The case, as it stands, has an unfavorable aspect, and we are of opinion justice would be best subserved by sending the cause to another jury, for further investigation, and for that purpose the judgment is reversed, and the cause remanded for a new trial.

Judgment reversed.

JO ROBINSON

v.

JOHN TATE *et al.*

SALE UNDER DECREE—*upon what evidence set aside, when made sixteen years after decree.* A decree of foreclosure was rendered in 1857, and three payments were made thereon, which were not disputed, and no sale was made until 1873, when a sale was made, and, on a report thereof by the master, the defendant moved to set aside the sale, on the ground that the decree had been paid. Upon a reference to the master, the defendant testified that the amount of the decree had been paid in full, and produced an account of goods which he had furnished complainant, and which were to be applied, as he said, on the decree, and which, if correct, paid the decree in full; he also proved a conversation between himself and complainant, in which it was understood that if the defendant, in the payments he was making, should overpay the amount of the decree, the complainant, upon a settlement, should refund. The defendant did not testify that he had not received the goods named in defendant's account, but simply that he did not remember anything about the account, and that it was never presented to him: *Held*, that in view of the fact that sixteen years had elapsed between the recording of the decree and the sale, the evidence was sufficient to justify the setting the sale aside on the ground that the decree had been satisfied.

WRIT OF ERROR to the Circuit Court of Saline county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. ALFRED C. DUFF, and Mr. JAMES M. GREGG, for the plaintiff in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This is a writ of error brought by Jo Robinson to reverse a decree of the circuit court of Saline county, wherein a sale of

certain premises was made by the master in chancery under a decree of foreclosure, in a certain cause, wherein Robinson was complainant and John Tate and Sally Tate were defendants.

The decree under which the sale was made was rendered on the 5th day of November, 1857, in which the defendants were required to pay, within a certain time, $219.16, and in default of payment the mortgaged premises were ordered to be sold in satisfaction of said amount and costs. The sale under this decree was made on the 6th day of December, 1873, over sixteen years after the decree was rendered, and the mortgaged premises were purchased by the complainant for $125. On the 11th day of May, 1874, the master filed a report of sale, and asked that it might be approved. The defendant, however, appeared and filed exceptions to the report of sale, and prayed that the sale be set aside—

1st. For the reason the decree was rendered more than seven years prior to the sale.

2d. On the ground that the decree had been paid and satisfied.

It appears, from the record, that prior to the sale a controversy had arisen between the complainant and defendant in regard to the amount that had been paid on the decree, and by agreement of the parties a reference was had to the master to take proof upon the question. The evidence was taken and is incorporated in the record.

This testimony was before the court for consideration on the exceptions to the report of sale, and the only question which we deem it material to consider, although others of a technical character have been raised, is, whether the evidence before the court justified the decree setting aside the sale.

Upon the decree appears two credits, one of $120, December 8, 1868, and another of $101, dated May 31, 1869. The defendant also held a receipt, dated September 3, 1861, for $7.04, to be applied upon the decree.

The defendant, in his evidence, testified that the decree had been fully paid. He also produced an account, consisting of

various items for goods which he had furnished the complainant, which were, as he says, to be applied upon the decree.

One Peter Robinson testified to a conversation between the complainant and defendant, in which, as he says, it was understood that if the defendant, in the payments he was making, should overpay the amount of the decree, in that case, on settlement, the complainant was to refund.

There is no controversy in regard to the two credits indorsed upon the decree, nor in regard to the receipt for $7.04. If, then, the account for goods furnished be correct, and the articles therein contained were to be applied upon the decree, it has been fully paid.

The complainant, in his testimony, does not testify that he never received the goods named in the defendant's account. It is true, he says, that "he don't remember anything about the account, and that he never saw it before, and that it was never presented to him." But this may all be true, and, at the same time, he may have received each and every item charged in the account. If the complainant has forgotten in regard to the account, and if the defendant failed to make out and present the account to him, his evidence may all be true, and, at the same time, the goods may have been furnished by the defendant, as he testified in his evidence.

Again, it seems strange, if the decree had not been paid, that no steps were taken, for over sixteen years, to enforce its payment. The complainant has not attempted to explain or account for this extraordinary delay.

Under such circumstances, the evidence before the court, in our opinion, was sufficient to warrant the conclusion that the decree had been paid. The court, therefore, did right in setting aside the sale, and the decree must be affirmed.

Decree affirmed.

Cairo and St. Louis Railroad Company

v.

John Killenberg.

1. Garnishee—*answer considered as true until disproved.* The answer of a garnishee, until it is contradicted or disproved, must be considered as true. If judgment is demanded upon the answer, it must clearly appear therefrom that the garnishee is chargeable, or he will be discharged.

2. Same—*not liable if certificate of indebtedness has been given to debtor and sold by him.* Where a railroad company issues to its employees certificates of indebtedness, and is afterwards garnisheed on account of such indebtedness, it will not be liable if the payees of the certificates have sold the same before the service of garnishee process, notwithstanding such certificates are not negotiable in law.

Appeal from the Circuit Court of St. Clair county; the Hon. William H. Snyder, Judge, presiding.

Messrs. Searls & Millard, for the appellant.

Mr. William Winkleman, for the appellee.

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

The only question here presented for determination is, whether the appellant, the Cairo and St. Louis Railroad Co., is liable as the garnishee of Thomas Gorman.

The facts are, that on March 17, 1875, judgment for $41.10 was entered, by a justice of the peace of East St. Louis, in favor of the appellee, John Killenberg, against Gorman. On the same day an execution was issued upon the judgment, returned "no property found," and a garnishee summons issued to the railroad company, returnable on the 23d of March, which was returned served. The railroad company not appearing on the return day, a conditional judgment was entered against it for $47.55. A *scire facias* was then issued, and returned served upon the railroad company, and, it not appearing upon the

return day, March 29, an absolute judgment was entered against it for $47.55.

From this judgment the company appealed to the circuit court of St. Clair county, where a trial was had at the September term, 1875, resulting in a verdict and judgment against the railroad company, in favor of Killenberg, for $47.55.

The railroad company appeared in answer to the garnishee proceeding, for the first time, upon the trial in the circuit court, and then its cashier, E. S. Sargent, on its behalf, gave testimony that, at the time of the service of the garnishee summons, the railroad company was not indebted to Gorman, as he understood it, and had not been indebted to him from that time to the time of trial, and that the company had nothing in their possession belonging to him that he knew of. Upon this testimony, which was given by the witness upon his examination in chief, and to be taken as the answer of the railroad company, the company was entitled to be discharged as garnishee, unless the testimony was overcome by contradictory evidence of indebtedness. The answer of a garnishee, until it is contradicted or disproved, must be considered as true. If judgment is demanded upon the answer, it must clearly appear therefrom that the garnishee is chargeable, or he will be discharged. *The People* v. *Johnson*, 14 Ill. 342, *Kergin* v. *Dawson*, 1 Gilm. 86. There was no contradictory proof attempted to be made, further than by the cross-examination, by the plaintiff, of this same witness. He testified, on cross-examination, that the company and Gorman settled on the 12th of March, 1875, and the company gave him, in full of their indebtedness to him, two certificates, one of which is as follows:

No. —— Time Check.

Cairo & St. Louis Railroad Company.

This certifies that Thomas Gorman has worked twenty-three and one-half days in the month of January, 1875, as boiler cleaner on ———, at $1.75 per day, amounting to forty-one dollars and twelve cents..... $41 12

Deduct board at ——..... — —

Deduct money and goods advanced..... — —
Balance due, forty-one dollars and twelve cents..... $41 12
Due when January roll is paid.
(Signed) R. N. Clark,
Cashier.

Endorsed as follows:
Thos. Gorman,
John Walker, No. 318 Olive street.

The other was similar, except it was for $49 for 28 days work, in February, 1875, and bore the endorsement "Benj. Walker," instead of "John Walker." The witness stated that this was the usual course, at that time, of the railroad company in paying off men. The company, having no ready money, gave this paper to the men in payment, and they went into the market and sold it, it being negotiable in fact and salable in St. Louis, where the transaction was had; that Gorman wanted means, and took the time checks instead of money and sold them; that these time checks given to Gorman were presented for payment by Benjamin Walker, who bought them from Gorman; that Walker kept a pawnbroker's establishment on Olive street, St. Louis, and bought many of the checks; that these two were paid by the company to Walker, the one for January, March 27, 1875, and the one for February, May 4, 1875.

It is not perceived that this evidence on cross-examination disproves the testimony in chief, or shows clearly that the garnishee was chargeable. True, these certificates of indebtedness were not negotiable in law, as they were not payable at a time certain, but only when the January and February rolls were paid, a contingency which might never happen. Yet, they might be sold and the equitable interest in them passed to a purchaser. The turning point, as to the company's liability or non-liability as garnishee of Gorman, was the time at which Gorman sold the certificates. If he had sold them before the service of the garnishee summons, then the company rightly made the payment to Walker, the purchaser, and were not liable as the garnishee of Gorman. But if the sale of the certificates was after the service of the

garnishee summons, then the company, at the time of such service, would have been indebted to Gorman and liable as garnishee. Had the evidence elicited on the cross-examination gone to the extent of showing that these certificates were sold by Gorman after the service of the garnishee summons, then it might be considered as overcoming the testimony in chief, and showing a liability as garnishee. But it fell quite short of this. The certificates were issued March 12, the garnishee summons was issued March 17, and returned served March 23, the day of service not appearing. Gorman appears to have been in straitened circumstances; the certificates which were sold by him and paid to the purchaser were introduced in evidence, bearing upon them the endorsement of Gorman in blank. All this quite consists with the fact that the certificates were disposed of by Gorman before the garnishee summons was served, and, indeed, conduces to the proof thereof.

We think, upon the evidence adduced, the garnishee should have been discharged.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

Mr. JUSTICE WALKER: I am unable to concur in this opinion or the judgment rendered herein.

JAMES P. BARLOW *et al.*

v.

JOSEPH R. STANDFORD *et al.*

1. DE FACTO OFFICER—*his acts worthy of credit.* An officer *de facto* is one who has the reputation of being the officer he assumes to be in the exercise of the functions of the office, and yet is not a good officer in point of law. The official acts of such an officer are always regarded as worthy of full faith and credit.

2. SERVICE—*amending return at subsequent term.* An amendment to a return upon a summons made at a subsequent term, upon notice to the adverse party, by the officer who made the service in the first instance, in

accordance with the facts from his personal recollection, by leave of court, is rightfully and properly made, and if the service, as amended, shows the court had jurisdiction of the person of the defendant, it could proceed to judgment.

3. EQUITABLE TITLE—*will defeat naked legal title on bill for partition.* Where a mortgage was foreclosed, and the decree provided that, on default of payment of the amount found due, the equity of redemption should be barred, and, default being made, the property was sold as directed by the decree, and no deed made, but the fact reported to the court, and a decree entered that the title to the property be vested in the purchaser, it was *held*, that such an equitable estate vested in the purchaser as to preclude the heirs of the mortgagor from asserting title by bill in equity for a partition of the land.

4. PURCHASERS—*under decree, protected though decree is afterwards reversed.* Purchasers under a decree of a court of equity, whilst it is in full force, and before any writ of error has been prosecuted, and without any notice whatever of claims and equities of the parties thereto, will be protected, notwithstanding the decree is afterwards reversed.

APPEAL from the Circuit Court of Crawford county.

Messrs. CREWS & HAYNES, for the appellants.

Mr. FRANKLIN ROBB, and Mr. E. CALLAHAN, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Both parties concede the title to the lands in controversy was in Enoch Willhite, in his lifetime. This bill is for the partition of the estate. Complainants, who are the heirs and grantees of heirs of Enoch Willhite, deceased, claim that he died seized of the lands, and that the title was in him; having come to them, they are endeavoring to maintain it. While, on the other hand, defendants insist they own the lands by a title acquired under a mortgage executed by Willhite in his lifetime upon them, in the year 1839, to secure a debt to the school fund.

In 1844, the mortgagees, by bill in the circuit court, foreclosed that mortgage, and, at the master's sale under the decree, the lands were bought in by the trustees of schools. Afterwards, the trustees, by quitclaim deed, conveyed the

lands to defendants Pearce and Standford. All the other defendants claim as grantees of them.

Since 1858 these lands have been, in one way or another, the subject of litigation. It was thought the description of the lands, as given in the mortgage, was too indefinite, and accordingly, in that year, the trustees of schools exhibited a bill, making the heirs of Enoch Willhite, deceased, parties, to correct the description, and for other relief. A demurrer interposed by the heirs was sustained, and the bill dismissed. That seems to have been the end of that litigation.

In 1860, Zadock A. Pearce, joining with his wife, who was one of the heirs of Enoch Willhite, filed their bill, making all the other heirs defendants, in which it was alleged, Enoch Willhite died seized of the lands in controversy, subject to a mortgage previously given to secure a debt to the school fund, asking, among other things, for the sale of the lands, and after the payment of the debt to the school fund, that the remainder might be divided between the heirs. That bill was sworn to by Zadock A. Pearce. On the hearing of that cause, a decree was rendered in accordance with the prayer of the bill, and, at the sale under that decree, Pearce and Standford became the purchasers of the entire estate, which was sold *en masse* for the sum of $1000. At the June term, 1868, the decree in this latter case was reversed in the Supreme Court, and the cause remanded. But, in the meantime, Pearce and Standford had bought the lands from the school trustees, and, on the remandment of the cause, complainants obtained leave and amended their bill by setting up, substantially, the same facts as alleged by defendants in their answer to this bill, viz: that Enoch Willhite did not die seized of the lands; that the trustees of schools had previously, by the decree and sale in the foreclosure suit, obtained all the title that Enoch Willhite, in his lifetime, had, and they were then the owners. But complainants, at a subsequent term of court, dismissed their suit, and that was the end of that branch of this litigation.

No further litigation in regard to these lands was had until 1873, when the present bill was filed for partition.

Defendants Pearce and Standford, each of whom married one of the heirs of Enoch Willhite, were informed, before their purchase under the decree of 1860, on the suit of Pearce and wife against the other heirs, and before they bought the title of the trustees of schools, whatever it was, of the rights and equities insisted upon by complainants. Most, if not all, of the subsequent grantees of Pearce and Standford bought for full consideration while that decree of 1860 was in full force, and before any writ of error had been sued out in the case, but some of them had actual notice of the claims of complainants before buying.

Whatever title to these lands the trustees of schools acquired under the decree and sale under the mortgage, which it is conceded was the prior lien, passed by their deed to Pearce and Standford, and hence to their grantees. That decree and sale were in 1845, and before the death of Willhite, the mortgagor. Should it be determined that decree was valid, the sale thereunder would bar the equity of redemption that was in Willhite in his lifetime, and hence would bar the rights of all claiming under him. As a matter of course, the heirs could assert no rights that their ancestor could not.

One principal objection taken to that original decree is, the court had no jurisdiction of the person of defendant Willhite, by service of process or otherwise. The summons issued in that suit was served upon defendant Willhite by a deputy sheriff, on the 14th day of September, 1844. He was a deputy under the sheriff whose term of office had or was about to expire. His successor had been elected, and on the 12th day of September, 1844, he took the usual oath of office, and filed his bond, but it was not approved until eleven days thereafter. It seems the statute then in force required the newly elected sheriff to give the outgoing sheriff notice that he had qualified, and was ready to enter upon the discharge of the duties of the office. R. L. 1827, p. 374, sec. 12. No notice was given—at least it does not appear any was given. The fact the newly elected sheriff had taken the oath of office and presented his bond, does not seem to have been known either to the sheriff

or his deputies, for they continued to act as they had previously done. This is evident from the fact, process issued by the circuit clerk was given to them to be served, as was done in this case. Hence, it will be observed the deputy who served the summons was an acting officer under color of authority, and, according to all our decisions on that question, the official acts of a *de facto* officer are valid. An officer *de facto* is defined to be one who has the reputation of being the officer he assumes to be, in the exercise of the functions of the office, and yet is not a good officer in point of law. The official acts of such an officer are always regarded as worthy of full faith and credit. Any other rule would be disastrous to public interests. *Mapes* v. *The People*, 69 Ill. 523.

But the return of the officer upon the summons was itself defective, in not showing the manner of service. Leave was given by the court, upon notice to the adverse party, for the officer making the service to amend his return, so as to make it conform to the actual fact. That order, granting leave to amend the return, was, at a subsequent term of court, on motion of complainants, as it seems, set aside and held for naught. However, while that order was in force, the officer did amend his return upon the summons, and a copy, as amended, was given in evidence. As amended, the return shows the court had jurisdiction of the person of defendant, and the only question is as to the propriety of making the amendment. The authority of the sheriff or other officer to amend his return upon process, so as to make it speak the truth, has always been conceded to exist. *O'Conner* v. *Wilson*, 57 Ill. 226.

In the case at bar, the amendment to the return upon the summons was made upon notice to the adverse party, and was made by the officer himself who made the service in the first instance, in accordance with the facts from his personal recollection. This is exactly within the rule as declared in *O'Conner* v. *Wilson*, and we are aware of no reason why the return of the officer was not rightfully amended. Thus, it will be seen, the court had jurisdiction of the person of defendant and

the subject matter of the suit, and, therefore, could pronounce the decree it did.

On the hearing of that cause, the court decreed a strict foreclosure of the mortgage, and in case the sum found due was not paid within five months, that the mortgagor's equity of redemption should be forever barred. The money was not paid, and the special master advertised the property and sold it as directed in the decree. Upon the coming in of the report it was accepted, and the court ordered "that the title to said lands vest in said trustees," for the benefit of the parties interested in the fund. No deed was ever, in fact, made, but if a deed was indispensable to convey the legal title, nevertheless, an equitable estate vested in the trustees, which they could convey to Pearce and Standford, and that is sufficient to defeat the present suit.

Some of the grantees of Pearce and Standford, as we have seen, purchased while the decree of 1860, in *Pearce et al.* v. *Willhite et al.* was in full force, and before any writ of error had been prosecuted, and without any notice whatever of the claims or equities of complainants. Under the decision in *Wadhams et al* v. *Gay*, 73 Ill. 415, their interests, in any view of the case, will be protected and their titles held good.

The decree of foreclosure, under which defendants deraign title, was rendered in 1844, and the sale under it was made in 1845, before the death of the mortgagor. Whatever irregularities may have existed in the decree and sale, could have been readily known to him upon the slightest inquiry, yet he made no effort to have either set aside or reversed. It is not claimed the mortgage indebtedness was ever paid, either by the mortgagor in his lifetime or his heirs since his death. As we have seen, these lands have been the subject of litigation in the various courts of the State since 1858, consequently the condition of the title must have been known since that date to the heirs now claiming the lands. More than thirty years have elapsed since the decree in that cause was pronounced, but, from that day to this, the heirs have made no offer to redeem the lands from the mortgage indebtedness, or to have

the decree and sale set aside. Evidence in the record tends to show the mortgagor, after the decree and sale, abandoned all claims to the property covered by the mortgage, and certainly, after the lapse of so great a period, and other interests have attached, his heirs ought to be regarded as having long ago abandoned all equities in the premises, if any ever existed in their favor. All that complainants now do is to assert a mere legal title to the property that has come to them by descent. They have not and do not now offer by their bill to redeem the lands from what they insist was an irregular sale. When these lands were sold under the decree in the foreclosure suit in 1845, they sold for nearly or quite all they were worth, and it does not appear any great profits could have been realized by redeeming them. Since then a portion of these lands have been subdivided and sold as village lots, and valuable improvements made upon them. Had there been no appreciation in the value of the property, it is hardly probable the heirs would be seeking to recover it at this late day.

It is meet there should be an end of the litigation concerning these lands, and the title thereto forever put at rest. To that end the decree will be affirmed.

Decree affirmed.

Mr. JUSTICE SCHOLFIELD having, at one time, been of counsel in this case in the court below, took no part in its decision.

JAMES W. GIBSON

v.

HIRAM B. DECIUS *et al.*

TRUST—*promise to pay money when land is sold.* Where land is conveyed by a client to his attorney, for fees in a suit then pending, and afterwards other attorneys are employed, and assist in the management of the case, even if the one to whom the land is conveyed employs them, and tells them he has received a conveyance of land for fees, and that he will

pay their fees when he sells the land, such facts would not make him a trustee of the land for the joint benefit of all, or entitle the others to a partition of the land, or any other relief in a court of equity, whatever might be their rights in a suit at law.

WRIT OF ERROR to the Circuit Court of Jasper county; the Hon. JAMES C. ALLEN, Judge, presiding.

Messrs. BROWN & GIBSON, for the plaintiff in error.

Mr. JOHN H. HALLEY, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Defendants in error filed a bill, against plaintiff in error, to establish their title to and have partition made of the tract of land in controversy. Plaintiff in error denied all right or title of defendants in error in the land, and resisted a partition. Defendants in error claim that the land was conveyed to plaintiff in error in payment of attorneys' fees due to them and plaintiff in error for services rendered in a law suit, in which they were all retained by Mrs. Wakefield during its progress, and that he held it in trust for them, to the extent of their respective fees; but plaintiff in error insists that the land was conveyed to him to pay fees due him for services he had rendered in the case, and that defendants in error were not retained until after the contract for the conveyance was made with him, and that he never agreed to convey to, or hold any interest in, or any portion of the land, for them.

Complainant Decius testified that, either at the March or November term, 1872, of the court, plaintiff in error informed him that he had a suit to quiet title, and wanted him to assist in the case. Plaintiff in error, in his testimony, denies that he ever requested Decius to assist him; but he says that Thomas Wakefield, the husband of complainant, employed Decius to assist. He also says that Decius was the judge of the court in which the suit was pending at both of the terms he names. If he did not resign, he continued to be judge until June, 1873; so he could not have been consulted by any one or retained in the case before June, 1873. Hence he is mani-

festly mistaken as to the date of his employment. Plaintiff in error fixes the first interview between him and Decius at the December term, 1873.

Decius testified that there was no agreement about his fee, but plaintiff in error had told him he would pay him a fee when he sold the land—"he never agreed to give any specified part of the land to me; there was no agreement at all." Plaintiff in error had received a deed of conveyance for the land on the 24th of February, 1872, before defendants in error, or either of them, came into the case. Hence any arrangement by which Decius could acquire any interest in the land, would have to be made with plaintiff in error; and what Decius himself says, in his testimony, wholly fails to invest him with the slightest pretense to any such interest. All that it could possibly amount to was, a promise to pay him a reasonable fee when plaintiff in error should sell the land. He does not pretend, in his testimony, that plaintiff in error ever, either before or after his retainer, agreed to give him any part of or interest in the land. Then, on what known principle of law can it be held that plaintiff in error is his trustee for any portion or interest in the land? We are wholly unable to comprehend that any rule, either at law or in equity, would require or even sanction it. To declare such a trust, the evidence must be clear and convincing that such an agreement was made, or such acts were done, as the law will imply a trust; but here there is an entire want of such evidence.

Complainant Shaw testified that, at the March term, 1872, plaintiff in error came to him about the case, and wanted him to assist, and he agreed to do so at that time; that plaintiff in error told him that the fee depended on the success in the suit; that he was to get forty acres of land if he was successful. He testified that he supposed he was to share equally; that he was engaged before Decius, but plaintiff in error, soon afterward, told him that Decius was employed. He thinks he talked to plaintiff in error about taking a deed to them, when he informed him that he had taken a deed to himself; that "there was nothing agreed upon between Gibson and me as to the

amount of my fee, nor as to my having any specified portion of the land;" that his only services were in consulting and assisting at the trial; that he had no conversation with Mrs. Wakefield about any employment in the case, or any conversation with her on the subject.

Plaintiff in error denies, in his testimony, that he ever employed or asked Decius or Shaw to assist him in the case; that they both came to him, and said they had been retained by the husband of Mrs. Wakefield, before he consulted with them about the case. Mrs. Wakefield, who was the person for whom the legal services were rendered, testified that she conveyed the land to plaintiff in error for his services in law suits for her and her husband; that Shaw, at the May term, 1874, talked to her "about the case, and told me he had a notion to go into the case and help Gibson. I told him I would be glad if he would, but we would not be able to pay him anything, and his work would be for nothing; and he said he would help anyhow, whether we could pay him anything or not."

We, from this evidence, fail to see that there is the slightest semblance of an agreement, on the part of plaintiff in error, to convey, or hold this land, or any portion of it, or any interest in it, to Shaw. We can not, by any rule of interpretation, torture the language of Shaw himself into such an agreement. Whether he has any legal claim on plaintiff in error for a *quantum meruit*, is not before us, and we will not discuss or determine that question until it shall be presented for decision; but the evidence fails to disclose the slightest grounds for holding that plaintiff in error became a trustee, or in any other manner holds any portion or any interest in this land for Shaw.

The testimony is wholly insufficient to justify granting the relief sought, and this is true without any reference to the Statute of Frauds. The evidence simply signally fails to support the allegations of the bill, and the decree of the circuit court can not be sustained. The decree must be reversed and the bill dismissed.

Decree reversed.

JOHN C. MAXWELL

v.

BENJAMIN B. LONGENECKER *et al.*

1. MONEY HAD AND RECEIVED—*when action will lie.* Before a defendant can be held liable for money had and received to the plaintiff's use, it must appear clearly that there is money in defendant's hands actually belonging to the plaintiff.

2. If a debtor places money in the hands of a person for the purpose of being applied to the payment of debts owing by such debtor, without setting apart the money in distinct amounts, for his several creditors, so that he has no further control over it, one of the creditors can not maintain an action against the party so holding the money, for money had and received to the use of such creditor.

APPEAL from the Circuit Court of Crawford county; the Hon. J. C. ALLEN, Judge, presiding.

Mr. E. CALLAHAN, for the appellant.

Mr. J. M. LONGENECKER, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The declaration in this case, in the first count, is, "for preparing and making morter, and plastering certain buildings of the defendant," and "for divers materials and other necessary things, by the said plaintiffs, before that time, found and provided, and used and applied in and about the plastering of said buildings, for the said defendant," and also for work and labor, and for goods, wares and merchandize, and for money loaned, money paid, laid out and expended, and money had and received, etc. The second count is on a due bill for $100.

The plea of *non assumpsit* was filed by the defendant, and also a plea that payment had been tendered of $23, balance due on the due bill declared on in the second count of the declaration, as well as costs, etc.

The cause was tried by the court, by agreement of parties,

without the intervention of a jury, and judgment was given for the plaintiffs, for $107.05.

The facts, as we gather them from the abstract, are, briefly, as follows:

In September, 1875, the plaintiffs below, and appellees here, who are plasterers, contracted with Wagner and Weakley to do the plastering in a block of five brick buildings which they were erecting, the buildings being for different owners, namely: one for A. S. Maxwell, one for Alfred H. Jones and John C. Maxwell, one for Alfred H. Jones, and two for William C. Jones. The work was to be done for $204.88 per building and $79 for the halls.

A. S. Maxwell, on a settlement with Wagner and Weakley, was found to be indebted to them, for the completion of his building, $817, which, by agreement between the parties, was paid into the hands of the defendant, to be by him paid out on work done for them—but the precise terms of this agreement are in dispute, and the evidence in that respect will be noticed hereafter.

The defendant gave plaintiffs a due bill for $100, in exchange for an order on him given by Wagner and Weakley, and payable to them for that amount, and this had all been paid before suit was brought, except $23, which amount defendant tendered plaintiffs after suit was brought, together with $5 for costs, being more than the amount of costs due at the time; and this tender has been kept good.

Plaintiffs claim that, soon after they commenced plastering, they learned that Wagner and Weakley were not responsible; that, in a subsequent conversation with A. S. Maxwell, he stated that he would see they got their pay for plastering his building; that after this they went to A. S. Maxwell for money, when he said he could not pay any more, for he had settled up with the contractors, Wagner and Weakley, but added that some money had been put in defendant's hands to pay for work and materials; and that they then went to defendant, who told them some money had been placed in his hands to pay out for work and materials on A. S. Maxwell's building.

The evidence is clearly insufficient to show an express contract whereby defendant agreed to pay plaintiffs any certain sum of money on account of the plastering of A. S. Maxwell's building. This is conceded by the counsel for plaintiffs, but he claims the defendant is liable to plaintiffs, under an implied contract, for so much money had and received to their use.

The evidence of the plaintiffs is to the effect that the $817 were placed in the defendant's hands to pay out for work and materials on A. S. Maxwell's building. It is not pretended that plaintiffs were parties to that contract, or that they ever released Wagner and Weakley from their obligations to pay, and accepted a promise of the defendant in its stead, or that the money in the defendant's hands was set apart, in distinct amounts, to the several creditors who had done work and furnished materials for the building, so that Wagner and Weakley had no further control over it.

Before the defendant can be held liable to the plaintiffs for money had and received to their use, it should appear there was money in his hands actually belonging to them. Chitty on Conts. (11 Am. Ed.) 908.

The money placed in the hands of the defendant, although placed there for the purpose of making certain payments, was the money of Wagner and Weakley, and, at any time before payments were actually made, or the rights of third parties, as against the defendant, became vested on account of the money placed in his hands, Wagner and Weakley were at liberty to withdraw it, or change the directions given with regard to its disposition.

The defendant is not shown, by the evidence, to have been the agent of the plaintiffs in the receipt of the money, and this being so, he is responsible only to his principals for its disposition.

The defendant testifies that the money was placed in his hands to be paid out on the order of Wagner and Weakley, and that he did so pay it out. In the absence of any express agreement between the particular creditors and Wagner and Weakley, when the deposit was made, this would have been

the legal effect of the deposit. As the agent of Wagner and Weakley, the defendant would have been subject to their direction, and when he had paid the money out, under their direction, his duty would have been discharged.

We think the evidence before us so clearly insufficient to sustain the judgment, that there ought to be a new trial, and that unless the plaintiffs shall be able to supply evidence in respect to what we have here considered the fatal omissions, the judgment should be for the defendant.

The judgment is reversed and the cause remanded.

Judgment reversed.

BENJAMIN WOOD

v.

WILLIAM DAVIS.

1. STATUTE OF FRAUDS—*contract for sale of land.* No formal language is necessary to be used in a memorandum in writing of a contract for sale of land. Anything from which the intention of the parties may be gathered will be sufficient to take it out of the Statute of Frauds.

2. But the writings, notes or memoranda, such as they may be, must contain, on their face, or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear description to render it capable of identification, with terms of sale, and conditions, if any, and price to be paid, or other consideration given.

3. Where a party, desiring to purchase land, applies to the agent of the owner and makes an offer definite as to price, terms, etc., and the agent submits the offer to his principal by letter, and afterwards writes to the purchaser that the owner has accepted the offer, and the agent sends to the principal a deed to be executed by him in accordance with the terms of such offer, which deed is executed by the principal and returned to the agent, and the purchaser, upon receiving the letter notifying him that his offer is accepted, goes to the agent to close up the transaction, and the agent then refuses to consummate the trade, these facts constitute a valid contract, not within the Statute of Frauds, for a breach of which the purchaser can maintain a suit for damages against the owner of the land.

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

Messrs. G. B. & F. W. BURNETT, for the appellant.

Messrs. GILLESPIE & HAPPY, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by William Davis, in the circuit court of Madison county, against Benjamin Wood, to recover damages for a failure to perform a contract for the sale and conveyance of a certain quarter section of land in Piatt county.

To the declaration the defendant pleaded *non assumpsit* and the Statute of Frauds.

The jury found in favor of the plaintiff. The court overruled a motion for a new trial, and rendered judgment upon the verdict.

No objection is made to the instructions, or the ruling of the court upon the admission or rejection of evidence, but the point relied upon by appellant is, that no sufficient note or memorandum of the contract was made and signed as required by the Statute of Frauds and Perjuries.

Numerous cases have arisen in this and other courts which involved the construction of the statute, and the principles which must control in the construction of the statute, have been elaborately discussed, and rules established which would seem to be sufficiently comprehensive to embrace any case that might arise.

In *McConnell* v. *Brillhart*, 17 Ill. 354, where the authorities are fully cited, it was held, that no formal language was required; anything from which the intention may be gathered, as in other contracts, will be sufficient; that any kind of a writing, from a solemn deed to mere hasty notes or memoranda in books, papers or letters, will be regarded sufficient.

But the writings, notes or memoranda, such as they may be, must contain, on their face or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the property to render it capable of identification from other of like kind, together with the terms,

conditions (if there be any,) and price to be paid, or other consideration to be given.

The rules here announced have been sanctioned in subsequent cases. *Cossitt* v. *Hobbs*, 56 Ill. 231.

The question arising upon this record is, whether the evidence introduced is sufficient to bring the case within the rules announced.

If such a contract was established as will take it out of the operation of the statute, then the recovery can be sustained, otherwise not.

It appears, from the evidence, that the land was advertised for sale by H. K. Gillespie, a farmer, who resided near it, but he was instructed by appellant to refer purchasers to a Mr. Reed, who resided at Monticello, twelve miles distant from the land, and who was a member of the law firm of Reed & Barringer. In the fall of 1874, appellee called upon Mr. Reed, to purchase the land, and was informed that he was the agent, and the price was $24 per acre. This appellee declined to pay, but, upon the solicitation of Reed, made an offer of $20 per acre, $1500 payable May 1, 1875, and the remainder in one year from that time. Mr. Reed received the offer, and agreed to send it to Mr. Wood, the owner.

A short time after this interview, appellee received a letter from Reed & Barringer, dated October 6, 1874, in which they said: "We have just received a letter from Mr. Wood concerning the land, and we think we will be able to make the sale to you. Have written to him to make his terms more explicit."

A few days after this letter was received, appellee called upon Reed, and was informed that nothing more had been heard from Mr. Wood, but he at once wrote another letter, which was read to appellee after it was written and before it was mailed.

Within a short time after this interview, appellee received from Reed & Barringer a letter bearing date November 18, 1874, in which they said: "We received a communication from Benjamin Wood yesterday. He accepts the proposition

of $20 per acre. We have sent him a deed to sign and return to us."

From the evidence of Reed, it appears a deed from Wood to appellee was properly executed and sent to him for delivery.

Three letters written by Wood to Reed were read in evidence, which show Reed was authorized to sell the land, but the letter which Reed & Barringer say, in their communication of November 18, was received from Wood, in which he accepted the proposition of $20 per acre, was not produced, although he was notified to produce the same.

After appellee received the letter of November 18, he called upon Reed & Barringer, for the purpose of closing up the transaction. Barringer then informed him they had received an offer of $22.50 per acre, and he would have to see Reed, and, upon seeing Mr. Reed, he was told, "Mr. Barringer is the man you want to see." He went to Barringer again, but could get no satisfaction in regard to the matter.

The conclusion is inevitable, from the evidence, that the sole reason the sale to appellee was not consummated, was on account of an offer of $2.50 per acre more for the land than appellee had contracted to pay, which the parties accepted, and shortly after the attempt of appellee to close the transaction, conveyed the land to another party.

It is, however, urged by appellant that the memoranda relied upon by appellee contain no description of the land.

The advertisement of the land for sale by Gillespie, in which it was properly described, may be regarded as a part of the transaction, upon which appellee can rely. But aside from this, it is not disputed that the deed which Wood executed and forwarded to his agent, contained an accurate description of the premises, and if there was no other description of the premises than this, the deed would be sufficient.

It is also urged that the time the payments were to be made, and the amount of each, were not definitely settled, as shown by the memoranda. The offer made by appellee for the land was $20 per acre—$1500 May 1, 1875, and the balance in one year from that time.

In the letter of November 18, written by Reed & Barringer, it is said: "We received a communication from Benjamin Wood yesterday. He accepts the proposition of $20 per acre." This letter removes all doubt and uncertainty in regard to the amount and times of payment; but, to destroy the force and effect of this letter, Reed claims, in his testimony, that Barringer was not authorized by him to write the letter. The facts, however, connected with the transaction are enough to warrant the conclusion that Barringer was acting with authority. He and Reed were partners in business. The letter of November 6, written by Barringer, is conceded to have been authorized.

When appellee called to close up the trade, it was not claimed or contended that Barringer had no authority to act in the premises, but Reed himself referred appellee to Barringer as the proper person to see. Under these circumstances, Reed is estopped to deny Barringer's authority to act in connection with himself.

But, if the letter of November 18 was not authorized by Reed, who was the agent of appellant—if it be true, as the evidence seems to indicate, that Wood himself wrote a letter to Reed accepting the proposition of appellee, and this was followed by the execution and acknowledgment of a deed from Wood to appellee, which was forwarded to Reed by appellant, and placed in his hands for delivery—these facts might be sufficient to constitute a contract.

It is also urged that the action can not be sustained against Wood alone, as the contract was made by the agent of Wood & Barco, they owning the land jointly. The evidence does not connect Barco with the transaction. His name nowhere appears, except in some of the letters from Wood to Reed.

Wood was the contracting party, and whether he owned the whole or only a part of the title to the land, could make no difference. If he contracted to sell and convey, he would be bound to comply with the contract or respond in damages.

After a careful examination of the whole record, we are satisfied the evidence sustains the verdict, and the judgment will be affirmed.

Judgment affirmed.

Mr. JUSTICE SCOTT dissenting.

ROBERT GARDNER *et al.*

v.

EUGENE EBERHART *et al.*

1. FORCIBLE DETAINER—*notice in writing—whether original or a copy.* Where four notices, in writing, of a demand of possession of land are prepared at the same time, all alike except that three of them are addressed to three different occupants of the land, respectively, and the fourth one is retained by the party preparing them, the one retained is not a copy, but all are original, duplicate papers, and the name of the person to whom they are addressed is no part of the notice, and, if these are delivered to the several parties to whom addressed, respectively, the one retained is properly admissible in evidence as a written demand to support an action of forcible detainer.

2. RETURN *upon execution — when land is sold.* It is no part of the return of the sheriff to show what land is sold on the execution, but simply to show satisfaction, part satisfaction or failure to make satisfaction. Where land is sold on execution, the sale, the land sold and the name of the purchaser may be shown by the certificate of sale or by recitals in the sheriff's deed.

3. LEVY UPON LAND—*notice to the debtor, and demanding payment or property.* A portion of a farm upon which a judgment debtor resided was levied upon and sold under execution. It was contended that under the 10th section of the chapter on judgments and executions, the sale was void because the levy and sale were made by the sheriff without notifying the debtor that he had an execution against him, and without demanding the payment of the execution or demanding property to satisfy the same. It did not appear that the debtor, at the time of the levy, had any land in the county subject to levy, which was not a part of the farm on which he then lived: *Held*, a notice and demand for such property would have done him no good, and the statute does not require it.

4. But if it were otherwise, the sale could not be held void for that cause.

5. SAME—*remedy under the statute.* To render the rights of an execution debtor effective under that statute, application to set aside the levy should

be made in apt time, and, if not impracticable, it must be done before the rights of third parties intervene.

6. PRACTICE—*objection for want of proof of signature must be specifically made.* If a party intends to rely upon the fact that the signature to an indorsement or assignment of a certificate of sale is not proved, as an objection to its introduction in evidence, he must call the attention of the court specifically to that point, or it will be presumed the point was waived.

7. SHERIFF'S DEED—*recitals.* The recital, in a sheriff's deed, of a certificate of sale, and the assignment thereof, is evidence of their existence, and, after the execution of the deed, such certificate and assignments thereof cease to be essential muniments of title.

8. HOMESTEAD—*embraces only the tract or ground actually occupied as a residence.* Courts will take notice of the government surveys of land, and also of blocks and lots in towns and cities, and, where a debtor has a dwelling upon any forty-acre tract, or on any town or city lot, which, with the buildings thereon, clearly exceeds in value one thousand dollars, the law regards such forty acres or such town or city lot as "the lot of ground by him occupied as a residence," and his exemption is confined to such tract or lot, and the sheriff may levy on and sell any adjacent tract or lot without the intervention of a jury.

WRIT OF ERROR to the Circuit Court of Jersey county; the Hon. CHARLES D. HODGES, Judge, presiding.

Mr. R. M. KNAPP, Mr. GEORGE W. HERDMAN, and Messrs. WOODSON & WITHERS, for the plaintiffs in error.

Messrs. WARREN & POGUE, for the defendants in error.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This was an action of forcible detainer, brought by defendants in error against plaintiffs in error, before a justice of the peace, and, on appeal, tried in the circuit court of Jersey county. A jury was waived, and the finding by the court was for plaintiffs below, and judgment on the finding, and defendants below bring this writ of error.

To show a demand in writing, etc., as a foundation of this action, it was proven that four papers, alike in every respect, were prepared and signed by plaintiffs below. Each of them began with the words "You are hereby notified," etc. One of them was addressed and delivered to Gardner, one to Johnson,

one to O. Day, and the fourth was retained by defendants in error, and was produced, verified and given in evidence at the trial. This one was addressed to "Robert Gardner." No objection was made to the substance of the paper; but it was objected that the paper produced was a copy and not an original, and that the paper delivered to O. Day, and the paper delivered to Johnson, respectively, differed on their faces from the paper produced, as to the name of the person to whom addressed. This objection is not well taken. Each of these four papers was an original, and the one produced at the trial was a duplicate of each of the others. The name at the head of the paper was no part of the demand, and was merely intended to designate the person to whom it should be delivered. The demand was perfect without the address, and no name need have been written on the face of the demand.

The plaintiffs below claimed to derive title to the land in controversy through a sheriff's deed, founded upon a sale of the land in question, as the property of Robert Gardner, upon an execution issued October 21, 1869, upon a judgment of the circuit court of Jersey county, rendered at the October term, 1868, in favor of White and Smith, against Briggs and Gardner. The levy upon this land was made in November, 1869, and the sale of the land in question was to White and Smith, on December 28, 1869; and the sheriff's deed dated November 20, 1871, conveyed the property to Eberhart and Ruedin, reciting a certificate of sale to White and Smith, and assignment thereof by them to Eberhart and Ruedin.

On the trial the court permitted the judgment and execution, and the return of the sheriff upon the execution, to be given in evidence, and it is now contended that the return upon the execution should have been excluded, and this upon the ground that the return does not show *what* land was sold.

It is no part of the office of a sheriff's return to show what land is sold upon the execution. The office of the return is, to show the satisfaction or part satisfaction of the judgment, or the failure to make satisfaction of any part of the judgment. Where land is sold at sheriff's sale, the sale, with the subject

matter thereof and the name of the purchaser, may be shown by the certificate of purchase or by the recitals in the sheriff's deed.

Exception was taken to receiving in evidence the certificate of sale, as is said, on account of a variance between the execution and the certificate. We find no material variance in that regard, and none is pointed out by plaintiffs in error.

It is contended that the sheriff's deed should have been rejected, on the allegation that there was no proof that White and Smith, the persons mentioned as vendees in the certificate, executed an assignment of the certificate of sale to Eberhart and Ruedin, the grantees named in the deed. The record does show that "the certificate of purchase, with the *assignment thereon*" was read in evidence. These papers are set out in full in the bill of exceptions, and the assignment purports to have been signed by White and Smith. The objection made to the reading of these papers at the trial was placed upon the allegation that the certificate recited a sale upon an execution dated on the 4th of October, while the execution in evidence bore date the 21st of October. The court inspected the paper, and decided that the date of the execution, as recited in the certificate, was the 21st of October, agreeing, in that respect, with the date of the execution in evidence. No objection seems to have been made on the ground that the signatures of White and Smith to the assignment were not proven to be genuine. If plaintiffs in error intended to present and rely on that objection, the attention of the circuit court should have been directed specifically to that point. The bill of exceptions failing to show that this was done, this court must presume that such proof was waived by the defendants below. Again, the assignment of the certificate is shown by the recitals in the sheriff's deed, and the certificate and the assignment thereof ceased to be essential muniments of title after the execution of the sheriff's deed.

It is contended by plaintiffs in error that this sale by the sheriff was void, because the levy and sale were made by the sheriff without notifying Gardner that he had an execution

against him, and without demanding the payment of the execution or demanding property to satisfy the same. It is contended that this was a violation of provisions of the 10th section of the chapter on judgments and executions. It does not appear, from the proof, that Gardner, at the time of the levy, had any land in that county subject to levy, which was not a part of the farm on which he then lived. A notice and demand for such property would have done him no good, and the statute does not require it. If it were otherwise, the sale could not be held void for that cause. To render the rights of an execution debtor effective under that statute, application to set aside the levy should be made in apt time, and, if not impracticable, it must be done before the rights of third parties intervene. This objection can not avail in this action.

Lastly, it is contended that this sheriff's sale was void, upon the ground that the land in question was a part of the homestead of Gardner, and no proceedings were had to have the land subject to sale set off according to the provisions of the statute, found in section 3, chapter 48a, in Gross' Statutes, page 327.

At the time of the judgment, and until after the sheriff's sale, Gardner was the owner of a farm containing over seven hundred acres, and had held the same in possession for many years. Through this farm there was a public highway; and the dwelling-house, stables and other domestic outhouses of Gardner, were located upon 325 acres of the farm, lying in a body immediately north of this highway. The land sold on execution was part of this farm, and consisted of a full quarter section lying immediately south of the highway, and the nearest part of the land to the dwelling-house was nearly half a mile further east than the house. The 325-acre tract, on which the dwelling was situate, was worth, at the time of the sale, about $15,000. The quarter section which was sold does not seem to have had any connection with the lot of land on which Gardner lived, in any use made of it for domestic or residence purposes. The business of Gardner was that of a farmer, and the land in question was used in that business, merely.

The case does not fall within the letter of the statute, and surely it is not within its spirit. The words of the statute are: "There shall be exempt from levy and forced sale, * * * the lot of ground, and the buildings thereon occupied as a residence and owned by the debtor, * * * to the value of $1000." It is only "the lot of ground" occupied as a residence, and the buildings thereon, which are exempt, and that exemption does not extend beyond the value of $1000.

A *farm* may, as in this case, consist of several "lots of ground;" but the statute exempts only the lot so occupied. The court will take judicial notice of the governmental surveys of the public lands, and that a quarter section of land consists of four forties, each with well-defined bounds. If the forty on which the residence buildings are situate does not exceed $1000 in value it is exempt. *Hill* v. *Bacon*, 43 Ill. 478. It seems to follow that if the forty so occupied did exceed the value of $1000, the other three forties, or either of them, could be levied upon and sold, without violation of the debtor's right of exemption.

Where the debtor occupied four contiguous town lots, all in one enclosure, numbered 12, 13, 14 and 15, and the debtor's dwelling was on lot 13, and another house, on 12, was occupied by a tenant, and a shop was on lot 14, the sheriff sold each of these lots separately. Application was made to the court to set aside all these sales, the debtor claiming exemption for the whole enclosure, under this statute. Lot 13, with the debtor's dwelling thereon, was worth greatly more than $1000. The circuit court set aside the sale of lot 13, and refused to set aside the sale of any of the other lots, and this ruling was affirmed by this court. *Linton* v. *Quimby*, 57 Ill. 272. The court will take notice of the subdivision of town and city property into blocks and lots, as well as the legal subdivision by government surveys of land in the country, and where several forty-acre tracts lie contiguous, or where several village or city lots lie contiguous, and where a debtor has a dwelling on any given forty-acre tract, which, with the buildings thereon, is of the value of more than $1000, or where a debtor has a dwelling

on any given town or city lot, which, with the buildings thereon, clearly exceeds in value $1000,—in such case the law regards the forty acres, or village or city lot on which the debtor's residence is situated, as the "lot of ground by him occupied as a residence." His exemption is confined to this lot of ground. The sheriff may, in such case, proceed to levy upon and sell the adjacent tract or lot, without the intervention of the jury, and such sale will be valid. The exemption in favor of the debtor is never violated so long as there is left intact a "lot of ground," with the buildings thereon occupied as a residence and owned by the debtor, to the value of $1000.

The sections of this act providing for a jury to set off the homestead, are for the protection of the creditor in cases of doubt as to the value of the lot of ground to be left as a homestead, or where there are no well-known boundaries by which to divide, such as the boundaries of government surveys, or the boundaries of blocks, or town or city lots.

In the case at bar, the homestead left is worth $15,000, and is not only separated from the land taken by the well-known boundaries of the government surveys, but by a public highway.

Finding no error in the record, the judgment of the circuit court is affirmed.

Judgment affirmed.

PETER GIZLER

v.

GEORGE WITZEL.

1. ASSAULT AND BATTERY—*action of trespass may be maintained, no matter what language may have provoked it.* It is not essential to a recovery, in an action of trespass for assault and battery, that it shall appear the assault was committed without any provocation on the part of the plaintiff. It is wholly immaterial what language the plaintiff may have used to the defendant, so far as the right of the plaintiff to maintain an action is concerned.

2. SAME—*if in self-defense, must not exceed necessary defense.* And even if a plaintiff, in an action for assault and battery, provoked the assault, by himself first committing a technical assault, still he can maintain his action if the assault and battery committed by the defendant goes further than a reasonable self-defense.

3. BURDEN OF PROOF—*on defendant, to maintain a plea of son assault demesne.* On issue taken upon a replication *de injuria* to a plea of *son assault demesne*, the burden is upon the defendant to prove that the assault was made in necessary self-defense, and that, in making the assault, he used no more force than was necessary to protect himself.

4. INSTRUCTION—*need not repeat the expression "from the evidence" in every clause.* It is not necessary that a jury should be told in each sentence of an instruction, that they should "believe from the evidence." If the first part of the instruction contains this clause, a jury of intelligent men will not be misled if it is omitted in the remaining portion.

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

Messrs. METCALF & BRADSHAW, for the appellant.

Messrs. DALE & BURNETT, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of trespass for an assault and battery.

The defendant pleaded not guilty, and *son assault demesne.* The first plea was, however, withdrawn, and to the second the plaintiff replied *de injuria.*

Upon a trial of this cause before a jury, the plaintiff recovered a verdict of $100. The court refused a new trial, and rendered judgment on the verdict.

The defendant, who brought this appeal, claims that the verdict is contrary to the evidence, and the court gave improper instructions for the plaintiff, and upon these grounds a reversal of the judgment is asked.

We can not hold that the jury misapprehended the evidence in this case, or that the verdict is not warranted by the testimony.

Appellee testified that appellant committed the first assault, and in this he is corroborated by two disinterested witnesses,

who saw the difficulty. This is denied by appellant, who says he was struck first, and he is corroborated by one witness, but the preponderance of the evidence is clearly with appellee.

The appellant ordered appellee out of his vineyard. Appellee crossed the fence and went into the street, where, shortly afterwards, appellant followed him, with a knife in his hand. Appellee obtained a club, and it is but a fair inference, from the evidence, that the attack was made by appellant, and he struck appellee in the arm with the knife, when he, in turn, was struck with the club held by appellee.

The use of a knife by appellant was inexcusable. He was not attacked, but rather followed appellee into the street, and sought the encounter, with a knife in his hand.

We see nothing in the evidence that would justify the conclusion that appellant, when he made the assault, was acting in self-defense, or that the use of a knife was necessary to protect him from bodily harm.

Had appellant remained on his own premises and not followed appellee into the street, it is not at all probable that any difficulty would have occurred.

At all events there was a conflict in the evidence, and it was for the jury to settle it, and, under the uniform decisions of this court, the verdict must be regarded as final.

The court, at the request of appellee, gave to the jury seven instructions, all of which, except the first, are claimed to be erroneous.

The main objection taken to the second instruction is, that it excludes from the consideration of the jury previous provocation, or acts of misconduct of appellee that occurred a day or two prior to the difficulty.

The evidence does show that, three days before the assault, the parties had a quarrel, and appellee struck appellant a light blow in the mouth. That could not, however, be regarded as any justification of the assault. In *Ogden* v. *Claycomb*, 52 Ill. 366, which was an action to recover for an assault and battery, and a question similar to the one here presented arose, it is said: "If the defendant strikes a blow not necessary to his

defense, or after all danger is passed, or by way of revenge, he is guilty of an assault and battery."

The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned, and even if he went beyond words, and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense. The case cited seems to settle the point raised on the instruction. We perceive no substantial objection to the third instruction.

The fourth is as follows:

"The court instructs the jury, that if they believe, from the evidence, that plaintiff commenced the assault, yet, if they believe the use of the knife was unnecessary in the defense of the defendant, they will find for plaintiff."

It is said, in the belief of one fact the jury were restricted to the evidence, and not the other. It is not necessary that a jury should be told, in each sentence of an instruction, that they should believe from the evidence. If the first part of the instruction contains the clause, a jury of intelligent men would not be misled if it was omitted in the remaining portion of the instruction. The criticism on the instruction, that the jury were made to believe that if appellant could have made his defense with any other weapon he should have done so, and not used the knife, we do not regard as well founded.

The objection made to the fifth instruction is, that the jury were directed, if plaintiff was entitled to recover, then he was entitled to compensation for what he expended in being cured, when they should have been told the compensation must be confined to what he necessarily expended.

We are inclined to hold that appellant is correct in his position; but the amount expended, as shown by the evidence, was small, and it was not contended that the amount was unnecessary, and hence the instruction, although inaccurate, did no harm.

No defect has been pointed out to the sixth instruction, and we perceive none.

The seventh instruction in substance declares that, under the pleadings in the case, the burden of proof was upon defendant to establish, by a preponderance of the evidence, first, that the assault was made in necessary self-defense; second, that in making the assault, the defendant used no more force than was necessary to protect himself. It is conceded that the first proposition contained in the instruction is correct, but the second is disputed.

In Vol. 3, Starkie on Evidence, 1473. the rule is declared in these words: "On issue taken on a replication *de injuria* to a plea of *son assault demesne*, which must be pleaded specially, the proof is, of course, upon the defendant, and the plaintiff need not produce evidence, except for the purpose of encountering the defendant's evidence, and also for the purpose of increasing the damages."

In *Harmon* v. *Edes*, 15 Mass. 347, it was held, on the plea of *moderate castigavit*, the defendant must not only make out his authority and the cause of the beating, but must also show that the beating was, in fact, moderate, so that if, by his own evidence, it should appear that he had abused his authority and inflicted blows unnecessary for the purpose, or cruel in the degree, the issue would fail him entirely.

The plea of appellant, under which he interposes his defense, alleges that the assault and battery complained of was committed in necessary self-defense, "the defendant using no more force than was necessary for such purpose." This allegation is a material averment in the plea. If more force was used than necessary to repel the assault, the averment fails, and with it the defense. *Ayres* v. *Kelley*, 11 Ill. 17.

As the issue was formed in this case, the burden of proof to sustain the plea filed by appellant was upon him, and if this be true, the instruction was correct.

No substantial error appearing in the record, the judgment will be affirmed.

Judgment affirmed.

Statement of the case.

JACOB PURSLEY

v.

WILLIAM A. FORTH *et al.*

1. CHANCERY—*will not relieve against party's own acts.* If a junior mortgagee pays off a senior mortgage, but, instead of having it canceled, treats the transaction as a purchase, and has the mortgage assigned to himself, and makes an assignment of it in order that a sale may be made under it, and not only assents to a sale being made under it, by being present and making no objection, but participates therein by bidding on the property, a court of equity will not interfere in his behalf, and set aside the sale on the ground that the mortgage debt had been paid, although the result of such sale is to deprive him of the benefit of his junior mortgage.

2. MORTGAGE SALE—*purchaser must comply with terms.* Where the terms of a mortgage sale prescribed by the mortgage are cash, the purchaser must pay cash, and a note of the party entitled to the proceeds of the sale is not cash, and a tender of such note is not a compliance with the terms of the sale.

APPEAL from the Circuit Court of Clay county; the Hon. JAMES C. ALLEN, Judge, presiding.

On the 21st of April, 1868, William A. Forth sold and conveyed to Mark Hails lot 4, in block 20, in South Xenia, Ill., for $3500. In payment, Hails transferred to Forth a promissory note, on Kenny & Patton, for $900, secured by mortgage on real estate, and also three notes, executed by one Lyon to Hails, dated April 1, 1868, for $800 each, due in one, two and three years, respectively, and secured by mortgage on certain real estate in Mt. Vernon, Ill.

To better secure the payment of the said Kenny & Patton and Lyon notes so taken by Forth, Hails executed back to Forth a mortgage on lot 4, in block 20, in Xenia. This is hereafter referred to as the collateral mortgage.

On the 21st of April, 1868, Hails, being indebted to Forth in the sum of $300, executed to him a second mortgage on this lot 4, in block 20, in Xenia.

On the 1st day of December, 1868, Hails, being indebted to Jacob Pursley, the appellant, in the sum of $1200, executed

to him a trust deed on this Xenia property, to secure the payment of that sum.

Thus, there were three mortgages on this Xenia property—the collateral mortgage given to Forth to secure the Kenny & Patton and Lyon notes, the $300 mortgage to Forth, and the $1200 mortgage to Pursley.

After the transfer of the three Lyon notes to Forth, as above, they, by assignment, became the property of one John Keen, as also one prior note of Lyon, for $600, due in seven months, of the same series of four notes given by Lyon, secured by the same mortgage.

At the November term, 1869, of the Jefferson circuit court, Keen obtained a decree of foreclosure of the Lyon mortgage on the Mt. Vernon property to secure the Lyon notes, for $1640, the amount of the first two notes, which were then due, the decree of sale being made subject to the two outstanding notes of $800 each, not then due.

As these Lyon notes were collaterally secured in their payment by this collateral mortgage on the Xenia property, and Forth and Pursley had each a subsequent mortgage on this Xenia property—one for $300, the other for $1200—they were desirous to have the Lyon notes satisfied out of the Mt. Vernon property, and the incumbrance of the collateral mortgage on the Xenia property removed from that property, so that their two $300 and $1200 mortgages might remain as the sole incumbrances on the Xenia property; to effect which object, there was an arrangement entered into that, at the foreclosure sale of the Mt. Vernon property, Forth and Pursley should bid off that property for the amount of the decree, and pay to Keen the two outstanding $800 Lyon notes. The Mt. Vernon property was accordingly bid off at the sale, in the name of Forth, at the amount of the decree. Forth and Pursley each paid one-half the amount. Subsequently, they paid to Keen the two outstanding $800 notes, each paying one-half, and Forth conveyed to Pursley the one undivided half of the Mt. Vernon property. Keen assigned to Forth and Pursley the

two notes and both mortgages—the Lyon mortgage and the collateral mortgage.

Pursley afterwards bought the $300 mortgage on the Xenia property from Forth.

On the 25th day of November, 1872, Pursley sold the $1200 and the $300 mortgages to Sarah Burkitt, one of the appellees, and a $300 chattel mortgage, for $2000, that being their amount with interest, for which Mrs. Burkitt gave Pursley her note for $1200 and a note for $800 secured by mortgage on real estate. At her request, he afterward assigned to her the collateral mortgage, informing her it was satisfied.

In December, 1872, Mrs. Burkitt advertised the Xenia property for sale, under the collateral mortgage, for non-payment of the two $800 Lyon notes received by Forth and Pursley from Keen, and also under the $1200 and $300 mortgages. These sales were enjoined, under a bill of injunction filed by Pursley and Hails, to which Burkitt and Forth were made parties, the bill setting up that the collateral mortgage had been paid and was discharged. The injunction suit was compromised by the making of the following agreement:

"XENIA, ILL., *May* 6, 1873.

"This certifies that undersigned have settled the suit pending in circuit court, entitled Jacob Pursley *et al. v.* W. A. Forth *et al.* Pursley takes W. A. Forth's interest in the Mt. Vernon property, and agrees to pay for it $3500, as follows: $1200 in notes and mortgages on Magnolia House, in Xenia, Ill.; his interest in two $800 notes, secured by mortgage, which W. A. Forth and Pursley bought of J. Keen, Sr.; an $800 mortgage on Sarah Burkitt's land in Wayne county, Ill., and $1500 in cash notes; Pursley to withdraw suit; each party pay their own cost."

Signed by Pursley and Forth.

On the 20th of June, 1873, the Xenia property, in pursuance of an advertisement by Burton & Filson, attorneys of Mrs. Burkitt, was sold by said attorneys, under the $1200 mortgage, pursuant to a power of sale therein contained, and bid off by Pursley for $1105. It was announced at the sale

by the crier that the property would be sold on the next day, under the collateral mortgage, or a prior mortgage. Pursley, though present, said nothing. On the next day, June 21, the same property was sold, under the collateral mortgage, to satisfy the two outstanding $800 Lyon notes, and bid off by Robert Forth, a brother of William A. Forth, for $950. Pursley was present at the sale, made no objection, and bid himself. Robert Forth paid the money and received a deed. One-half of the money was paid over to Mrs. Burkitt and the other half to William A. Forth.

After the sale on the 20th of June, under the $1200 mortgage, Pursley tendered to Mrs. Burkitt's attorneys in fact, in payment of his $1105 bid, the $1200 note of Mrs. Burkitt, and demanded a deed. They refused to accept the note, and demanded the money.

This bill in equity was filed by Pursley to set aside the deed made to Robert Forth under the sale by virtue of the collateral mortgage, on the ground that the mortgage had been paid and satisfied, and Robert Forth had notice thereof; and also, to compel the attorneys in fact of Mrs. Burkitt to accept her note of $1200 for Pursley's bid of $1105, and execute to him a deed of the property which he bid off under the $1200 mortgage.

The court below, on hearing, dismissed the bill. Pursley appealed.

Mr. B. B. SMITH, and Mr. GERSHAM A. HOFF, for the appellant.

Messrs. CHESLEY & HAGLE, for the appellees.

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

The collateral mortgage on lot 4, in block 20, in Xenia, was given as well to secure the payment of the Kenny & Patton $900 note as of the Lyon notes. The bill alleges the Kenny & Patton note was paid. There is no distinct proof of it; but

the evidence, and the conduct and admissions of the parties, all proceed on the ground that the Lyon notes were the only ones that remained to be satisfied under the mortgage, and we have no doubt, under the evidence, that this Kenny & Patton note should be taken as satisfied.

On the payment, then, by William A. Forth and Pursley, to Keen, of the amount of the two only remaining $800 Lyon notes, the collateral mortgage, which had been given to secure the payment of the Lyon notes, was, in truth, paid and satisfied. So the parties might have treated it, and canceled the notes, and had satisfaction of the mortgage entered; but they did otherwise. They took an assignment of the notes and mortgage, thereby electing to give the transaction the form of a purchase and assignment, rather than a payment, and to keep the mortgage on foot. They were at liberty so to do.

The same purpose was manifested when Pursley assigned the collateral mortgage to Mrs. Burkitt, although he informed her that it was satisfied, and she does not appear to have paid any distinct consideration for the assignment.

But when Mrs. Burkitt comes to advertise the property for sale, under that mortgage, in December, 1872, Pursley has the contemplated sale enjoined, setting up, in his injunction bill, that the mortgage had been paid and satisfied.

A settlement was made of the injunction suit, but, in accordance with the strange determination manifested by Pursley throughout, to have this collateral mortgage kept on foot, it is made one of the terms of the settlement of this suit between Pursley and Forth, who was made a party to the suit, that Pursley should let the latter have Pursley's "interest in two $800 notes, secured by mortgage, which W. A. Forth and Pursley bought of J. Keen, Sr.," thus recognizing these two notes as still subsisting.

At the sale of this property, under the $1200 mortgage, on the 20th of June, 1873, Pursley was present, and bid off the property at $1105. The crier at that sale testifies that, before commencing it, he explained fully its terms and conditions; that he was making the sale subject to a prior mortgage, and that the sale on that mortgage would take place on the next

day. The prior mortgage was this collateral mortgage. Pursley uttered not a word of dissent. Had he intended thereafter to treat this collateral mortgage as a paid mortgage, and not as a subsisting one, it would have been well to have made it known on this occasion. It would have been an act of justice to the owner of the equity of redemption. Had Pursley announced that the prior mortgage had been paid—that he paid it himself—the property would, probably, have sold for a better price; but, then, as a bidder at the sale, he might have had, himself, to pay more for the property.

On the next day, June 21, the sale of the same property came off, under the collateral mortgage, in pursuance of advertisement previously given. The person making the sale announced that the mortgage was executed by Hails to W. A. Forth to secure the payment of the two $800 notes which were given as a part of the purchase money for the property. Pursley was present at the time, and made not a word of objection. He was even a bidder himself at the sale. The property was struck off to Robert Forth, as the highest bidder, at $950. He paid the money and took a deed.

After all this, Pursley now seeks, in contradiction of all his previous action, to have the transaction of taking up the two $800 Lyon notes in the hands of Keen adjudged to be a payment of the notes and a satisfaction of this collateral mortgage, and the sale under it, consequently, to be held invalid.

Although Pursley denies the fact, it is testified to by both William A. Forth and Aaron Burkitt, the husband of Mrs. Burkitt, that the foreclosure of, and sale under, the collateral mortgage, was by the direction of Pursley; that the reason he gave was, "to cut Hails out," as this was the oldest mortgage.

The case appears to be one of hardship, in the result. Appellant, by his action, has involved himself in a serious embarrassment. He appears to have utterly destroyed his rights under two mortgages, one for $1200 and the other for $300, on this property, by allowing it to be sold under a prior mortgage, which, in reality, had been paid and satisfied; but it is the consequence of his own voluntary, deliberate action.

There is nothing of fraud, accident, mistake of fact, or incapacity to act—cases where a court of equity interposes and grants relief. Courts do not assume the guardianship of men's interests, and undertake to relieve against their acts merely because they are ill-advised and prejudicial in effect. Although the mortgage had been satisfied, appellant chose to hold it out and deal with it as a subsisting mortgage. He took an assignment of it, made an assignment of it in order that a sale might be made under it, and acquiesced in the making of the sale. If the result bears hardly upon him, it is one to which he was consenting and aiding. *Volenti non fit injuria.* It does not suffice that Robert Forth, the purchaser, had notice and was informed by appellant that the mortgage was satisfied. This was neutralized by the fact that appellant, for whatever purpose, elected that the transaction should take the form of an assignment of the mortgage, instead of a payment of it; that he assented to the making of the sale under the mortgage, not only by being present and making no objection, but actually participating in the sale as a bidder. Forth was encouraged, by the conduct of appellant, to lay out his money in the purchase of the property under the mortgage. There is no ground for equitable relief. The principles of equity are all opposed thereto. Perry on Trusts, section 870. Appellant kept silence when it was his duty to speak. Equity will not now hearken to his complaint.

As respects the other branch of the case, the taking of the note of Mrs. Burkitt for appellant's bid at the sale under the $1200 mortgage, the terms of that sale, as prescribed by the mortgage, were cash. There was no power to sell for anything else than cash. The sale was made on the terms prescribed. Mrs. Burkitt's note was not cash, and the tender of the note was not a compliance with the condition of the sale, although the proceeds of the sale were coming to her. There is an allegation in the bill of her insolvency, but we see no proof of it in the record.

The decree must be affirmed.

Decree affirmed.

AARON M. JOHNSON

v.

JAMES HOLLOWAY.

1. PRACTICE—*objection to transcript of justice of the peace should specify grounds.* Where a general objection is made to the introduction of a transcript from a justice's docket in evidence in the circuit court, without any specific ground of objection being pointed out, the objection will be treated as going to the form and pertinency of the transcript, only, and it can not be urged for the first time in the Supreme Court that there is no copy of the summons or return in the transcript.

2. EXECUTION—*alias by justice of the peace before twenty days after judgment.* Where an affidavit is filed by a plaintiff, and an execution issued thereon by a justice of the peace inside of twenty days after the date of the judgment, and the execution is returned inside of the twenty days, the same affidavit will be sufficient to authorize the issuing of an *alias* execution.

3. EVIDENCE—*to justify levy upon property.* As a general rule, a sheriff or constable has only to produce a *fi. fa.*, regular on its face, to justify his levy upon and seizure of property; but when he levies on property claimed by some one else than the defendant in execution, and he denies the ownership, and the officer claims the sale by the debtor was fraudulent as to creditors, he must go farther, and show the execution was issued on a judgment.

4. FRAUDULENT SALE—*possession.* Where a debtor sells personal property by verbal contract, and retains the possession, such sale is fraudulent *per se*, as to creditors of the vendor.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. B. B. SMITH, for the appellant.

Messrs. CASEY & DWIGHT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This record shows that James Johnson executed his note to one Tipton, with John Johnson as surety, for $155. The note was transferred to Kohl & Warner. Afterwards, James Johnson was sued for slander, and whilst that suit was pending, and without having paid Kohl & Warner the note, he sold and conveyed his real and personal property, liable to execu-

tion, of the value of from six to eight thousand dollars, to his son Aaron, on time, reserving but a small portion of it. Aaron was a single man, a member of his father's family, and he testified that he was not worth over $300 at the time. He left the property on the farm, and it was used as before the sale.

Kohl & Warner brought an action on the note, and obtained judgment against James Johnson. They swore out an execution, which was returned unsatisfied, and *alias* execution was issued before the expiration of twenty days from the date of the judgment. The latter execution was levied on a portion of the personal property included in the sale by James Johnson to his son Aaron. The latter replevied the same, and on a trial in the court below, the jury found the sale to have been fraudulent and the property liable to execution, and plaintiff in the replevin suit appeals to this court.

It is first urged, that the court below erred in admitting the transcript of the justice of the peace upon which the execution was issued. When the transcript was offered to be read, there was no specific objection urged against its introduction in evidence; but it is insisted on argument, that the transcript was incomplete, as there was no copy of the summons or the return of service therein. It recites, that a summons was issued and placed in the hands of a constable, who returned it served by reading to the defendant James Johnson, and John Johnson not found.

As a general rule, a sheriff or constable has only to produce a *fi. fa.*, regular on its face, to justify his levy upon and seizure of property; but when he levies on property claimed by some one else than the defendant in execution, and he denies the ownership, and the officer claims the sale was fraudulent as to creditors, he must go farther, and show the execution was issued on a judgment.

Even under this rule it does not follow, in this case, that there was error. The objection was general, and no specific grounds were stated. Had the ground now urged been pointed out when the transcript was offered in evidence, there can scarcely be a doubt but the summons, or a copy of it, could

and would have been produced, thus showing complete jurisdiction to render the judgment. A party should not be permitted to reserve such objections to be raised for the first time in this court. If he required this proof, he should have said so, that the opposite party might have produced it. The objection being general, it applied to the form of the transcript and its pertinency as evidence. It was formal, and the copy of the return and judgment were pertinent.

It is also urged, that, the execution having been issued before the expiration of twenty days from the rendition of the judgment, it was void for the want of a proper affidavit to authorize it to issue. There had been an affidavit filed, upon which the first execution had issued, and which had been returned by order of the plaintiff. The affidavit was still on file, and was a part of the proceedings in the case, and if the facts stated in it were true when it was filed, there is nothing to show that they had ceased to be true. They were not contradicted or overcome by the return of the first execution. It, therefore, formed a proper basis upon which to issue an *alias* execution. So far as we can see, it would have been useless to have filed another, and the law never requires the performance of an useless act. The requirements of the statute were observed in this respect, and the execution was authorized and valid.

We fail to see that the instructions were calculated to mislead, or could have had that effect. It has been the uniform rule of decision in this court, that where a debtor sells personal property by verbal contract, and retains the possession, such a sale is fraudulent, *per se*, as to creditors, and it can not matter in the slightest degree, as to this question, whether the sale is to a son or to any other person, as the rule is the same. The third of appellee's instructions was, therefore, correct.

After a careful perusal of the evidence in the record, we are clearly of opinion that it sustains the finding of the jury.

Perceiving no error in the record, the judgment of the court below must be affirmed.

Judgment affirmed.

Syllabus.

The City of Shawneetown

v.

Hezekiah G. Mason *et al.*

1. Experts—*not required to prove fact of sickness.* Whether a person is sick, is a fact requiring no special skill or science to understand, and it may be proved by anybody who knows the fact, whether he is a physician or not, though it may be otherwise as to proving the character of the sickness.

2. Practice—*filling panel when juror discharged.* Where a juror is taken sick after a trial begins, it is proper for the court to discharge him and call another juror in his place, and order the trial to proceed *de novo*.

3. Cities—*power to change grade of streets.* A city may lower or elevate the grade of its streets, when done in good faith, with a view to fit them for use as streets, and can not be held responsible for errors of judgment in that respect, or made liable for the inconvenience and expense of adjusting the adjacent property to the grade of the street as changed.

4. But the same law that protects the citizen, in the enjoyment of his private property, against invasion by individuals, will protect him against similar aggressions on the part of municipal corporations; and whilst a city may elevate or depress the grade of its streets as it thinks proper, yet, if, in doing so, it turns a stream of mud and water upon the grounds and into the cellar of one of its citizens, or creates in his neighborhood a stagnant pond, that brings disease upon his household, it will be liable to him to the extent to which he is deprived of the legitimate use of his property, or its value is impaired by thus turning the water thereon, or by creating the pond of stagnant water.

5. Same—*liable for changing grade of street for other purposes than to improve it as a street.* Whilst a city is not liable to owners of adjacent property for changing the grade of a street, if done for the purpose of improving the street, yet, if the street is appropriated to another use than that contemplated when it was laid out, as, for a levee to prevent a river from overflowing the town, and the grade is raised for such purpose only, then, under the constitution of 1870, the owners of property damaged thereby are entitled to just compensation.

6. Damages—*special benefits to part of property may be considered in determining whether the whole has been damaged.* In estimating the damage done to property by the appropriation of a public street adjacent thereto to public use other than a street, where no part of the private property is taken, the effect on the whole property should be considered, and not merely a part of it. If one part of the same property is damaged, and another part specially benefited, so that the value of the whole is not diminished, then

there is no damage done; but any general benefit, common to all other property affected by the work, should not be considered in determining whether the property is benefited as much as injured.

7. SAME—*party enjoining can not recover damages, because the thing prevented by injunction is not done.* It is the duty of a city, in building an embankment in its street, to make suitable drains so as to prevent water from being thrown on to the property of its citizens; but if it is prevented from doing so by an injunction, at the suit of a citizen, such citizen can not recover for any injury occasioned by the want of drains which he has himself, by injunction, prevented the city from making.

APPEAL from the Circuit Court of Gallatin county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Mr. W. L. HALLEY, and Mr. R. W. TOWNSHEND, for the appellant.

Mr. F. M. YOUNGBLOOD, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The material allegations in the first count of the declaration, and which present with sufficient fullness the character of the action, are, that plaintiffs "are the owners of in-lot No. 1139, in the city of Shawneetown, situated and fronting on Front street in said city; that it was the duty of the city to keep said street in repair and free from obstructions in front of said lot, so that plaintiffs might have a convenient passage way in and out of said premises; that the city wrongfully and unlawfully erected an embankment of earth of great heighth, to-wit: ten feet, and of great width, to-wit: sixty-two feet at the base and fourteen feet on top, on and along said Front street in front and adjoining the premises of plaintiffs, and thereby obstructed and prevented the passage way into and out of said premises, and rendered the lower story of the dwelling unfit for use, shut out the light, threw water into the cellar, etc., and wholly obstructed the river from the same."

The defendant pleaded two pleas—not guilty, and a license—upon both of which, issues were joined.

The jury returned a verdict in favor of the plaintiffs, assess-

ing their damages at $1300, upon which, after overruling a motion for a new trial, the court gave judgment.

The bill of exceptions recites that, after the jury were impaneled and the evidence of four witnesses had been heard, the court, being satisfied by the evidence of a witness, who was not a physician, that one of the jurors was sick, and unable further to attend as a juror in the trial of the case, ordered him discharged, and a new juror summoned in his place, and that the trial begin *de novo*.

The counsel for the defendant moved that the remaining eleven jurors be also discharged, but the court overruled the motion, to all of which proper exception was taken, and this ruling is questioned by the first error assigned.

It is insisted that the court was not authorized to discharge the juror upon the evidence of a witness who was not a physician, and, also, that, when one juror was discharged, the whole panel should have been likewise discharged. This is untenable. Whether a person is sick or not, is a fact requiring no special skill or science to understand—although what is the character of the sickness may be otherwise—and it may be proven by anybody that knows the fact. *Chicago, Burlington and Quincy Railroad Co.* v. *George*, 19 Ill. 510. And the statute authorized the court, when the juror was discharged on account of sickness, to fill up the panel, as was done. Gross' Stat. of 1869, p. 389, sec. 12; R. L. 1874, p. 633, sec. 13.

The injuries complained of result from the construction by the defendant of a levee along Front street for the purpose of protecting the city against the inundation or overflow of the Ohio river. The levee is authorized by the city charter, and its construction was prosecuted by the authority and under the direction of the city. No portion of the plaintiffs' property is taken—the levee occupying the street alone—and, with the exception of water claimed to be thrown, by reason of the embankment, into the plaintiffs' cellar, the injuries complained of are incidental, rather than direct.

The counsel for the defendant claim that the embankment was the mere raising of the grade of the street, and that being

done by the city, in the exercise of an unquestioned power, adjacent property owners have no cause to complain for any injury they may have sustained in consequence.

That a city may lower or elevate the grades of its streets at its pleasure, when it is done in good faith, with a view to fit them for use as streets to meet the public wants, and can not be held responsible for errors of judgment in that respect, or made liable for the inconvenience and expenses of adjusting the adjacent property to the grade of the street as improved, was held in *Nevins* v. *Peoria*, 41 Ill. 502; and this has been followed in the cases since decided in which that question was material. The presumption is, that those who purchase lots upon streets calculate the chances of such elevating or lowering of the grade of the streets, as the increase of population of the city may require, in order to make the passage to and from the several parts of it safe and convenient, and, as their purchases are always voluntary, they may indemnify themselves in the price of the lots which they buy, or take the chance of future improvements, as they shall see fit. *Callendar* v. *Marsh*, 1 Pickering, 418.

But in *Nevins* v. *Peoria*, *supra*, it was said: "The same law that protects my right of private property against invasion by private individuals, must protect it from similar aggressions on the part of municipal corporations. A city may elevate or depress its streets as it thinks proper, but if, in doing so, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond, that brings disease upon his household, upon what ground of reason can it be insisted that the city should be excused from paying for the injuries it has directly wrought?" And it was held that, to the extent to which the owner is deprived of the legitimate use of his property, or its value is impaired, by the act of the city, he may recover. This was followed in *The City of Aurora* v. *Gillett et al.* 56 Ill. 132, where the basement of the plaintiffs' house was flooded by reason of the defective sewerage of the city; in *City of Aurora* v. *Reed*, 57 Ill. 29, where, through the insufficient drainage

provided by the city, plaintiff's property was flooded by surface water; in *City of Pekin* v. *Brereton*, 67 Ill. 477, where the injury complained of was the making of deep excavations in the street and sidewalk adjoining plaintiff's lots, so that he was obstructed in his access to them; in *City of Pekin* v. *Winkel*, 77 Ill. 56, where, by the embankment of a railroad, access to the plaintiff's lots was cut off, and in *Bloomington* v. *Brokaw*, 77 Ill. 194, where the complaint was, that the city was so constructing the street as to flow the water from the street upon the plaintiff's property.

There can, therefore, in no view, be any question but that the plaintiffs are entitled to recover for any permanent injury, caused by the erection of the embankment, to their property, by reason of its throwing the water into the cellar, rendering the house damp and unhealthy, or cutting off access to the property, which may be sustained by the proof.

But we are of opinion the erection of this embankment is not to be strictly regarded as the mere elevation of the grade of the street. It is true, it is still used as a street, but the elevation is not made with a view of improving the street, but as a levee, for the protection of the city against inundation from the Ohio river.

When the street was laid out, there is nothing to show that this was one of the anticipated uses to which it was to be devoted, and it can not, therefore, be assumed that, when lot owners purchased, they purchased with the view that this levee might be constructed where it is. It is an appropriation of the street to a new use, we concede, legitimate enough in itself, but still a use not implied from the laying out of the street, and it can not be intended lot owners have, by anticipation, compensated themselves against loss resulting by reason of its erection, as in the case of the change of grades in streets properly.

This appropriation of the street occurred since the adoption of the present constitution, and, therefore, if the plaintiffs' property has been "damaged" by the erection of the embank-

ment, they are entitled to just compensation. Const. 1870, Art. 2, § 13.

There is some difficulty in determining with precision, and it is probably impossible to lay down a rule by which to ascertain, in all cases, when property is to be considered as damaged, within the meaning of this provision of the constitution.

In *Stone* v. *Fairbury, Pontiac and Northwestern Railroad Co.* 68 Ill. 394, a majority of the court held the injury for which compensation is to be made, in such cases, must be a direct physical injury.

In *Chicago and Pacific Railroad Co.* v. *Francis*, 70 Ill. 238, it was held, where the property is not taken, the damages for which there may be a recovery, must be real, and not speculative. It was said, after discussing the question at some length, "We must, therefore, hold that the damage contemplated by the constitution must be an actual diminution of the present value or price, caused by constructing the road, or a physical injury to the property, that renders it less valuable in the market, if offered for sale."

In *Page et al.* v. *Chicago, Milwaukee and St. Paul Railway Co.* 70 Ill. 324, which was a condemnation for railroad purposes, it was held, the true measure of compensation for the land damaged but not taken, is the difference between what the whole property would have sold for, unaffected by the railroad, and what it would sell for as affected by it, if it would sell for less. The damages must be for an actual diminution of the market value of the land, and not speculative.

The last two cases proceed upon the same principle, substantially, that has been applied by the English courts in construing the "Lands Clauses and Railways Clauses Consolidation Acts," providing for the payment of damages in case property is "injuriously affected by the execution of the works."

It is said, in Lloyd's "Law of Compensation," based on these statutes, "Land owners are generally entitled to compensation in respect of their property being injuriously affected, when it is depreciated in value by an act of the railway com-

pany, which, if done by a private individual, would support an action." P. 85.

Where property is so circumstanced that it has no certain market value, so as to apply the rule recognized in the cases cited, the proof, to authorize a recovery, should show such an actual injury as in some substantial way affects the value of the property or its use; and this is in accordance with the spirit of what was held in *Stone* v. *Fairbury, Pontiac and Northwestern Railroad Co. supra.* This may, however, be, as was held in the cases referred to, relating to streets, by cutting off or obstructing access to the property; by causing rooms to be filled with smoke or unhealthy or offensive vapors; by rendering the walls of buildings damp and unhealthy; by darkening windows; or, in short, by any of the numberless ways by which the value of property may be materially depreciated, and its usefulness impaired—the test being that the injury must rest upon some substantial cause actually impairing the value of the property or its usefulness, and not be the result of taste or fancy, merely because of the proximity of the public improvement to the property assumed to be affected by it. It may be that, to some persons, and for some purposes, proximity alone to a public improvement will render property less desirable than it would be under other circumstances. This may be so in regard to private, quite as notably as to public improvements, but so long as the improvement is lawful, and does no actual injury, such incidental damage has never formed the basis of recovery. Property owners are, from the very necessity of things, subject to greater or less influence from surrounding improvements, and, in general, are probably as much benefited as injured thereby—but whether benefited or injured, such influence has never, of itself alone, been regarded as sufficiently definite and tangible to constitute a legal right; and we can not suppose it is intended by our constitution that it was designed it should be made the basis for the payment of damages in the case of public improvements.

A material question in the present case is, whether, in determining how much, if any, damage is done to the plaintiffs' property, the evidence shall be confined to a particular part of the property claimed by the plaintiffs to be damaged, or shall extend to the whole property, and the question determined by reference to the effect the building of the embankment has upon the property as a whole.

The court below ruled, in the admission of evidence, and instructed the jury, virtually, that the inquiry was limited to the part of the property claimed to be damaged, and that proof of special benefit to any portion of the property was not to be considered.

This was error. Proof of general benefits resulting from the improvement, to this property, in common with other property in the city, was inadmissible, but whether this particular property was damaged, within the meaning of the constitution, depended upon whether it had received such material injury as rendered it less valuable to the owners, or less useful, as a whole, than it would have been but for the embankment having been constructed as it is.

We said, in *Page et al.* v. *Chicago, Milwaukee and St. Paul Railway Co. supra*, in discussing this question as there presented, "It was not the damages to a strip of land lying within a limited number of feet of the road bed, that the jury were required to assess, but the damages, if any, to the *entire* tract, by reason of the construction and operation of appellee's road. It is inadmissible to treat that portion of the property injured as a distinct and separate tract from that portion benefited. If the inconvenience of the road to a certain selected part of the tract will be outweighed by the additional convenience of the road to the residue of the tract, the tract will not be damaged by the inconvenience of the road. A partial effect only is not to be considered, but the whole effect; and the effect, not upon any selected part of the tract, but upon the whole tract. This is not deducting benefits or advantages from damages, but it is ascertaining whether there be damages

or not." The ruling in *Chicago and Pacific Railroad Co.* v. *Francis*, *supra*, was the same.

There was evidence tending to show that the water thrown into plaintiffs' cellar was thrown there by reason of the defendant having been enjoined from prosecuting its work by the plaintiffs whilst it was in an unfinished condition. If this be true, it needs no argument to show that it can not be an element of recovery in an action at law. Defendant owes the duty to make sufficient drains or sewers by the side of the levee to carry off all water flowing from the levee, so as to keep it away from the adjacent property, but it might be that these could not be completed before the completion of the levee, and if their completion was prevented by the act of the plaintiffs, the consequent damages result from the plaintiffs' own wrong.

We may dismiss the cross-errors with but a few remarks.

This is an action on the case for a *tort*, and is, in no sense, a suit under the act relative to "eminent domain," or to recover the amount of a judgment obtained in a proceeding under that act. The proceedings in the county court for condemnation were, therefore, totally irrelevant, and properly excluded by the court.

Although the property of the streets was, by the general government, donated for *street* purposes, we are of opinion there is nothing in the act of Congress making the donation inconsistent with the exercise of the power by the General Assembly to authorize the use of the land for the additional public purpose of a levee. The streets are not destroyed, nor is their use impaired by the levee.

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

Judgment reversed.

THOMAS W. PURCELL
v.
ALFRED PARKS.

1. FEES AND SALARIES—*county clerk not entitled to appropriate fees until compensation is fixed.* Where the county board fails to fix the compensation of the county clerk, elected after the adoption of the constitution of 1870, he is not entitled to appropriate any of the fees of his office to his own use until the amount of his compensation is fixed.

2. Where the county board has not fixed the compensation of the county clerk before his election, the power to do so remains, and they may fix it after his election and it will not be a violation of the constitutional provision prohibiting the increasing or diminishing of his compensation during his term of office, because, until fixed by the board, he has no compensation to be either increased or diminished.

3. Where the board has once acted, and fixed the compensation of the county clerk, that compensation can not be increased or diminished during his term. Any subsequent order of the board, either increasing or diminishing the compensation of a county clerk, can operate only on the compensation of one whose term begins after the making of such order.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. HENRY C. GOODNOW, for the appellant.

Mr. TILMAN RASER, and Mr. THOMAS E. MERRITT, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

By the constitution of this State, adopted in 1870, it is provided that "the fees, salary or compensation of *no municipal officer*, who is elected or appointed for any definite term of office, shall be *increased* or *diminished* during such term." (Sec. 11, Art. 9.)

A county clerk is required to be elected in each county, who shall enter upon his duties on the first Monday of December next after his election, and hold his office "for the term of four years." (Sec. 8, Art. 10.) As to all county officers who should be in office at the meeting of the first General Assembly after

the adoption of the constitution, it was provided by the constitution, that all laws then in force fixing their fees should terminate with the respective terms of such officers, and that the General Assembly should "provide for and regulate the fees of said officers and *their successors*, so as to reduce the same to a reasonable *compensation* for services actually rendered." (Sec. 12, Art. 10.) It is also provided by the constitution, that the county board of each county shall fix the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel and other expenses; and, in all cases where fees are provided for, said compensation shall be paid only out of, and shall, in no instance, exceed, the fees actually collected," and that "they shall not allow either of them more per annum than" $2000, in counties containing 20,000, and not exceeding 30,000 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." (Sec. 10, Art. 10.)

In pursuance of the requirements of the constitution, the General Assembly, by an act approved March 29, 1872, did provide for and regulate, among other fees, the fees of county clerks. Rev. Laws 1874, chap. 53, §§ 13 and 18.

In the county of Marion the county board took no action in the matter of fixing the compensation of the county clerk of that county until in March, 1874.

Purcell was elected county clerk of that county at the November election, 1873, for a term of four years from and after the first Monday of December of that year, and, on the latter day, qualified as such and entered upon the duties of his office, and charged and received fees under the act of 1872 providing for and regulating the fees of various officers.

At the March term, 1874, during the term of this officer, the county board of Marion county made and entered on record, against the protestations of this officer, an order, as follows: "Ordered that the *salary* of the county clerk be one thousand dollars per year, to be in force from the first day of December,

1873, as provided by an act of the General Assembly approved March 29, 1872, and in force July 1, 1872." This action was brought by the treasurer, in behalf of the county, against the county clerk, claiming to recover the excess of the amount of fees actually received by the clerk up to the day of bringing suit, over and above the amount of his salary due at that time, at the rate fixed by this order of March, 1874. The admissions of the parties at the trial show, also, that such excess amounted to the sum of $1060.61, after deducting necessary expenses for clerk hire, stationery, fuel, and other necessary office expenses. The circuit court gave judgment for that sum against Purcell, the clerk. He appeals to this court.

I am instructed by the court to say that, in the opinion of a majority of the judges thereof, the clerk, under the constitution and statute, is not entitled to appropriate to his own use any of the fees of his office, except by virtue of an order of the county board. In the absence of such order, such clerk has no compensation by law whatever. Hence the fixing of such compensation by the county board, in their order of March, 1874, did not, in the sense of the constitution, either increase or diminish the compensation of such officer, for, up to that time, he had, by law, *no compensation* to be increased or diminished. It was the duty of the county board to have fixed the compensation in question before the election. Not having done so, the power remained unexhausted, and the board might have been compelled, either before or after the term began, to exercise the power and fix the same.

We are all of the opinion that when the board has once acted, and fixed the compensation of the county clerk, that compensation can not be changed so as to increase or diminish the compensation to be received by him during his term. A subsequent order of the county board, increasing or diminishing the compensation of the county clerk, can operate only upon the compensation of clerks whose terms begin after the making of such order.

The judgment of the court below is, therefore, affirmed.

Judgment affirmed.

Mr. JUSTICE DICKEY, dissenting.

The writer of this opinion can not concur in the views of his brethren on this question. His views are as follows:

The several provisions of the constitution must be read together, and so construed as to harmonize in every part thereof and give effect to every clause thereof, if the words used are capable of such construction.

Keeping in mind all these provisions, it seems clear to me that the constitution regarded fees and salaries as compensation, and when it says that it prohibits the increase or diminution (during his term) of "the fees, salary or compensation" of certain municipal officers, it means the same as if the words had been "fees, salary, or any other kind of compensation" Fees, before the adoption of the constitution, had ever been understood as compensation to the officer, and the constitution nowhere professes to change the meaning of the word, or says anything tending to show that the word "fees" is used, in that instrument, in any abnormal sense; but the constitution, as it seems to me, plainly shows that the word "fees" meant compensation, for it requires that the General Assembly should, by a general law, provide for and regulate the fees for the *compensation* of county officers then in office, and of their *successors* to be elected under the new constitution, "so as to reduce the same to a reasonable *compensation* for the services actually rendered." The constitution also required that the amount or portion of these fees so to be provided for as a compensation, which should be appropriated to the personal use of the officer, should be further guarded against growing too large, by other limitations.

In counties, like Marion, having 20,000 inhabitants and not 30,000, this amount should, in no case, exceed $2000; and, in addition to this, it was made the duty of the county board of each county to pass upon the amount of this compensation, and fix the same at what the board might consider adequate, not, in any case, to exceed the amount of fees actually collected, or to exceed the sum of $2000. In other words, the clerk was to receive and appropriate, as compensation, all the fees actually collected under the act of the legislature, until the

amount reached the amount provided, to be fixed by the county board, which might be $2000 or any given sum less than $2000, but could not, lawfully, exceed $2000; and that all fees actually collected, over that amount, should be paid into the county treasury. All these provisions are, nevertheless, subject to the rule, twice laid down in the most positive language, that the compensation of such officer shall, in no case, be increased or diminished during the term of his office. It seems necessarily to follow, that no action of the legislature or of the county board, taken after such officer has entered upon his term, can have any legal effect, in affecting the amount of his compensation for and during that term. Any statute, or order of the county board, to be effective in this regard, must, of necessity, be made and in force before such term begins.

The language of the statute of March, 1872, is in consonance with this view. After dealing with the salaries of certain officers, it says: "the fees and *compensation* of the several officers hereinafter named shall be as follows;" and then follow the provisions as to the fees of the clerks of the circuit court, the recorders, the county clerks, the sheriffs, masters in chancery, county collectors and other local officers. It seems to follow, that Purcell, having entered upon his term as county clerk, with authority to receive and appropriate the fees of that office provided by the General Assembly, restrained by no limitation resulting from the act of the county board in fixing his compensation, had the lawful right to appropriate to himself, as compensation for his services, and for necessary clerk hire, stationery, fuel and other expenses, all the fees arising under the statute, until the limitation of $2000 provided in the constitution was reached, and the excess above that sum he must pay into the county treasury. The order of the county board of March, 1874, had no legal effect upon his compensation, but will, if it remain unchanged, lawfully fix the compensation of the county clerk for the succeeding term. If it be assumed that, in the absence of an order of the county board, the clerk has no compensation, it seems necessarily to follow, that he can have *no compensation* so long as his term lasts.

It seems to me it can not properly be held, that the granting of a compensation to an officer, who, by law, has none, is not, in substance, increasing his compensation. As well might it be said that, to permit a tenant to prove that his landlord had no title, would be no violation of the rule, that "a tenant can not dispute his landlord's title," and this upon the ground that so doing is not disputing his title, but merely showing that "he had no title to dispute." A vicious practice had prevailed in legislatures and county boards, of intermeddling with the compensation of officers after their election, increasing that of friends and reducing that of those not in favor. This was the evil to be cured. To permit a county board to lie by until after the election of a county officer, and afterwards provide a large compensation for the officer, if a friend, and a meagre compensation if otherwise, is, I think, to permit a plain violation of this constitution. If this be not so, the county board may, at any time, by an order made just before an election of a county clerk, rescind all orders theretofore made fixing the compensation of that officer, and then, after the election is over, may fix a large compensation if the successful candidate be in favor, or a small compensation if he be not in favor, and thus the constitution may, in this regard, become a dead letter.

DRURY BISHOP

v.

MARY MORGAN.

1. WILLS—*construction of description of land.* Where a will describes a tract of land devised, as the south-east quarter of a section, containing forty acres, more or less, the words "containing forty acres, more or less," do not modify or affect the description of the land as the south-east quarter, and a court, in construing the will, will not consider the fact that the testator did not own the land described, but did own the south-east quarter of the north-east quarter of that section when he made the will, and at the time of his death.

2. DESCRIPTION OF LAND. Quantity, in the description of land, is never allowed to control courses, distances, monuments or natural land marks, such as creeks, rivers, ponds or lakes.

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

Messrs. METCALF & BRADSHAW, for the appellant.

Mr. THOMAS G. ALLEN, for the appellee.

Per CURIAM: The appellant and appellee are brother and sister—the only children and heirs at law of Jonathan Bishop, deceased. Their father, when he made his will and at his death, was the owner in fee of 120 acres of land, lying in and being part of the north-east quarter of a certain section 10, and consisting of one 80-acre tract, being the north half of that quarter section, and of one 40-acre tract, being the south-east quarter of that quarter section, and owned no other real estate.

The will of the father contains the following:

"2d. I give and bequeath unto my son, Drury Bishop, his heirs and assigns forever, all that piece or parcel of land situated in Madison county, State of Illinois, to-wit: the north half of the north-east quarter of section number 10, in township number 3 north, in range number 9 west, of the third principal meridian, containing 80 acres, more or less; also, that certain piece or parcel of land situated in Madison county, State of Illinois, known and described as follows, to-wit: the south-east quarter of section number 10, in township number three (3) north, of range number 9 west, of the third principal meridian, containing 40 acres, more or less."

The only point in controversy in this case relates to the construction of that clause in the will which devises to Drury Bishop "all that parcel of land known and described as the south-east quarter of section 10, * * * containing 40 acres, more or less," and to the question whether the facts stated can be considered in giving construction to that clause in the will.

It is plain there is nothing in this case to distinguish it in principle from the case of *Kurtz* v. *Hibner*, 55 Ill. 514, unless it be indeed the use of the words, "containing 40 acres, more or less," in the description of the land devised. It is contended that this is evidence, on the face of the will, of a mistake, or that the words, on their face, contain two descriptions, one saying it is "the south-east quarter" of the section mentioned, and the other saying it is "a 40-acre tract," lying in that section.

We know of no adjudicated case or elementary rule by which the use of the words, "containing 40 acres, more or less," can be allowed to affect or modify a description, such as "the south-east quarter of said section," which is clear and certain as to location and boundaries. Quantity, in the description of land, is never allowed to control courses, distances, monuments or natural land marks, such as creeks, rivers, ponds or lakes. The majority of the court are of opinion that these extraneous facts can not be considered, and ought not to control the plain words of the will.

The decree must be affirmed.

Decree affirmed.

Mr. JUSTICE DICKEY: I can not concur in this decision. Where there is palpably, on the face of a will, a misdescription of the subject matter of the devise, the court will look into the condition and situation of the testator at the time of making the will, and thus seek for the true intention of the testator in the use of the words found in the will. The words of the will are all to be considered, and if they are repugnant to each other, or contain two descriptions incompatible with each other, the court will, where the circumstances show *clearly* the intention of the testator, determine, from the consideration of the circumstances and all the words used, what words are to be rejected and what words must be supplied to express correctly the true intention of the testator.

In this case there is, on the face of the will, a palpable misdescription, or what is called "an equivocation." The quarter

of a section contains 160 acres of land. The tract here devised is described as supposed to contain "40 acres." Palpably there is a mistake in this description, on the face of the will. Wherein is the mistake?

Unless the presumption is rebutted, a testator is supposed to know what property he does own, and is supposed to deal in his will with none other.

In looking into the circumstances under which the words in this will were used, we find that the testator, after disposing of the tract supposed to contain 80 acres, had but one other tract of land which he had the power to dispose of, and that was the south-east quarter of the north-east quarter of this section 10, supposed to contain 40 acres. He then undertakes to describe the thing to be devised, and says, "the south-east quarter" of this section 10, "containing 40 acres, more or less." What land does he mean? No man can doubt that he meant by these words to identify the land which he did own, which was a part of section 10, and which was supposed to contain 40 acres, and that he did not mean to devise a tract of land which he never owned and which was not supposed to contain 40 acres, but was supposed to contain four times that quantity; and especially is this inference cogent when we find that the words actually used, so far as they go, are apt words to describe the tract which he did own.

The true description is: "the south-east quarter of the north-east quarter of section 10, * * * containing 40 acres, more or less." The words in quotation marks are the words found in the will. The words "of the north-east quarter," are omitted. Courts often supply words, when it is clear, from the context, that they have been omitted by mistake, and there is no doubt as to the proper words to be supplied.

Reference is made to the decision of this court in the case of *Kurtz* v. *Hibner*, *supra*, and it is supposed that these cases are so much alike that they must be governed by the same rule. To my mind, they do not rest on the same ground. In that case, the will, on its face, was clear and perfect, and no part of it was repugnant to any other part. There was no

"equivocation" apparent on the face of the will. The court there held, that the language was so plain that it was not open to construction—that there was no room for construction, and refused to examine the circumstances, to aid construction. In this case the whole description in the will can not stand without modification. There is, on the face of the will, "an equivocation," produced by the words "containing 40 acres, more or less."

The language demands construction. When the court is once thus called upon to construe, in my view of the law it ought to look into the facts surrounding the testator when he used the words, and adopt the meaning attached to these phrases by the testator when he used them. This seems to me to be the teaching of the authorities and the logic of the case.

A will can not be reformed by a court of equity as may a deed or a contract, and for that reason a more liberal rule of construction has always been applied in the construction of wills than in the construction of deeds and contracts. It is not denied that in giving *construction* to descriptions of land in deeds and contracts, the quantity mentioned is regarded of little importance when compared with other evidence of identity. Were the words used in this will found in a deed, and application made to a court of equity to reform the deed, it must be conceded that the use of the words, "containing 40 acres, more or less," connected with the fact of the ownership of the south-east quarter of the north-east quarter of the section, and with the fact that the grantor never owned or claimed to own the south-east quarter of the section, or any other part of the section, would be evidence sufficient for the reformation of the deed. If this will had omitted the words, "south-east quarter," and had simply said a parcel of land in said section 10, "containing 40 acres, more or less," no court would hesitate to admit the proof offered in this case, and, when heard, to apply the description as claimed by appellant. In my humble judgment, the rule of excluding such proof was pushed to the utmost verge that the law requires, in the case of *Kurtz*

v. *Hibner*, and without questioning the ruling in that case, my sanction can not be given to what to my mind seems to be carrying it farther. The words "more or less" do not always destroy the measure of quantity, to which they are applied as a qualification. This court limited their effect in the case of *Tilden* v. *Rosenthal*, 41 Ill. 385. No greater effect should be given to them here.

Mr. CHIEF JUSTICE SHELDON: I concur in the above opinion of Mr. JUSTICE DICKEY.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIAM MCADAMS.

1. SCHOOL DISTRICTS—*meaning of, in constitution of* 1848. The school districts referred to in the 5th section of the 9th article of the constitution of 1848 as capable of being vested with power to assess and collect taxes for corporate purposes, are the public school districts well known and existing throughout the State, formed for the purpose of the maintenance and support of public schools under the general school laws of the State, as a part of the system for the establishment and maintenance of common schools throughout the State.

2. SAME—*can not be arbitrarily established and vested with taxing power.* The legislature, under the constitution of 1848, had no power to constitute a private school house, erected under the provisions of a will of a testator as a school house and place of worship, a district, and provide for the election of trustees therein, and invest them with the taxing power for the support of a school to be maintained therein.

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

Messrs. HAMILTON, HODGES & BURR, for the appellant.

Messrs. WARREN & POGUE, for the appellee.

Opinion of the Court.

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

This was an application by the sheriff and *ex officio* collector of taxes of Jersey county, in this State, made to the county court of Jersey county, at the May term, 1874, for judgment and order of sale of real estate for non-payment of taxes. The defendant, McAdams, filed his objections to the rendition of a judgment against his lands situate in Hamilton primary school district, for the tax levied for school purposes for the year 1873. The county court overruled the objections, and gave judgment against defendant's lands for said taxes, and costs. On appeal to the circuit court, that court reversed the judgment, and rendered judgment for the defendant, and plaintiff appealed to this court.

It was admitted by the parties, on the trial in the circuit court, that, at a regular meeting of the board of trustees of Hamilton primary school, held on the 14th day of August, 1873, said board voted a tax of $6000 for school purposes, to be levied on the taxable property in Hamilton primary school district, for the year 1873, and that the following certificate thereof was filed with the clerk of the county court of Jersey county on August 27, 1873, to-wit:

"We hereby certify that we require the amount of $6000 to be levied as a special tax for school purposes, on the taxable property of our district, for the year 1873.

Given under our hands this 14th day of August, 1873, by order of the board of trustees H. P. S., T. 7, R. 12.

J. T. CURTISS, *President.*
F. GIERS, *Secretary.*"

And that the county clerk extended the tax on the taxable property of Hamilton primary school district on the collector's book for the year 1873, by virtue of said certificate of tax.

The question presented is as to the validity of this tax.

On the 1st day of February, 1840, the General Assembly of this State passed "An act to incorporate Hamilton Primary

School," (see Private Laws of 1840, p. 53,) the preamble whereof recites:

"Whereas, Silas Hamilton did, by his will and bequest bearing date the 20th day of October, 1834, give and bequeath $4000 in the words following, viz: Believing in the very great importance of primary schools, and desiring that my friends and relatives in this neighborhood should receive the benefit of them, I give and bequeath $4000 for the establishment of a primary school, viz: $2000 to be appropriated to the erection of a building suitable for a school and for a place of public worship, and $2000 to be constituted a fund for the support of a teacher; said house is to be located not exceeding one mile south of this, my residence, nor one mile west, nor one-half mile north, nor one-fourth mile east of it, but at or near the point called the Four Corners, and I desire my executors to oversee the erection of said building.

"And whereas, the executors of said Hamilton have procured a lot of land at the place called the Four Corners, mentioned in said will, it being in the center of section No. 14, in township No. 7 north, range No. 12 west, in Jersey county, and have erected a stone building thereon for the use and purpose mentioned in said will, and for the purpose of enabling the neighborhood aforesaid to use and forever enjoy the benefits of said bequest. Therefore," etc.

The first section enacted that five named individuals and their successors be created a body politic and corporate, by the name and style of the Hamilton Primary School, and by that name could acquire, hold and convey property, "together with all donations and bequests made by Silas Hamilton for school purposes."

It was further provided that the said school should remain located where it was; that the powers conferred by the act should be employed for the purpose of establishing a primary school, and promoting the cause of education; that all gifts and donations which had been or might be made, should be received and held by said Hamilton primary school for the purpose of establishing a seminary of learning, and as best to

promote the objects of the donor, and the trustees were invested with the general power of management of the affairs of the school. The affairs of the school were to be governed by trustees, the five named in the first section to be the first trustees; and on the first Monday of June thereafter, there were to be elected five trustees, and thereafter one every year—one to then go out; that at the election of trustees, persons residing within four miles square, said school house to be the center of the four-miles square, and having the qualification to vote for members of the General Assembly, should be entitled to vote for trustees. The trustees were empowered to make settlement with the executors of Silas Hamilton in respect to said donation, and it was made their duty to see that the donation of said Hamilton was faithfully applied to the objects of the donor.

On the 31st of March, 1869, (Private Laws of 1869, p. 534.) the legislature passed an act amending said act of February 1, 1840, in which it is provided in the second section that the said incorporation shall be three miles square, north and south, east and west, calling the school house the center: "provided, always, that this amendment shall not be so construed as to prevent any relative of Dr. Silas Hamilton from attending said school, who is under twenty-one years of age."

Section 3 is as follows: "The board of trustees are hereby authorized to assess taxes for purpose of paying teachers, repairing the stone school house, or for erecting new buildings for school purposes, not exceeding two per cent per annum."

This is the sole provision upon the subject of this taxation.

The 5th section of the 9th article of the constitution of 1848, in force at the time of the passage of the legislative acts above named, provided that "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."

It has ever been held by this court that this section was to be construed as a limitation upon the power of the legislature to delegate the right of corporate or local taxation to any other than the corporate or local authorities, and that, by the phrase "corporate authorities," must be understood those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they have given their assent. *The People ex rel. McCagg* v. *The Mayor of Chicago*, 51 Ill. 17; *Same ex rel. Wilson* v. *Salomon*, id. 37; *Harward* v. *St. Clair Drainage Co.* id. 130; *Lovingston* v. *Wider*, 53 Ill. 302; *Updike* v. *Wright*, 81 Ill. 49.

These trustees who imposed this tax were not any such corporate authorities of any such corporate bodies as are enumerated in the above cited section of the constitution. Although this Hamilton primary school district may be termed a school district, it is no such school district as is contemplated in the above constitutional provision. The "school districts" there referred to, were the public school districts well known and existing throughout the State, formed for the purpose of the maintenance and support of public schools under the general school law as a part of the system for the establishment and maintenance of common schools throughout the State. To hold that this school district in question comes within the constitutional intendment of "School districts," would be to enable the legislature to confer the taxing power upon any college, seminary or private school of learning within the State, by constituting about it an arbitrary district, provide for the election of trustees therein, and bestow upon them the taxing power for the support of the institution.

Although it was held in *The People* v. *Salomon*, *supra*, that the clause in the constitution that the legislature may vest the corporate authorities of counties, cities, etc., with the power to assess and collect taxes, did not confine the legislature to any particular corporate authorities, or to any then known instrumentalities of that character, but that several towns, as in that case three towns, might be united in one district for the special purpose of establishing and maintaining a public

park, and the corporate authority of the district so created might be vested with the power of assessing and collecting taxes for the special corporate purpose; yet it was expressly said that the park commissioners there, became a corporate authority, *quasi* municipal, the object of their creation being of a municipal character, and of that alone; that they became a public municipal corporation.

In *Harward* v. *St. Clair Drainage Co. supra*, it was said, with reference to the constitution of 1848, "Under our constitution, the right of taxation can not be granted either to private persons or private corporations." And see *Board of Directors, etc.* v. *Houston*, 71 Ill. 318.

A tax is an imposition for the supply of the public treasury, and not for the supply of individuals, or private corporations, however benevolent they may be. *The Philadelphia Association* v. *Wood*, 39 Penn. St. 73.

The power to tax is vested exclusively in the legislature, and, until they delegate this power to some municipal corporation, the power remains there. Cooley on Taxation, 110.

As to the distinction between municipal or public, and private corporations, Dillon on Mun. Corp., in section 10, lays it down, that corporations intended to assist in the conduct of local civil government are sometimes styled *political*, sometimes *public*, sometimes *civil* and sometimes *municipal*, and certain kinds of them with very restricted powers—*quasi* corporations—all these by way of distinction from *private* corporations. All corporations intended as agencies in the administration of civil government are *public*, as distinguished from *private* corporations; and in section 29, *private corporations* are created for private, as distinguished from governmental, purposes, and they are not, in contemplation of law, public, because it may have been supposed by the legislature that their establishment would promote, either directly or consequentially, the public interest.

In Ang. & Ames on Corp. section 31, it is said that the main distinction between public and private corporations is, that over the former the legislature, as the trustee or guardian

of the public interest, has the exclusive and unrestrained control, and acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends. * * * Private corporations are indisputably the creatures of public policy, and, in the popular meaning of the term, may be called public, but yet, if the whole interest does not belong to the government (as, if the corporation is created for the administration of civil or municipal power), the corporation is private; and see *City of Louisville* v. *President and Trustees of University*, 15 B. Monroe, 642; *Curtis* v. *Whipple*, 24 Wis. 350.

Under the decisions of this court, it would seem, as before said, that by the phrase, "corporate authorities," used in the constitution, is to be understood municipal officers.

The trustees, in this case, were in no proper sense municipal officers; nor was the Hamilton primary school a municipal corporation.

The bequest of $4000, by the will of Silas Hamilton, for the establishment of a primary school, $2000 thereof to be appropriated to the erection of a building suitable for a school and for a place of public worship, was not made to, nor did it belong to, the State; and the same of the lot of land procured by his executors, and the building erected by them thereon. It was not public property, but private property.

The incorporation of Hamilton primary school was not for governmental purposes, nor for any purpose belonging to the carrying out of the common school system of the State, but for the purpose of the administration of a private charity.

It is but a private corporation, and under the constitution of 1848, as we conceive, the legislature could not rightfully invest its corporate officers with the power of taxation. We hold the tax in question to be unauthorized and invalid.

The judgment will be affirmed.

Judgment affirmed.

ELIZABETH FREDERICK

v.

ADAM EWRIG.

1. CLOUD UPON TITLE—*paper, when its office is performed, if a cloud, will be decreed to be surrendered.* A paper which has performed its office, the continued existence of which may operate as a cloud upon the title of another party, will, by courts of equity, be decreed to be delivered up and canceled, or, if necessary, a conveyance of the property will be compelled.

2. REDEMPTION—*or an assignment.* Where property has been sold under a mortgage and the equity of redemption conveyed, and the grantee of the equity of redemption applies to the holder of the certificate of the mortgage sale for leave to redeem the property, after the expiration of twelve months from the day of sale, and the holder of the certificate, as a matter of favor, and for the purpose of permitting a redemption, and for no other purpose, accepts the amount due on the certificate and endorses and delivers the certificate to the owner of the equity of redemption, this is a redemption, and, after that, the certificate is null and void, and can not be used as the basis of a title.

WRIT OF ERROR to the Circuit Court of Clinton county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. WINKELMAN & HAY, for the plaintiff in error.

Mr. G. VAN HOOREBEKE, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This record is brought here, by a writ of error to the circuit court of Clinton county, to reverse a decree rendered by that court, in favor of Adam Ewrig, complainant, and against Elizabeth Frederick, defendant, the object of which was to enjoin certain actions of ejectment commenced by Elizabeth Frederick to recover possession of certain lands claimed by complainant, and to remove the cloud upon his title cast thereon by the claims and pretensions of the defendant.

Issues were made up and the cause heard on the pleadings and evidence, and a decree rendered against the defendant as prayed, to reverse which she prosecutes this writ of error.

The important questions raised on the record are two; and, first, what was the nature of the transaction with Nichols, in regard to the disposition made of the certificate of purchase held by him? and, second, had defendant a homestead right in the premises, and is the decree erroneous, because the same was not secured to her by the decree?

To understand these propositions, it is necessary the facts should be distinctly stated.

On the 15th of February, 1864, one Alvah Lewis was the owner of the lands, the subject of this controversy, who, on that day, sold and conveyed the same to John Frederick, the husband of plaintiff in error, taking from him, at the same time, a mortgage to secure the payment of some four thousand dollars of the purchase money. On the 9th of August, 1865, John Frederick and his wife conveyed these lands to his brother Nicholas, who, with his wife, on the same day, conveyed the same to plaintiff in error.

At the May term, 1869, of the Clinton circuit court, the mortgagee, Lewis, for the use of one William Nichols, sued out a writ of *scire facias* to foreclose this mortgage, and such proceedings were had that a judgment passed for the mortgage debt, and a special execution issued to the sheriff to sell these lands. The sheriff duly executed the writ, and sold the lands to William Nichols for the mortgage money, something over four thousand dollars, to whom the sheriff delivered the usual certificate of purchase, bearing date October 9, 1869.

At this date, the land having been conveyed to plaintiff in error by the deed of Nicholas Frederick and wife of August 9, 1865, she had the equity of redemption. Holding this equity, she had a right, under the statute, to pay Nichols the purchase money, with interest at the rate of ten per cent, and thus relieve the land from the sale. But this right was to be exercised within twelve months after the sale. In thirteen months after the sale an application was made to Nichols by Joseph Abend, acting as the agent of Mrs. Frederick, upon which, upon the interpretation to be given to it, this controversy mainly hinges.

If we understand the ground assumed by the plaintiff in error, she contends, her application to Nichols was not to redeem the land, but to procure a transfer of the certificate of purchase from Nichols. To enable her to raise the money to do this, it became necessary to apply to Abend, a real estate broker, who found the Karrs, Adam and Peter, with funds to loan. The money was advanced by the Karrs on the joint note of Mrs. Frederick and John Frederick, Sr., and his son, Nicholas Frederick, secured by a deed of trust signed by John Frederick, Jr. and the plaintiff in error, in which Joseph Abend and Henry Abend were constituted the trustees. The interest on these notes was paid by Mrs. Frederick. Subsequently, the certificate of purchase issued to Nichols came into the possession of the Karrs as explained in the testimony. It appears, on November 11, 1870, as Nichols testifies, Joseph Abend came to him at his house and told him he was acting for Mrs. Frederick and wanted to redeem these lands from his purchase, and was told the time of redemption had expired and that he would have to redeem as a judgment creditor. Abend then said he wanted to redeem them for the benefit of Frederick's wife. Nichols then told him he would let him redeem, and gave him the certificate with his name endorsed, he understanding it was for the benefit of Mrs. Frederick, without which he would not so have acted. If Nichols is to be believed, and there is no question on that point, the object, and the only object, in applying to him was to effect a redemption of these lands, and that by the grantee of the judgment debtor and mortgagor, she having at that time the right to make the application to redeem, being possessed of the equity of redemption. It is true, Nichols put his name on the back of the certificate, and says he transferred all the interest he had in it to somebody, and, probably, to Abend, he saying he was redeeming for the woman.

There was no formal transfer of any right Nichols had in the lands, or of his interest in the certificate of purchase, Nichols acting on the representations of Abend to effect a redemption for the woman, he receiving his money and interest at the rate of

ten per cent. We do not understand certificates of purchase are in their nature like commercial paper, which can be and are transferred from the payee to another by the endorsement of the payee's name. We understand when application is made by the holder of an equity of redemption, to the holder of a certificate of sale, to redeem the lands described from the sale, and a redemption is effected, the certificate is *functus officio*, and is no longer valid for any purpose. The statute is clear on this point: "and on such sum being paid, the said sale and the certificate therefor given shall be null and void." R. S. 1845, chap. 57, title "Judgment and Execution." There can be no doubt, then, there was a redemption of these lands intended to be effected by Abend for the benefit of Mrs. Frederick, who was, at the time, the grantee of the mortgagor and judgment debtor.

It appears, after the certificate was so procured with Nichols' name on the back, a formal assignment was written over his name, purporting to vest the interest in the Karrs, and the same delivered to them, not as a muniment of title, or a means of acquiring title through it, but as further security for the money they had advanced to Mrs. Frederick to enable her to redeem the lands. But if the statute we have quoted is of any force, the certificate was of no force; the land having been redeemed, it was null and void. It is very clear, we think, Nichols did not consider, when he agreed to a redemption, and gave the certificate to Abend, he was so transferring it, so that at some future time a title might be obtained under it. The intention with which an act is done must be ascertained, if it can be, from the transaction itself and the surrounding circumstances. It is quite apparent, Nichols' acts were prompted by the fact a woman was in the case whom he desired to benefit. His sympathies were aroused, and being a woman, he waived the advantage which he had, more than one year having expired, and permitted her to redeem the lands. He had no idea he was conferring upon her, or upon any one else, the power to get the title to these lands by force of the certificate.

It is claimed, by the defendant in error, that if the certificate was in full life after this transaction with Nichols, it never came to the possession of the Karrs for any other purpose than as security for the money they advanced to redeem the lands; that they did not suppose they were taking a step to acquire the title to these lands. This is shown from the testimony of the Karrs. They constantly insisted they did not want the lands, and bought the certificate to secure the money, and Peter Karr testifies he kept the certificate until he got his money.

It will be remembered, this arrangement with Nichols was made November 11, 1870. Karr's loan to Mrs. Frederick, through Abend, was for two years, and tacitly extended beyond that time, and not fully paid by Mrs. Frederick until the 18th of June, 1874, when the Karrs made a quitclaim deed to her, they having obtained a deed from the sheriff on this certificate on the 4th day of June, a fortnight previously. It is very clear, from the testimony of all the witnesses, the Karrs, Mr. Frederick and Ewrig, that this certificate was held by the Karrs as security merely, and they had given Mrs. Frederick a writing to redeliver it to her when the loan was discharged, neither of these parties contemplating anything else, not one of them then entertaining the idea that a title should grow up out of it. Peter Karr testifies he kept the certificate until the money was paid; why, then, it being in their hands as security only, and they bound by contract to redeliver it, did they change their arrangements, and procure a sheriff's deed? The facts will show.

Mrs. Frederick, under the deed of August 9, 1865, from Nicholas Frederick and wife to her, relied in perfect security on her title thus acquired, subject to no disturbance other than that which might result from the mortgage executed by her husband to Alvah Lewis, of February 15, 1864—all other claims she felt certain she could defy.

But she was not secure, for on the 15th of November, 1872, John Frederick, who had conveyed this land to his brother Nicholas, was, on his own petition, adjudged by the proper court a bankrupt, and his estate, real and personal, assigned

to one George Swaggard in due form, who, thereupon, became entitled to the same.

One Remick, a creditor of the bankrupt, commenced proceedings in the United States District Court for the Southern District of Illinois, making said Frederick, Swaggard his assignee, Mrs. Frederick the plaintiff in error here, and Nicholas Frederick, parties defendant, the object of which was to set aside the deed made by John Frederick and wife to Nicholas Frederick, and the deed from the latter to plaintiff in error, of the date of August 9, 1865, for these lands, as fraudulent and void; and on the sixth day of April, 1874, a decree was entered in said suit, setting the said deeds aside, and declaring the lands therein conveyed to be assets of John Frederick, and ordering the same to be sold to pay his debts.

It may be remarked here, in reply to a suggestion of plaintiff in error that the Karrs were not a party to these proceedings, that there was no necessity they should be parties, as they had not a particle of interest in any matters therein litigated and adjudged.

The assignee, Swaggard, proceeded to the performance of his duties, and sold the lands to Adam Ewrig, the defendant in error, for thirteen thousand five hundred dollars, being their full value.

These proceedings in the United States Court must have filled Mrs. Frederick and her advisors with astonishment, as her title to the land acquired in 1865 was taken from her, and the redemption from Nichols would avail nothing. Other arrangements were necessary. Swaggard, the assignee, before he sold the lands, having heard the Karrs had this certificate, some ten days before the sale called upon Adam Karr to ascertain the amount of his claim, which he stated to be about five thousand dollars. The assignee informed him he would sell the land in a few days, and come and pay off his claim. Karr said all he wanted was his money—that he did not want the land. After the sale, the assignee went to Karr with the money to pay his claim, and he said he had conveyed to Mrs. Frederick a few days before. This was the consummation of

the plan, made necessary by the action of the Federal Court, and we are asked to sanction it, and to hold that thereby plaintiff in error became vested with the legal title to these lands, and Ewrig, the purchaser at the assignee's sale, after paying more than thirteen thousand dollars for the lands, acquired nothing. Armed with this deed from the Karrs, obtained under the circumstances stated, the plaintiff in error commenced a series of actions against those in possession under the defendant in error, rendering an injunction necessary, and a removal of this deed as a cloud upon his title indispensable.

We are satisfied the application by Mr. Frederick's agent to Nichols was to redeem these lands, and nothing more, and though the time for redeeming had expired, he yielded to female entreaty, and permitted her to redeem, from which time the certificate of purchase became and was null and void —that it was not the intention and design of these parties, at that time, to use the certificate as a basis of title; and we are also satisfied, even if it had not spent its force, the Karrs held it as security for their loan, and were under obligations to deliver it up to plaintiff in error, on the payment of the loan. This they did not do, but, to further the plans of plaintiff and her advisors, when they were informed by the assignee he was about to sell the lands and would pay them, and when he came in a few days thereafter with the money to pay them, he was informed they had conveyed the lands to the plaintiff in error.

This was not according to the agreement, understanding and intention of the parties. A paper which has performed its office, yet whose existence may operate as a cloud upon the title of another party, will, by courts of equity, be decreed to be delivered up and canceled, or compel a re-conveyance of the property, if necessary. *Redmond et al.* v. *Packenham et al.* 66 Ill. 434. This principle is under an old head of equity jurisdiction, but as we can not act upon the certificate, we can decree and determine, in conformity with the decision of the court below, the sheriff's deed to the Karrs, and their deed to plaintiff in error, to be fraudulent, null and void, and that the same be canceled.

Upon the other point, as to the right of homestead, we are satisfied, being a party to the fraudulent conveyance to Nicholas Frederick, under which she claimed title, deprives her of a right to claim a homestead. Besides, the District Court of the United States, in the bankruptcy proceedings, had a right to set off a homestead right, and it is fair to presume that subject was adjudicated by that court. But if it was not, this decree would not be reversed for an omission to set it off, as that can be done hereafter, should plaintiff in error establish a right.

The decree gives her largely more than she is entitled to receive, but as there are no cross-errors assigned, we can not interfere in this regard. She has decreed to her all the money she paid to redeem these lands, with ten per cent interest on the amount, and has enjoyed the rents and profits of these valuable lands to her own use, without being required to account for one dollar thereof. This is quite as much as the demands of justice and equity can accord. A different decree, as demanded by plaintiff in error, would deprive the defendant in error of thirteen thousand five hundred dollars, the price paid for the lands, with no recourse upon any one.

As to the claim of plaintiff in error, that a part of the moneys paid on this land came to her from her father's estate, and she therefore has an equity to that extent, the answer is, one thousand dollars so came to her in 1856 or 1857, she being then married, and, by the law then in force, the same became the property of her husband, and could be appropriated by him to his own use, raising no equity in her behalf.

It is further complained, the decree does not find the allegations of the bill to be true. This is hardly necessary, when all the evidence is contained in the record, and we can see from it if the court reached correct conclusions.

It is also insisted by plaintiff in error, as the bill does not claim costs they can not be recovered. *Carter* v. *Lewis*, 29 Ill. 500, is cited in support of this proposition. We do not think the case sustains the objection. That was a creditor's bill, in which judgments of different amounts were set out,

claiming only those amounts. This court held, as interest and costs on them were not claimed, those items could not be allowed in the decree.

We are satisfied with the decree of the circuit court in this case as doing justice to the parties, and affirm the same.

Decree affirmed.

Mr. JUSTICE DICKEY: I can not concur in the positions taken in this opinion, nor in the judgment.

Mr. JUSTICE WALKER, dissenting:

That Abend, Nichols, the Karrs and Mrs. Frederick all understood that there was not a redemption, is manifest from the fact that the certificate of purchase was assigned by Nichols and delivered to the Karrs as, and was held for, security for the money they advanced to Mrs. Frederick to purchase the certificate, and was regarded by all parties as an assignment and not as a redemption. I, therefore, hold, that Mrs. Frederick was a purchaser, and became entitled to hold the fee under the deed from the Karrs; and I am unable to concur either in the reasoning or conclusion announced in the opinion of a majority of the court.

Mr. CHIEF JUSTICE SHELDON: I concur with Mr. JUSTICE WALKER that the transaction with Nichols was an assignment by him of the certificate of purchase.

MORITZ J. DOBSCHUETZ *et al.*

v.

JOHN J. HOLLIDAY *et al.*

1. REAL ESTATE—*engine and machinery attached to, become part.* A steam engine, machinery and fixtures attached to the soil by a lessee thereof for the purpose of hoisting coal from mines situated thereon, including all boxes

and other necessary appliances connected therewith, become a part of the lessee's estate therein.

2. MECHANIC'S LIEN—*attaches to leasehold estate for work on machinery which lessee, under his lease, may remove.* Although, by the terms of a lease, the lessee has the privilege of removing all machinery and fixtures placed upon the leased premises, yet an engine and fixtures attached to the soil are a part of the estate itself until severed, and a mechanic or materialman, who, under a contract with the lessee, furnishes such engine and fixtures, and puts it up on the premises, is entitled to a mechanic's lien against the estate of the lessee on account thereof.

3. LEASEHOLD ESTATE—*mechanic's lien on, not affected by voluntary surrender to owner of the fee.* A voluntary surrender by a lessee of the leased premises to his landlord, before the expiration of his lease, can not affect a mechanic's lien upon the leasehold estate which attached whilst the lessee was the owner; and in such case, if the owner of the fee should neglect to discharge the lien, upon the consummation of a sale under the decree establishing it, he would be compelled to accept another tenant.

4. DECREE—*against owner of fee who accepts surrender of leasehold estate subject to mechanic's lien.* Where a lessee of land, whose estate only is sought to be subjected to a mechanic's lien, surrenders his estate to the owner of the fee, a decree establishing the lien may properly order that, in default of the payment of the amount of the lien by the lessee or the owner to whom he has surrendered, the interest of all the parties therein be sold; such a decree would be construed as applying to the interest of the parties in the leasehold estate, including the improvements for which the lien is established.

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

Messrs. C. W. & E. L. THOMAS, for the appellants.

Messrs. WILDERMAN & HAMILL, and Mr. JAMES M. DILL, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Petitioners contracted with the lessee in possession of the premises described, to build for him an engine, and do other work in constructing the necessary apparatus for hoisting coal from the mines he was about to open in the demised lands. There was a definite agreement as to the amount to be paid for the engine, and the time and manner of payment were fixed,

but not as to the other articles to be furnished and the labor to be performed in setting the machinery. All other work was embraced in a different, contemporaneous agreement. One-half the contract price of the engine was to be paid in cash, during the progress of the work, and the other half, together with the amount and value of the other articles, to be paid in coal, at market rates, to be delivered in quantities, within one year from the completion of the work. The lessee having refused to deliver any more coal under his agreement, it is now sought to establish a mechanic's lien against his interest in the premises and the improvements for the balance due.

Under our statute, the lien given in favor of the mechanic or materialman is made to extend to an estate in fee, for life, for years, or any other estate, or any right of redemption, or other interest which the owner may have in the lot or land at the time of making the contract. R. S. 1874, chap. 82, sec. 2.

In this case the party with whom the contract was made was the owner of a leasehold estate limited in duration to twenty years, unless sooner terminated by the exhaustion of the coal in the mines demised. That interest it is sought to subject to the lien for the materials furnished and labor done in erecting the superstructure and apparatus for hoisting coal from the mines.

No variance exists between the contract alleged and the one proven. All the agreement between the parties was not reduced to writing. Only that part that related to the engine, the amount and manner of payment, was the subject of a written agreement, while the remaining portion, having reference to other materials to be furnished and labor to be performed in setting all the work in place on the premises, was by verbal contract.

One principal ground upon which the lien is resisted, so far as the engine is concerned, is, that it is personal property, and hence no lien exists under the statute. Whatever may have been the private agreement of the parties, it is very clear the engine, when set up and attached to the realty, as it was,

became a part of the estate the lessee had in the premises. No doubt the parties could agree among themselves they would treat the engine and other fixtures as personalty, but their private agreement could not change the character of the property, so far as third parties were concerned. The engine and superstructure, when attached to the soil, became a part of the estate of the lessee, and, unless expressly reserved, would pass to his grantee with the estate. *Ombony* v. *Jones*, 19 N. Y. 234.

Under the agreement of the parties, the lessee had the privilege of removing all machinery and fixtures used in and about the mines in prosecuting the work, but until severed they constituted a part of the estate itself. Of this we think there can be no question. No importance can be attached to that clause in the proposition to construct the engine "delivered aboard the cars at East St. Louis," in illustrating this branch of the case. It is a misapprehension to suppose those words indicate when the title to the property vested in the purchaser. All they mean, in that connection, is, that the makers, in addition to completing the engine, were, also, to deliver it on board the cars at East St. Louis, without additional charges above the contract price.

No grounds of forfeiture of the lease are shown by the evidence in the record. The witness—one of the lessors—states, "we declared a forfeiture and took possession;" but it is apprehended, under the decision in *Cheney* v. *Bonnell*, 58 Ill. 268, it was necessary to show that the facts warranted a declaration of forfeiture. Otherwise, the possession that followed will be treated as a surrender of the premises by the lessee to the lessors, and nothing more. The voluntary surrender to the owner of the fee can not affect the lien upon the estate of the lessee, which attached while he was the owner. Should the owners of the fee neglect to discharge the lien upon the consummation of the sale under the decree establishing it, they would be compelled to accept another tenant. After the surrender, the estate would still be subject to the burdens that rested upon it, as well as before. The merger

of the estate of the lessee with that of the owners of the fee would not destroy the previous lien. *Gaskill* v. *Tramter*, 3 Cal. 334.

Evidence offered shows, with sufficient clearness, petitioners did the work and furnished materials under the contract as alleged. The contract was with the owner, in the sense that term is used in the statute. As the materials and work became a part of the estate, no valid reason exists why petitioners should not have a lien for the unpaid balance due under the contract. It is the exact case where the statute gives the lien for the security of the mechanic and materialman.

It is insisted upon as error, the decree orders payment of the amount found due to be made by the tenant with whom the contract was made, or by the owners of the fee to whom the tenant has since surrendered the premises, and, in case of default of payment, all the interest of all the parties be sold. Only the leasehold estate, with the improvements made under the contract with the tenant, were sought to be subjected to the lien, and, construing the decree as having no broader scope and as only intended to embrace the estate of the lessee, which had become merged, by the surrender, with the estate of the owners of the fee, it was not irregular to decree that all the interests of all the parties in that estate be sold to satisfy the amount found due. That is all the court intended, as we understand the decree. With this limitation, which we think is plainly understood, the decree is strictly correct. *Kidder* v. *Aholtz*, 36 Ill. 478.

No order was made for an execution against the owners of the fee for any unpaid balance that might remain after the sale of the lessee's interest, and, as they had not personally assumed to pay the debt, no such order could be rightfully made. It will be time enough to complain when the court shall assume to make such a decree. We can not anticipate the court will order an execution in a case where it would be inequitable to do so.

Respondent Kennedy filed a cross-petition, in which he alleges he made repairs on the engine and furnished materials,

and made a box to be used in connection with the other machinery in hoisting coal from the mines, and asks that a lien be established in his favor for the value of the labor performed and materials furnished. Objection is taken that boxes used as this one was, constitute no part of the realty. This position seems to us to be untenable. These boxes are a necessary and indispensable part of the machinery for raising coal. Connected, as they are, with other machinery attached and made part of the realty, they become a part also. What reason can be assigned why such boxes, when so connected, are not as much a part of the realty as any revolving or other movable part of the engine, which, when attached to the soil, is a part of it? No distinction can be taken. Such boxes are a part of one system of machinery, each part being indispensable to the working of the other, and without which other parts would be utterly valueless for the purposes intended.

The decree is warranted by the law and the evidence, and must be affirmed.

Decree affirmed.

TOM W. KINDER

v.

BRINK, MCCORMICK & CO.

1. PROPOSITION—*binding on party making, when acted on by other party.* A proposition in writing, signed by a party, to pay a sum of money to another upon the performance by the other of certain things, when accepted and acted upon, and the things to be done are performed before the proposition is withdrawn, becomes binding on the party signing it.

2. INSTRUCTION—*whether calculated to mislead.* An instruction stated to the jury, that if certain work was of the character contemplated by the parties, the jury should find, etc. It was objected that the word "quality" should have been used instead of "character," but the court held that the words were frequently used convertibly, and that in the connection in which the term was used in the instruction, it could not have misled the jury.

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

Messrs. KROME & HADLEY, for the appellant.

Messrs. GILLESPIE & HAPPY, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action originally brought before a justice of the peace in Madison county. A trial was had, resulting in a judgment in favor of plaintiffs, for the sum of $25 and costs. The case was removed to the circuit court by appeal, and on a trial by the court and a jury, it likewise resulted in a judgment in favor of plaintiffs, for $79. A motion for a new trial was entered and overruled, and defendant appeals to this court.

The suit was brought on this instrument:

"$100. VENICE, ILL., *Oct.* 27, 1873.

"In consideration for causing a sketch of my early history and portrait to be printed in their Atlas Map of Madison County, I promise to pay to Brink, McCormick & Co., or order, the sum ———, the whole sum amounting to $100, one-fourth of the payment to be made on signing contract, remainder when the maps are ready for delivery.

"TOM W. KINDER."

There were indorsed on the instrument, at different dates, payments amounting to $21.

The first objection urged is, that the instrument does not purport to be a contract, but simply a unilateral statement or proposition; that it is signed by but one party, and only binds that party; that, had appellees failed or refused to print the early history and portrait of appellant, he could not have maintained an action to recover damages. This, like any other such proposition that one party makes to another, may be accepted, and when acted upon, and the matters proposed to be done are accomplished before the proposition is withdrawn, it becomes binding on the party making the offer. This is true

of conditional promissory notes, subscriptions for the building of churches, seminaries, charitable institutions, and many transactions of daily occurrence.

The case of *Randolph County* v. *Jones*, Breese, 237, is referred to as announcing a different doctrine. If that case announces the doctrine contended for, then it is modified, if not overruled, by *Robertson* v. *March*, 3 Scam. 198, *Thompson* v. *Board of Supervisors*, 40 Ill. 379, and numerous other cases in this court; and, so far as we can see, *Waggeman* v. *Bracken*, 52 Ill. 468, does not have the remotest application to the facts of this case. There, articles of agreement were prepared to be executed by two parties, and were signed by but one of them, and it was held that they were not binding as a contract, nor had they any legal effect, but were simple memoranda. Here, the instrument was only intended to be executed by the party who signed it, and it was executed and delivered.

It is urged that the court erred in giving appellees' instructions. It is objected to the first, that if the insertion of the early history and the portrait in the map was of the character contemplated by the parties, then the jury should find for the defendant, that it should have used the word "quality" instead of the word "character." We do not see that this could have misled the jury. It is believed that the two terms are frequently used convertibly, and in the connection and under the circumstances the term was used in the instruction, we deem it almost impossible for the jury to have misunderstood or to have been misled by it.

It is urged that the second instruction was erroneous. It tells the jury, that if they believed that, at the time of making the contract, the standard of the work was to be the Morgan County Atlas, and they further believed that the work done was of that character, then they should find for the plaintiffs. We can perceive no force in this objection. There was evidence tending to prove that the Morgan County Atlas was to be the standard for the proposed atlas, and evidence as to the manner in which it was executed. If the work came up to that standard, and that was adopted as the measure of the

Madison county map, then there can be no question of appellant's liability, and it was for the jury to pass upon and find the facts. This instruction was entirely accurate.

It is insisted that the verdict is not sustained by the evidence. It was, as we generally find it, somewhat conflicting; but if the evidence of the appellees stood alone in the record, it would be amply sufficient to sustain the verdict, nor do we think that it has been overcome by that of appellant. The jury saw the bearing of the witnesses on the stand, heard them testify, and they had superior advantages of weighing and finding the value of the evidence, and, having determined it, we will not interpose to set their finding aside.

The judgment of the court below must be affirmed.

Judgment affirmed.

HALLAM & BARNES

v.

HARRIET H. MEANS.

1. PHYSICIANS AND SURGEONS—*degree of care and skill required.* While, perhaps, persons who hold themselves out to the public as physicians and surgeons, would not be required to possess the highest degree of skill which the most learned might acquire in the profession, yet they are bound to possess, and in their practice to exercise, that degree of skill which is ordinarily possessed by physicians in practice.

2. And where an injury results from a want of ordinary skill, or from a failure to exercise proper diligence and caution in the treatment of a case, the physician must be held responsible.

3. In this case a person had his leg broken. The fracture of the larger bone was oblique, and near the upper part of the lower third of the limb. The fracture of the smaller bone was nearly transverse, and was from two to three inches above the ankle joint. A surgeon was called within twenty minutes after the accident. In consequence of the want of care or skill on the part of the surgeon the broken leg was shortened three-fourths of an inch. A judgment against the surgeon for $1000 damages was affirmed.

4. It was held to have been the duty of the attending surgeon, according to the medical testimony adduced, to adjust the fracture and extend the limb

to its original length, and when this was accomplished and the bones placed in apposition, use those appliances in general use among surgeons which are best calculated and will hold the limb in proper position and at its original length.

5. However, if the character of the injury received be such that the patient could not endure extension and counter extension, then a failure to resort to those appliances would not show a want of skill, or negligence on the part of the surgeon.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. W. STOKER & SON, for the appellants.

Mr. B. B. SMITH, and Mr. M. SCHÆFFER, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action on the case, brought by Harriet H. Means, in the circuit court of Marion county, against appellants, to recover damages for the unskillful and negligent manner in which they, as physicians and surgeons, treated a broken leg of appellee.

The ground mainly relied upon by appellants to secure a reversal of the judgment is, that appellee failed to establish, by a preponderance of evidence, a want of skill or a want of ordinary or proper care on the part of appellants, either in adjusting the fracture or treating the broken limb.

The facts in this case have been passed upon by two juries, each of which returned a verdict in favor of appellee. The first trial resulted in a verdict of $500, which, on motion of appellants, the circuit court set aside and granted a new trial. Upon the second trial, the jury returned a verdict for $1000, upon which the court rendered judgment.

Where the facts in a case have been passed upon by two juries, each finding the same way, and then a reversal is asked on the ground that the evidence is not sufficient to sustain the verdict, it must be a case, in its facts, where the verdict is manifestly and clearly in conflict with the proof, to justify a reversal.

The law has intrusted the trial of issues of fact before a jury, and where a party has had the benefit of two trials in the mode prescribed by law, an appellate court ought not to interfere, except to prevent manifest injustice.

It is true, there is a clear conflict in the evidence as to the skill used by appellants in the treatment of the broken limb, but, upon a careful examination of the whole testimony, we think it apparent that the record discloses enough upon which to base the verdict of the jury.

The law required appellants, who held themselves out to the public as physicians and surgeons, to possess, and in their practice use, ordinary skill in their profession. While, perhaps, they would not be required to possess the highest degree of skill which the most learned might acquire in the profession, yet they were bound to have, and in their practice use, that degree of skill which is ordinarily possessed by physicians in practice. *Ritchey* v. *West*, 23 Ill. 385.

And where an injury results from a want of ordinary skill, or from a failure to exercise proper diligence and caution in the treatment of a case, the physician must be held responsible.

The question, then, is, whether appellants, in the treatment of appellee, used that skill which the law required, or whether there was evidence tending to establish a want of ordinary skill in the treatment.

It appears, from the testimony contained in the record, that, on the 19th day of January, 1872, appellee's leg was broken. The fracture of the larger bone was oblique, and near the upper part of the lower third of the limb. The fracture of the smaller bone was nearly transverse, and was from two to three inches above the ankle joint.

Immediately after the injury, and within twenty minutes after the leg was broken, appellants were called upon and undertook the treatment of the case.

Dr. Green, upon examination and measurement, found the broken leg three-quarters of an inch short. In his evidence before the jury, he said: "Shortening is caused by lapping of

bones; the upper fragment of the smaller bone has slipped past the lower fragment, and makes a prominence; that is the case with both bones; there is lapping of three-fourths of an inch, producing shortening."

This witness also testified: "The first duty of a surgeon is to adjust the fracture. I mean by that, extension or pulling out the same as the well bone. My practice is to set the bone anyhow. If I find the patient too nervous without, or there is too great rigidity of the muscles, I put him under the influence of chloroform, if he can not stand it without; and if the patient would not allow a proper adjustment of the fracture, I would abandon the case. The fragment can not be properly adjusted without extension and counter extension. Counter extension means holding it, and extension, extending it. It is done by pulling it out the proper length, and holding it there."

We have given this portion of Dr. Green's evidence as he gave it to the jury, for the reason that his testimony is directly in point, and he seems to be skilled in his profession.

According to the medical testimony before the jury, it was the duty of appellants, when they were employed as surgeons to treat the broken limb, to adjust the fracture and extend the limb to its original length, and when this was accomplished, and the bones placed in apposition, use those appliances in general use among surgeons which are best calculated to and will hold the limb in proper position, and at its original length.

Was this done by appellants?

When the fracture was adjusted, they do not pretend extension or counter extension was used. The excuse for not extending the limb, and using counter extension to hold it to its proper position, was on account of extreme tenderness and swelling. This excuse is, however, in conflict with the testimony of several witnesses who were present at the time.

Appellants were called upon to adjust the fracture, within twenty or thirty minutes after the bones were broken. While the limb may have become swollen immediately after the injury, yet it is unreasonable to suppose swelling would have occurred

so soon, or that degree of tenderness then existed that would manifest itself a few days after the accident.

Upon this point we are not, however, left to conjecture. It was proven by several witnesses who were present, that no swelling of the limb had occurred when the fracture was adjusted and placed in splints by one of appellants.

It is true, appellants claim that extension and counter extension were attempted some days after the fracture was adjusted, and the patient could not endure it, but it does not satisfactorily appear that the ankle joint was injured, or the fracture so near it as to interfere with proper treatment. But, independent of this, no good reason is shown why extension and counter extension were not used in the first instance.

The shortening of the limb, the prominence produced by the lapping of the bones, spoken of by Dr. Green, the inability of appellee to use her leg in walking without pain, the jury no doubt concluded, from the evidence, were to be attributed to the fact that the bones were not, at the proper time, placed in apposition, and the limb extended and held in position, as might have been done by the exercise of reasonable skill, which is required of a surgeon in the practice of his profession.

While we are willing to concede the evidence is somewhat conflicting, yet we are not prepared to say, upon consideration of all the testimony, the jury were not justified in arriving at the conclusion reached by the verdict.

It is also claimed by appellants that the third instruction given for appellee was improper, which was as follows:

"That if you believe, from the evidence, that, in the treatment of fractures of bones, regard should be had to the direction in which the break occurred; and if the jury believe, from the evidence, that the fracture of the bones of the plaintiff, which the defendants treated, required extension in order to secure the proper adjustment of the parts to each other, and that the defendants did not use any means to secure extension, but, by a want of skill, or by negligence, suffered the broken

fragment to be or become displaced, and that thereby the plaintiff has suffered and become permanently lame and disabled, as charged in the declaration, you should find defendants guilty."

It is suggested by appellants, "If inflammation, tenderness, complication of joint, and circulation, admitted of extension and counter extension, then it was appellants' duty to use it, and not otherwise."

While it is true appellants could not be held responsible on account of a failure to use extension and counter extension, if the condition of the patient and fracture were such that those appliances could not be resorted to or endured, yet we fail to perceive wherein the instruction could mislead the jury in that regard. If the character of the injury received was such that appellee could not endure extension and counter extension, then a failure to resort to those appliances would not show a want of skill, or negligence on the part of appellants.

The jury were expressly informed by the instruction that the injury of which appellee complains must have arisen from the want of skill or negligence of appellants in suffering the broken fragment to become displaced.

It is also urged that appellee's second, fourth and fifth instructions were argumentative, and calculated to mislead. We do not so regard them. They state the law involved substantially correct, and they contain nothing calculated to mislead the jury.

The appellants' twelfth instruction the court modified. In this we perceive no error. The instruction, as asked, announced the rule that, if appellants possessed ordinary skill, they could not be held liable, whether they used ordinary skill or not.

A surgeon, in order to relieve himself of responsibility, must not only possess, but, in the practice of the profession, must use ordinary skill.

As the record discloses no substantial error, the judgment will be affirmed.

Judgment affirmed.

Syllabus.

HORACE HAYWARD

v.

CAROLINE GUNN.

1. LIMITATION—*when a trust is exempt from the bar of statute.* To exempt a trust from the bar of the Statute of Limitations, it must, first, be a direct trust; second, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and, third, the question must arise between the trustee and the *cestui que trust.*

2. Hence, where money is placed in the hands of an agent for a particular use, the surplus, if any, to be refunded by him, an action at law to recover such surplus will be barred by the Statute of Limitations, by the lapse of the statutory period after a breach of the duty resting on the agent to return the surplus.

3. SAME—*effect of Married Women's Law of* 1861 *on statute.* The effect of the act of 1861, investing married women with the sole control of their separate property, was, as to such property, to place them in precisely the same position, so far as the Statute of Limitations is concerned, as they would occupy if unmarried.

4. EVIDENCE—*failure to render bill of items not ground for disregarding testimony of party in regard to.* The inability or refusal of a party testifying to a demand to render an itemized account, is a circumstance that might tend to weaken the effect of his testimony, but it is not conclusive proof that the testimony is false, nor should the jury be instructed to disregard the testimony in the absence of such an account.

5. STATUTE OF FRAUDS—*whether undertaking is collateral or original.* Where a woman puts notes in the hands of an attorney to be collected, and the proceeds applied to the payment of a debt for which her husband's property has been sold, and the costs of the proceedings against her, with the agreement that when the notes are paid the certificate of purchase shall be assigned to her, such transaction on her part is an original undertaking, and not a promise to pay the debt of another, and, hence, not within the Statute of Frauds.

APPEAL from the Circuit Court of Richland county; the Hon. J. C. ALLEN, Judge, presiding.

Messrs. CANBY & EKEY, for the appellant.

Messrs. WILSON & HUTCHINSON, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellee brought assumpsit against appellant, as surviving partner of the firm of Hayward & Kitchell, attorneys at law, for certain moneys belonging to her which she claimed they had received and failed to account for.

The declaration contains only the common consolidated money counts. Appellant pleaded, first, *non assumpsit;* second, that the several causes of action did not accrue within five years next before the commencement of the suit; and third, payment and set off. Appellee joined issue on the first plea, traversed the third, and replied, specially, to the second plea, first, that the several causes of action did accrue within five years; second, that the suit was to recover moneys, of which Hayward & Kitchell, as her attorneys, had been entrusted with the collection and custody; third, that suit was brought to recover on a contract in writing; fourth, the coverture of appellee; and, fifth that appellant fraudulently withheld and concealed from appellee knowledge of the several causes of action. Appellant joined issue on the replication to the third plea and the first replication to the second plea, and traversed the other replications to the second plea, upon which appellee joined issue.

The jury, under the instructions of the court, returned a verdict in favor of appellee for $584. Motion for a new trial was made by appellant, whereupon appellee remitted $184 of the amount found by the verdict of the jury, and the court then overruled the motion and gave judgment for appellee for $400.

The facts proved on the trial, so far as they are material to an understanding of the questions upon which we are required to pass, are, substantially, these:

One Samuel H. Gunn, the husband of appellee, being the owner of certain lots in Olney, and, at the same time, largely indebted to the firm of Cummins, Seaman & Co., of New York, had executed to them a mortgage on the lots to secure the payment of his indebtedness. The mortgage had been

foreclosed and the lots sold, and bid in by Cummins, Seaman & Co., who held certificates of purchase therefor. Appellee was desirous of purchasing and obtaining title in herself to a portion of these lots, and, to enable her to gratify that desire, the firm of Gunn Brothers (which did not include her husband) agreed to give her $1500 for a claim she held in her own right on certain other lots. The legal business relating to the collection of the indebtedness of Samuel H. Gunn to Cummins, Seaman & Co., including the foreclosure, sale, etc., was entrusted by them to the law firm of Hayward & Kitchell. After some negotiation, it was agreed between Cummins, Seaman & Co. and appellee, that they would, upon her paying them $1000, and releasing her claim to dower in the other lots for which they held certificates of purchase, assign and deliver to her the certificates of purchase to six designated lots. It is also claimed by appellant that appellee was, in addition to paying the $1000 to Cummins, Seaman & Co., to pay all costs and attorneys' fees incurred by them in collecting or attempting to collect claims against Samuel H. Gunn. Appellee concedes that she was to pay, in addition to the $1000, the costs, and attorneys' fees incurred in the foreclosure of the mortgage, but she denies that she was to pay any other costs. Cummins, Seaman & Co. placed in the hands of Hayward & Kitchell the certificates of purchase intended for appellee, to be held by them until she complied with the agreement, and then delivered to her. Appellee sold to Gunn Brothers the lots they agreed to buy of her for $1500, and they secured the payment of the same by their three promissory notes for $500 each. She placed these notes in the hands of Hayward & Kitchell with the understanding, as she claims, that they should collect them when due, and, after paying the amount of $1000 to Cummins, Seaman & Co. and the costs in the foreclosure suit, account to her for the balance; but appellant claims that one of the notes was assigned by her to Hayward & Kitchell for the payment of the costs, attorneys' fees, etc., which Cummins, Seaman & Co. had incurred in their efforts to collect from Samuel H. Gunn, and that the proceeds of the

other two notes were to be applied, when collected, in payment of the $1000, and accruing interest, to Cummins, Seaman & Co. The notes were collected, the $1000, and some accruing interest, paid to Cummins, Seaman & Co., and appellee relinquished her dower in the lots agreed upon to Cummins, Seaman & Co. and received the certificates of purchase to those she was to have.

It appears this all occurred as early as May, 1868, and this suit was not commenced until October 30, 1874. Appellee was divorced from her husband, as the record shows she testified, in 1869; but it is claimed, in point of fact, it was in 1871. In the view we take of the case, however, this is unimportant.

It appears, from the bill of exceptions, a receipt was given by Hayward & Kitchell for two of the notes, but what its language was does not appear. As to the third note, there does not appear to have been any writing whatever between the parties.

Appellee's claim is for the balance on the proceeds of the notes (after the payments authorized by her were made) in the hands of appellant, as surviving partner of Hayward & Kitchell.

The court, at the instance of appellee, gave to the jury several instructions to which exception is taken by the appellant. The first is as follows:

"If the jury find from the evidence that the defendant held in his hands funds which were placed there to pay certain claims, the overplus (if any) to be returned to the plaintiff, and if you further find that the defendant still has such funds in his hands, you will find for the plaintiff, and assess her damages at such sum as you find is justly her due. Such facts, if proven, will take a case out of the Statute of Limitations, and authorize a recovery, notwithstanding the lapse of time."

Appellee contends that the facts contemplated by this instruction, and upon the hypothesis of proof of which it was

given, create the relation of trustees and *cestui que trust* between appellee and Hayward & Kitchell, and, therefore, the Statute of Limitations can not be interposed as a bar to her claim. This, in our opinion, is a misapprehension of the law applicable to the evidence on this point. "To exempt a trust from the bar of the statute, it must be, first, a direct trust; second it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and, third, the question must arise between the trustee and the *cestui que trust*." Angell on Limitations, chap. 16, § 166; *The Governor, etc.* v. *Woodworth*, 63 Ill. 254.

The second requisite is here entirely wanting. It is obvious that a court of law has been just as competent to administer relief to appellee, ever since the breach of duty of Hayward & Kitchell, if they have been guilty of such breach, as it is now. Indeed, from the evidence, it is not perceived that appellee would, at any time, have been justified in resorting to a court of equity. No discovery was necessary, and the remedy at law was adequate. See, also, *Murray* v. *Coster*, 20 Johns. 576; *Wisner* v. *Barnett*, 4 Wash. C. Ct. 631.

The third instruction is: "The jury are not authorized to allow defendant for an account, unless the same is fully stated, so that the jury can understand for just what matter said charges are made."

This can have reference only to the evidence of appellant, in which he testified that he had appropriated the money collected, in excess of that paid Cummins, Seaman & Co., to the payment of costs and attorneys' fees. He gave no itemized account, but stated that the costs and attorneys' fees amounted to more than the amount Hayward & Kitchell had received. The effect of this instruction, as we conceive, was, to direct the jury to disregard this portion of his evidence. Appellant's inability or refusal to render an account was a circumstance that might tend to weaken the effect of his testimony, but it could not, surely, be taken as conclusive proof that it was false. If the agreement of the parties was, that appellee was to pay all the costs and the attorneys' fees in the case of

Cummins, Seaman & Co. *v.* Samuel H. Gunn, and it required all the money collected on the notes in the hands of Hayward & Kitchell, after paying Cummins, Seaman & Co. the $1000 and accruing interest, to do so, and the money was thus applied, it can not be that appellee is entitled to recover, whether appellant makes an itemized account or not. The proof of rendering an account is but one step in the evidence—if made, it might be contradicted and impeached, or, if not made, the legitimate appropriation of the money might still be proved by any competent evidence.

Appellee's fourth instruction was this:

"One party can not be held to pay the debt of another, without an agreement in writing. The plaintiff can not be held to pay the debt of Cummins, Seaman & Co., unless plaintiff agreed, in writing, that she would pay such debts."

This was unquestionably erroneous, and its tendency was to necessarily mislead the jury. As between appellee and appellant, this contract was in no sense collateral. It was an original undertaking, whereby appellee agreed to and did place the notes in the hands of Hayward & Kitchell, for a stipulated purpose, and in consideration whereof they agreed the notes should be applied to that purpose; but even if the question were, whether Cummins, Seaman & Co. could recover on this contract against Hayward & Kitchell—they having collected the notes and neglected to comply with their undertaking to that firm—we could have no doubt as to their right, notwithstanding the absence of a memorandum in writing. See *Eddy* v. *Roberts*, 17 Ill. 505; *Hite* v. *Wells*, id. 88; *Brown* v. *Strait*, 19 id. 88; *Wilson* v. *Bevans*, 58 id. 232.

Besides, it has been frequently held, a contract which, while executory, may be avoided because the formalities prescribed by the Statute of Frauds are wanting, when executed, can not be avoided on that ground. *Swanzey* v. *Moore*, 22 Ill. 63; *James* v. *Morey*, 44 id. 352.

The fifth of appellee's instructions was—

"If the jury believe, from the evidence, that, during part

of the time since the receiving of the money sued for, plaintiff was a married woman, then, for so much of said time, the Statute of Limitations will not run—that is, the Statute of Limitations could not bar plaintiff of her right, she being a married woman, unless more than five years have elapsed since the disability was removed."

By section 21, chapter 83, Revised Laws 1874, it will be observed, no exception as to the running of the Statute of Limitations against married women, in regard to their individual rights, now exists; and we are of opinion the necessary effect of the act of 1861, in vesting married women with the sole control of their separate property, was, as to such property, to place them in precisely the same position, so far as the statutes of limitation are concerned, that they would occupy if *femes sole*. When the reason ceases, the law itself ceases. The exception in favor of married women, in the old statutes of limitation, was because of their disability to sue without the consent of their husbands and the joining of their names. That being removed by the act of 1861, a married woman should be held to the same promptness, in the assertion of her rights, as any other property holder laboring under no legal disability.

But, it is insisted, even if there was error in the instructions relating to the Statute of Limitations, such error can not affect the merits of the case, because the suit is upon a contract in writing. This view, unfortunately for appellee, has no support in the evidence. There is no written evidence of the agreement whereby appellee placed the notes in possession of Hayward & Kitchell. The receipt only embraced two of the notes; and that it did not embrace the terms of the contract, is evident from the fact that neither party has resorted to it as affording such evidence, but both have confined themselves exclusively to parol evidence of what they respectively claimed to be the contract. Moreover, the proceeds of the third note, and which was not included in the receipt, we infer from the evidence, form, in reality, the only subject of controversy.

Whether, as appellant contends, that note was assigned to Hayward & Kitchell to pay attorneys' fees and costs, or was to be collected and accounted for, as appellee contends, must be determined entirely, so far as the record now discloses, from parol evidence. It is not possible to throw this note out of the case, as the record now stands, and turn the litigation entirely upon one of the others, in any view.

With regard to the question of the suppressing of knowledge of appellee's cause of action, we need but say, the evidence before us is not sufficient to sustain the judgment on that ground, disregarding the errors we have alluded to.

It may be, as is contended by counsel for appellee, that the bill of exceptions does not, in fact, present the case fairly as it was presented to the court below; but we can indulge in no presumptions to that effect. The court below settles the bill of exceptions, and when it does so, we can not entertain any suggestions tending to impeach it, or in anywise reflecting upon the conduct of the court in settling it.

The judgment is reversed and the cause remanded.

Judgment reversed.

MARIA L. SMITH *et al. v.* JACOB KNŒBEL *et al.*

and

JAMES L. D. MORRISON *v.* MARIA L. SMITH *et al.*

1. MORTGAGEE—*when title held only as security, will so continue when conveyed to another who has notice.* When land is sold on execution, and bought in by the debtor in the name of another, who pays the money and takes the certificate of purchase to himself to secure the repayment, and the owner dies without redeeming, and the holder of the certificate becomes his executor, and takes out a deed to himself upon his certificate, but only claims to hold it as security for the money advanced by him, a purchaser from him, with notice of the fact, will hold only as a mortgagee, and the land may be redeemed from him.

2. REDEMPTION—*when allowed, and from what.* Where an executor, for the purpose of raising money to pay debts of the estate, causes a sale to be made under an execution against his testator of more land than is neces-

sary to satisfy the execution, and, as a part of the transaction, agrees to convey to the purchaser a portion of the land, the legal title of which is in him, though, in fact, held only as security, upon the payment of the amount due him the heirs or devisees of the testator will be permitted to redeem from such sale by paying the whole amount paid by the purchaser, and he will not be permitted to insist on the legal title acquired by the deed from the executor, but the whole will be treated as one transaction, and a redemption allowed by the payment of all the money he has paid out upon the land, both at the original sale and to remove incumbrances.

3. SAME—*upon what terms allowed, from irregular sale by executor.* Where the purchase money at a sale of land made by an executor pays all the debts of the estate, and leaves a surplus for the heirs, although the sale was irregular a court will require the heirs, upon a bill filed to set it aside, to refund all the money paid by the purchaser at such sale, with interest, and also to repay all taxes paid by him, and pay for all lasting and valuable improvements made before the bill was filed, he being charged with rents and profits.

4. SAME—*equities of parties classified.* Where lands have been sold under such circumstances that a court will permit a redemption, and it appears that there have been large sums spent by the purchaser in improving and ornamenting the premises, some of which improvements are valuable and some only ornamental and matters of taste, the purchaser's right to have the purchase money refunded is the highest equity, the second in degree is the right of the heirs to receive the value of the property, exclusive of the improvements, over and above the amount of purchase money, and the lowest equity is the right of the purchaser to be reimbursed for the improvements made by him.

5. SAME—*interest, and rents and profits.* Where a bill to redeem land is filed, and the party in possession refuses to accept redemption money, he will not, when the case is heard, be permitted to say that the rents and profits after the filing of the bill were less than the interest on the redemption money, and claim the excess, but, from and after the filing of the bill, the rents and profits will be treated as equivalent to the interest on the redemption money.

APPEAL from the Circuit Court of St. Clair county.

Mr. CHARLES W. THOMAS, and Mr. G. A. KŒRNER, for the appellants, the heirs of William C. Kinney.

Mr. W. H. UNDERWOOD, for the appellee J. L. D. Morrison.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

The proceedings brought before this court by these two appeals were begun in the circuit court of St. Clair county on

the 18th day of July, 1866, by a bill in chancery, filed by Maria L. Kinney, Mary F. Kinney, and Elizabeth K. Kinney, complainants, against James L. D. Morrison, Jacob Knœbel, Frederick Meyer, Edward Abend, and Wm. C. Davis.

By their original bill, complainants sought a decree setting aside a certain sale, made on the 11th of March, 1860, by Meyer, as sheriff of St. Clair county, of 640 acres of land in that county, known as sec. 12, town. 1 north, of range 8 west, upon an execution in which Davis was plaintiff. At this sale the land in question was bought by Morrison. Complainants were, at the time of the sale, minors, and were the only heirs at law of Wm. C. Kinney, deceased. The land was sold as a part of the estate of deceased. Issues were formed, proofs taken, and the suit was first heard in the circuit court in October, 1867.

The circuit court, at that hearing, dismissed the bill, and complainants appealed to this court, and the case was decided here at the June term, 1868. It is reported in 51 Ill. 112, under the title of *Kinney et al.* v. *Knœbel et al.* To that report of the case reference is made for a full statement of the then condition of the record, and the grounds upon which the judgment of the court was placed. It was then decided, in substance, that what purported to be a sheriff's sale to Morrison, could not be sustained, but must be set aside upon terms. The decree was reversed, and the cause remanded for an account to be taken of rents and profits, taxes and improvements, and for further investigation of Morrison's claim, under what was called the Whitesides bond, and under what was known as the Knœbel deed.

After the suit was reinstated in the circuit court, amendments were made to the bill and to Morrison's answer. Maria L. Kinney had intermarried with George W. Smith, and Mary F. Kinney had intermarried with Gustavus A. Kœrner, and the respective husbands of these parties were made parties. Additional proofs were taken, and the suit was brought again to a hearing on the merits, November 23, 1871.

The circuit court found the thirty acres claimed by Morrison under the Whitesides bond to be the property of the origi-

nal complainants, held in fee by them, unaffected by the sheriff's sale to Morrison, and the north-west quarter of the section to be the property of Morrison, held in fee, by virtue of the deed to him by Knœbel and wife, and that his title to the same was not to be affected by the setting aside of or the redeeming from the sheriff's sale to Morrison, and a decree was entered that the complainants might redeem the residue of the section, by the payment of $95,369.69 to Morrison, within a time fixed by the decree, and in default thereof that they should be forever barred of all claim to that part of the land. From this decree both complainants and defendants have appealed to this court.

This decree of the circuit court can not be sustained. The proof relating to the claim of Morrison, founded upon the bond to Whitesides, is meagre, and far from sufficient to establish any title in Morrison. Palpably it was not regarded by Whitesides or any one else as such an equity as gave him absolute right to this thirty acres of land in fee. Thirty acres of this land could not have been worth less than $1600, yet Whitesides relinquished his claim upon it for $400. Morrison, so far from claiming title thereunder, at first seems to have regarded it as a mere incumbrance upon a part of the estate, and to have thought, by the conditions of his purchase, that he should not be required to pay for its extinguishment. He presented a claim therefor against the estate of Kinney, in his settlement with the executor, and it was then allowed, and he received credit for the amount he thus paid Whitesides.

The circuit court was right in refusing to sustain Morrison's claim under this Whitesides bond, but it is not perceived upon what ground it can be held that the complainants thereby acquired any title to this thirty acres, other than that they inherited from their father, or which should place their claim to that tract on any basis differing from the basis upon which their claim to other parts of the section rests. Morrison's purchase at the public sale was of the whole section. If that sale be set aside, and the title he professed to buy be restored to the heirs, they should refund any money he may have advanced to preserve their title. They thereby acquire no inde-

pendent title, nor any title not subject to the equities which pertain to the whole subject matter of the sale.

The decree is equally erroneous in holding that Morrison acquired an independent and valid fee simple title, by his deed from Knœbel, for the north-west quarter of the section. At the time of the sheriff's sale of this entire section, at which Morrison became a purchaser, Knœbel had a claim against the north-west quarter of this section, evidenced by a sheriff's deed made to him on the 14th day of July, 1859. This deed was founded upon a sheriff's sale, made to Knœbel February 13, 1858. At that time the property was struck off to him at $928.12, and a certificate of purchase issued to him. That sale to Knœbel was made by the sheriff by virtue of two executions, issued upon judgments rendered at the September term, 1857, each in favor of one Terrill, one for the sum of $167 and costs, against Kinney and Abend, and the other for the sum of $701.50 and costs, against Kinney and Knœbel.

As to the character of that claim, Knœbel testifies that before the sale on these executions, Terrill's agent threatened to levy on his (Knœbel's) land, to satisfy one of these judgments, which had been entered against Kinney and Knœbel, and was founded upon a note of Kinney, signed by Knœbel as security. Knœbel reported this threat to Kinney. Kinney told Knœbel, that "sooner than that Knœbel should lose one cent by him, he would sacrifice everything he (Kinney) had." He said "he would see the sheriff, and get him to levy upon some of his (Kinney's) own land; that he had not then the money, and Knœbel would have to advance the same." Kinney did see the sheriff, and induced him to levy upon the north-west quarter of this section 12, and when the sale occurred (Knœbel not being present), Kinney bid in the land in Knœbel's name, at $928.12, and immediately reported to Knœbel what he had done, and Knœbel advanced to Kinney the money to pay the bid, and a certificate of purchase was issued in Knœbel's name, and given to him.

This land, at that time, was worth from $8000 to $10,000. Knœbel and Kinney were evidently intimate friends. Kinney,

before that time, had made his will, and in it had named Knœbel as his executor. It can hardly be doubted that both Kinney and Knœbel regarded this whole proceeding merely as a means of securing to Knœbel the repayment of the money so advanced by him, with interest and costs, growing out of the transaction, nor did Knœbel ever treat this as anything more than such a security.

Some weeks before the sale to Morrison, and after Knœbel had received his sheriff's deed for this quarter section, Knœbel called a meeting of the creditors at Trumbull's office, and laid before them the then condition of the estate.

Trumbull, in his testimony as to what transpired at this meeting, says: "The greater portion in value of the real estate consisted of what was known as the Kinney farm (this section 12). This had been sold some ten or twelve years ago by the State, on a judgment against Wm. Kinney. * * * One of the tracts of the Kinney farm had an incumbrance of $1200 or thereabouts."

This, evidently, has reference to the Knœbel claim, and shows that, in laying before the creditors the affairs of the estate, he claimed only a lien on this quarter for some $1200.

In his answer, filed October, 1869, Knœbel admits that Wm. C. Kinney died seized of this entire section of land, as stated in the bill, clouded, however, by the claim of the State of Illinois, and incumbered as set forth in Morrison's answer; and a reference to Morrison's answer shows that Morrison sets out what is called the State claim, the Whitesides bond, and the sheriff's sale of this north-west quarter of the section to Knœbel. The bill had charged Knœbel, among other things, with having fraudulently neglected to have redemption made from this sheriff's sale to himself. It was also charged that the subsequent taking by him of a sheriff's deed, under that sale, was fraudulent and void. Answering this charge, Knœbel, in his answer, says, that what he had done he "did solely for the benefit of said estate." And he further says, that "all and everything he did in relation to said lands (meaning all the section), was done by him through the advice of counsel, and

that all and every act of this defendant (Knœbel) * * * were in the utmost good faith, and solely for the purpose of saving said Kinney's estate—that all the creditors might be paid, and save all that could be saved for the benefit of heirs." In another part of his answer he says, that "although not legally bound so to do, he treated his acts and liens as in trust for said estate, and so accounted and finally settled said estate."

In his deposition, given in 1867, Knœbel, speaking of his purchase at sheriff's sale of this north-west quarter, swears: "I purchased in the quarter section to secure myself, and had received a sheriff's deed therefor."

It is plain that this certificate of purchase for this quarter was originally received by Knœbel merely as a security, and not as a purchase. The sheriff's deed, taken by him after Kinney's death, was surely taken merely to carry out in good faith the original design.

An executor is not bound to advance his private funds for the benefit of the estate, but the proof shows that Knœbel did, in divers ways, advance his money to save the property of the estate from sacrifice, and took great interest in its preservation. This land was worth at least $8000. It had been bid in at $928. Had this certificate of purchase been held by a stranger, it can hardly be supposed that Knœbel would not have found means to redeem from this sale, or that he would ever have permitted a sheriff's deed to be made to the stranger. We are convinced, when he accepted this sheriff's deed, he had no thought of appropriating that land to himself, but received it in furtherance of the design with which the land was bid in, merely as a security.

We must conclude, then, that at the time of the sale to Morrison, this title or claim of Knœbel was not an absolute and indefeasible title as against Kinney's heirs or creditors, but was in the nature of a mortgage for advances, and was subject to redemption. Knœbel held as against the heirs the form of a legal title, but in substance a mere equitable lien, upon the north-west quarter of this section 12—not an indefeasible title.

He held the land merely as security, subject to redemption by the heirs.

Did Morrison, by the quitclaim deed from Knœbel and his wife, acquire any greater or higher title to this quarter? We think not. Morrison had actual notice that Knœbel held merely a lien. This is shown by the proof that it was generally so understood among the bystanders at the sale.

Trumbull testifies that he was present at the sheriff's sale to Morrison. He says: "It was struck off, I think, at $35,000, and the purchaser took it subject to an incumbrance on one tract of $1000 or $1200, which the purchaser was to pay." He adds, that he can not remember whether it was mentioned by Challenor, who cried the sale, or by Knœbel, but thinks one of them spoke of it.

Mr. Stookey, who was present at the sale, says, he understood there was an incumbrance of $1000 which the purchaser was bound to pay, making the purchase money $36,000.

On cross-examination, he was asked whether anything was said at the sale about prior incumbrances, and he answered, "My impression is, the State claim was mentioned, and $1000 which was going to Knœbel, which the purchaser would have to pay."

Thomas, who attended the sale, and bid, testifies, that he understood that the north-west quarter of the section, 12, had been sold under some execution. "I understood the redemption on this would be about $1200, and that this redemption would have to be made by the purchaser."

It seems to have been known to the bystanders and bidders, and must have been known to Morrison, that Knœbel did not claim anything in this land higher than a lien or incumbrance for $1200, and Morrison can not, therefore, resist the equitable right of the heirs to claim redemption from that lien, any more than Knœbel, himself, could resist their right had he made no conveyance.

Whatever may have been the original nature and extent of Knœbel's title to this land, Morrison can not properly claim (under his deed from Knœbel, and as against the heirs of Kin-

ney,) to hold rights arising from a purchase from Knœbel separate and distinct from his purchase of the whole section at this so called sheriff's sale.

This sale has been decided by this court to have been a sheriff's sale only in form. In fact, it was a mere device by the executor to convert the property of these minor heirs into money to pay the debts of the estate, and for the supposed benefit of these heirs. The sale of Knœbel's claim to the north-west quarter of the section was part and parcel of the same transaction, and this deed of Knœbel was part of the machinery for the same purpose. If Knœbel had held an absolute fee simple title to the north-west quarter, and had chosen, for the purpose of facilitating the sale of the whole section, to have contributed that title (less $1200) to the property sold, it would nevertheless have been part and parcel of the principal sale, under the circumstances. That sale being set aside, the sale of the Knœbel interest falls as part of the whole. That this view is correct, we need only look into the pleadings and evidence to ascertain.

Morrison, in his answer filed November, 1867, says, that this whole section, etc., was sold to this respondent, under said execution, at said sale, for $35,000, subject to Jacob Knœbel's title to a part thereof, which he offered to release to the purchaser for $1200 in money, to him to be paid. Defendant actually paid $36,200 for said land, of which sum he paid Jacob Knœbel $1200 for his release deed to the north-west quarter of section 12, and $35,000 more under the sale on execution aforesaid," * * And this defendant further alleges, that said Jacob Knœbel, in pursuance of his promise, conveyed to this defendant, in consideration of $1200, said north-west quarter of section 12, and defendant further says that, after said sale, "he paid the $35,000," etc.

This purchase of the Knœbel claim on this quarter section, is thus shown, by Morrison's own answer, to have been part and parcel of the principal sale made by Knœbel, in the form of a sheriff's sale. Again, Knœbel testifies, in July, 1867, "I promised, at the sale to Morrison, to quitclaim for my out-

lay, which I did." Again, when called by Morrison as a witness before the master, October, 1869, he testified: "I stated at the sheriff's sale when Morrison bought the land, that I would make a deed for the said north-west quarter to any body who would pay a good price for the land and pay me $1200." He further says he thought the land was his, but he gave it up for the benefit of the estate.

The entire transaction of March 17, 1860, was, in substance, a sale of the Kinney farm by Knœbel, the executor, to Morrison, the purchaser, at the price of $36,200. The sheriff's sale and the Knœbel deed were but parts of the instrumentalities by which the end was to be accomplished. $1200 of the purchase money was to go to Knœbel for his lien under his sheriff's deed; about $1500 was to go to the satisfaction of the Davis judgment, and to the refunding the money paid to redeem from the Abend purchase, and the residue of the $36,200 was to go into the hands of the executor as a fund with which to pay the debts of the estate, the surplus, if any, to be paid to the guardians of the minor heirs. The purchaser was to take the risk of what was called the State lien. The whole transaction was one, and all its parts rest upon the same basis, and must stand or fall together.

This court, upon the former appeal, decided that the title which Morrison acquired under the so-called sheriff's sale of March 17, 1860, was subject to redemption by the heirs of Kinney. We find no additional facts in this record tending to disturb that decision. As between these parties, we regard that question as *res adjudicata*.

We will now consider the mode and the terms upon which the equities of these parties should be disposed of.

This question is not free from difficulty. Had the property remained *in statu quo*, the solution might not be difficult. It is, however, shown, that Morrison has made valuable, extensive, and very expensive improvements. Some of these improvements, "though not of a merely ornamental character," are not necessary improvements, or even improvements appropriate to rendering the property profitable and useful. Many

of these improvements are such as ordinary owners of land can not afford to make or buy. While they are useful, they are, nevertheless, purely matters of luxury, and appear to be a part of the realty, and some of them of such nature that it is difficult to say what is useful and what is merely ornamental.

This court, in 51 Ill. 126, said, that as the purchase money Morrison paid relieved the estate of Kinney from all its indebtedness, and gave a surplus to the executor, for the benefit of the heirs, we are of opinion that, as a condition precedent to their redeeming these lands, the heirs should pay him the purchase money, with interest. It was further said, that he should be charged with rents and profits, and allowed for taxes and for lasting and valuable improvements, made before the suit was brought, and which were not of a merely ornamental character.

This language, it seems, was not intended to conclude the question as to the terms of the redemption, for afterwards it is said: "We only hold that the title which Morrison acquired * * * can be redeemed from, by appellants."

In the view we take of the case upon the record now presented, the purchase money was, in fact, $36,200, consisting of the $35,000 bid in form, and of the $1200 paid to Knœbel, to relieve the property bid for from his lien. The $400 afterwards paid to Whitesides, was refunded to Morrison by the executor, hence no further notice need be taken of that transaction.

The amount we have to deal with as the purchase money, is $36,200. The interest upon this amount from the day of sale (March 17, 1860,) to the day of filing the original bill, (July 18, 1866,) at six per cent per annum, amounts to $13,762, making, principal and interest, the sum of $49,962. From this must be deducted the net profits derived by Morrison from the use of the land.

From the proofs and the master's report it appears that the net value of the use of the land, from the time Morrison took possession until the suit was brought, (after paying taxes and for clearing part of the land, and necessary incidental expenses,)

was about the sum of four thousand nine hundred and fifty-six dollars ($4956.) If this estimate be correct, and had none but necessary and economical improvements been made, the sum of forty-five thousand and six dollars ($45,006) would have been the amount of redemption money necessary to be paid by the heirs at the bringing of suit, to effect a complete redemption of this whole property.

It seems, from the master's report, that the net value of the use of all this land has been less during the pendency of the suit than the amount of interest accruing upon the purchase money for the same time. Inasmuch, however, as Morrison has denied the right of the heirs to make redemption, has refused to accept redemption, and has retained possession against the will of the heirs, without any offer on his part to do equity, we think that he can not be allowed to allege that he has been losing money by so doing, and on that account to demand a larger amount on account of his purchase money than he had right to demand when the suit was begun. He can not justly complain, under these circumstances, if this part of the account be adjusted by holding the use of the property a just equivalent for the use of the purchase money, and we think it should be so adjusted. We, therefore, find that $45,000 is the amount to which Morrison is entitled in equity on account of his purchase.

The proofs, however, show that Morrison, before the beginning of suit, had actually made large and expensive improvements, variously estimated at from $50,000 to $90,000, and that the value of the entire property has been largely enhanced thereby.

Weighing all the evidence bearing upon the subject, we are inclined to the conclusion that the whole property is worth (and would probably sell for) some $40,000 to $50,000 more with these improvements than it would without them.

After weighing the proofs in the record, we are brought to the conclusion that the land, with all its improvements, is worth about $120,000; that the land alone, excluding improvements, is worth about $75,000; that the redemption money

which the heirs should pay to Morrison, on account of purchase money, amounts to about $45,000.

It follows, that the equity of the heirs of Kinney, in this property, amounts to about $30,000, while that of Morrison amounts to about $90,000. The difficulty presented relates to the manner of separating these equities and giving to each his own, without doing injustice to the other. The highest equity in the case is the equitable right of Morrison to have his purchase money refunded. The equity next in rank is the right of the heirs to have their land restored to them, upon the refunding of this purchase money. The lowest equity in rank is the claim of Morrison to payment for his improvements. In truth, the propriety of making to him an allowance for these improvements does not rest upon any right of Morrison to demand the same, but upon the ground that good conscience in the heirs must forbid them from voluntarily taking to themselves any benefit produced to them by another, without making proper compensation. If, however, that benefit, without their consent, be combined with that to which they have a just right, in such manner that it is impossible for them to appropriate their own without appropriating the same, and the supposed benefit is such that they do not need it, do not wish to buy it, and, in fact, are unable to buy it, in such case they ought not thereby to be excluded from taking that which is their own.

The solution of the question is, however, rendered less difficult in this case, from the fact that Kinney's heirs have signified their willingness to accept a reasonable pecuniary compensation for their equity, instead of insisting upon the possession of the land itself. In that way, these equities may all possibly be preserved.

This is a case resting upon its own peculiar facts, and we have concluded to make such order as seems to us to make the nearest approach practicable to preserving all these equities, and to be the least likely to work serious wrong to any of the parties.

The decree of the circuit court in this case is, therefore, re-

versed, and the cause remanded, with directions to the circuit court that a decree be entered, declaring the legal title to the whole of said land (that is, said section 12,) to be in Morrison, but held by him in trust for the parties having equitable interests therein; and finding that Morrison has a first equity therein (on account of purchase money paid therefor as above stated), which equity is of the value and amount of $45,000; and also finding that the heirs of Kinney (the original complainants) have an equity in said premises, on account of the excess of the present value of said land, not embracing improvements made by Morrison, over the amount of the sum allowed Morrison on account of purchase money, and that the value and amount of this equitable interest of the said heirs of Kinney is now at least $30,000; and finding that said Morrison has also an equity in said premises, subordinate to the two preceding equities, growing out of the enhancement of the value of the whole premises, by reason of improvements made thereon by Morrison, and that this subordinate equity of said Morrison is now of the value of $45,000. And said decree shall order and adjudge that the said heirs of Kinney may redeem from Morrison the whole of said premises, embracing all improvements thereon attached to the land as part of the realty, whether the same be useful or merely ornamental, by paying to him, within three months from and after the date of the decree, the sum of $90,000; and that, if this redemption be not made by the said heirs within the said period of three months, then the defendant, Morrison, may, at any time within the three months next succeeding the period allowed for redemption by the said heirs, redeem the whole of said premises, embracing all improvements, from all the equitable claims thereto of the said heirs of Kinney, by paying to them within that time the sum of $30,000; and it shall be decreed that Morrison pay the costs of this suit up to the time of the making of said decree.

The decree shall further provide, that in the event that neither of the redemptions aforesaid be made, the whole of said premises, embracing all improvements thereon which are part of the

realty, shall be sold, providing for the application and distribution of the net proceeds of such sale, after paying the costs of such sale, to be made in such manner as to give, first, to said Morrison the sum of $45,000; and next, to the said heirs of Kinney (original complainants) the sum of $30,000; and next, to said Morrison the sum of $45,000; and that the excess, if any, above the sum of $120,000 shall be divided and distributed so as to give to said Morrison three-fourths thereof, and to the said heirs of Kinney one-fourth thereof.

The distribution of the proceeds of such sale is to be made as of the day of such sale, so that each party shall share in the interest which may arise from the deferred payments of any part of the amount bid by the purchaser at such sale, according and in proportion to his, her or their share in that portion of the purchase money from which such interest may accrue.

The decree must also provide that such sale be made upon the premises, upon notice of at least sixty days, and that the terms of such sale shall be, that the purchaser or purchasers shall pay, in cash down, one-fourth of the amount of the purchase money, and the balance in three equal annual installments, with interest on the unpaid part at the rate of six per cent per annum, to be secured by the promissory notes of the purchaser or purchasers, with mortgage upon the property bought.

The decree should require any redemption or sale of the premises, or the sale of any part thereof, before becoming final, to be reported to the court and to be approved by the court. The circuit court will retain and, from time to time, continue the suit, until the ends of the decree are accomplished, and, at proper times, should put the proper parties in possession, and require, at apt times, of the proper parties, suitable releases, conveyances and acquittances to accomplish the objects of the decree.

Decree reversed.

Mr. JUSTICE WALKER:

If it be conceded that the rule adopted in settling the equities of the parties in this case is correct, still the value, I

think, which has been placed on the farm is too high. There has elapsed a long time since the evidence was taken, and I have no doubt that there has been a large depreciation in the value of this, as well as all other property of a similar character. There is evidence in the record that fixed its value higher, but there is also evidence fixing it much lower, and, from the length of time since the evidence was heard, it seems to me to be unsafe to act on it to fix the value of the farm. Under the rule adopted, I think the case should be remanded to take proof on that question, and thus fix the rights of the parties with more certainty.

Mr. JUSTICE BREESE:

I do not concur in all the views presented by this opinion. In my examination of the record, I have failed to find any evidence on which to base the equities of appellants as they are adjudged in this opinion. There is no proof on the point, and the question was not raised or discussed in the argument. The findings of the circuit court were had upon the remandment of the cause by this court, as reported in 51 Ill. 112. In that case this court said, "Notwithstanding the sale was unauthorized, Morrison has advanced money, which has paid and discharged liens of creditors, to a large amount, on the property; and, inasmuch as he acted fairly and without fraud in his purchase, it is manifestly equitable that he should be subrogated to the rights of the creditors whose debts his money has paid, especially so, as the complainants are asking the aid of the court by permitting them to redeem. This is but equitable and just. As the purchase money Morrison paid at the sheriff's sale relieved the estate of Kinney from all its indebtedness, and gave a surplus to the executor for the benefit of the heirs, we are of opinion that, as a condition to their redeeming these lands, appellants should pay him the purchase money with interest. He should also be allowed for all taxes he has paid on the premises, and for all lasting and valuable improvements, which are not of a merely ornamental character, made before the suit was brought; and he should be

charged with rents and profits received from the place. He should also be allowed to remove statuary and other ornamental expenditures, so far as may be done without permanent injury to the freehold."

With these directions, the cause was remanded, and I do not understand that any evidence has been since taken on which the equities, as declared in the opinion, could possibly be based. Every decree should have sufficient evidence to support it. Here, there is none, and the equities of appellants seem to be merely speculative. I concur with Mr. Justice WALKER, since the evidence was taken, some five years since, there may have been a large depreciation in the cash value of this land. In my judgment, the equities of appellants should not be adjusted as they have been, as, it seems to me, they have been so adjusted in the absence of evidence.

THE PEOPLE *ex rel.* Herman G. Weber, Etc.

v.

THE OWNERS OF LANDS, Etc.

TAXES—*copy of notice is essential to judgment.* An omission of the record to show that a copy of the notice of an application for judgment against lands and lots, for taxes due thereon, is filed as a part of the records of the court, is fatal to the application. The filing of such copy is an essential part of the necessary foundation for the judgment sought.

APPEAL from the County Court of St. Clair county; the Hon. FREDERICK H. PIEPER, Judge, presiding.

Messrs. G. & G. A. KŒRNER, for the appellant.

Messrs. C. W. & E. L. THOMAS, for the appellees.

Per CURIAM: This is an appeal from the judgment of the county court of St. Clair county, in refusing to render judgment against certain lands for city taxes, upon a delinquent list presented by the treasurer of that county, as such, to that court.

The record, if the transcript be true and full, (and the clerk so certifies) is wholly insufficient to warrant a judgment.

The Revenue Act provides for the publication of notice for such application, and states what such notice must contain. Section 186 requires the printer to authenticate the due publication of the notice and transmit the same to the collector, and further requires that a copy of the notice containing the list shall be presented to the court "at the time judgment is prayed for," and "*said copy shall be filed as part of the records of said court.*"

This copy of notice, "filed as part of the record," is an essential part of the necessary foundation for the judgment sought. The record shows no such thing. This alone was fatal to the application.

The judgment of the county court is affirmed.

Judgment affirmed.

WILLIAM OWENS *et al.**

v.

JOHN WEEDMAN.

1. TROVER—*plaintiff must have right to possession.* To maintain trover the plaintiff must show a tortious conversion of personal property, and that, at the time of such conversion, he had a right of property in the chattel converted, and also had the possession thereof, or a right to its immediate possession.

2. SALE—*right to possession by vendee.* Where personal property is sold and a part of the price paid down, and the balance is to be paid on delivery, the right of property will pass as between the parties, but not the right to possession until the full price is paid; and if a credit is given as to part of the price, and possession is not taken by the vendee until the credit expires, the rule is the same.

3. SAME—*right of vendor to resume possession.* Where a party sells two car loads of hogs, to be paid for as weighed and delivered, and receives part payment, and makes an entire delivery in pens for the purchaser, under the expectation of immediate payment, on a neglect or refusal to make complete payment, the vendor may resume the possession of all the hogs, and hold

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* This case, and the five next following, were of January term, 1876, and omitted from their proper place.

them at the purchaser's expense until full payment is made, especially when the purchaser has done no act accepting the delivery, and if payment is not completed in a reasonable time, dispose of them and account to the purchaser for the proceeds.

4. SAME—*remedy for wrongful sale by vendor.* If, in case of the sale of chattels, the vendor, in default of payment on delivery, or where a delivery is offered, should make a wrongful sale by reason of being too hasty, or without proper notice, he will not be liable in trover, but in an action on the case, or in assumpsit, for any surplus that may be due the purchaser.

APPEAL from the Circuit Court of DeWitt county.

This was an action of trover, by Weedman against Owens and Drybread. The plaintiff, in his declaration, alleged, in substance, that he was lawfully possessed, as of his own property, of 150 hogs, and lost them, and the same came into the possession of defendants, and that they converted them to their own use. Defendants pleaded not guilty, and on trial a verdict of guilty was rendered, and the plaintiff's damages assessed at $550, for which judgment was entered against the defendants, and from this judgment they appeal to this court. A motion for a new trial was made by defendants and overruled, and defendants excepted. All the evidence is preserved by bill of exceptions.

At the trial Weedman testified, in substance: "I am a resident of McLean county. My business is farming and feeding stock. I have an interest in the bank, and also in a flouring mill. About May 13, 1873, I met Owens in Farmer City, by the bank. He wanted to sell me some hogs. He said he had bought about 90 head, and wished to sell them to me. I inquired his price, and he said he paid $4.40 to $4.50. We made a trade. I told him that 90 head were too many for one load and not enough for two, and I did not want to buy the whole 90 hogs unless he would furnish me enough to make the two car loads. He said that he could buy them, and I told him I would take the hogs at the price he set, and he was to go on and furnish the two car loads. He thought they would weigh about 200 pounds. I thought it would take about 70 to the load. This was Tuesday or Wednesday. I gave him until

Friday to get the hogs in. He said he could buy some hogs of Watson, and I gave him $20 to pay on those hogs of Watson's. I agreed to give him $15 for his labor in getting up the balance to make out two car loads. The conversation was: I told him I did not want to do the work. He said he could buy the hogs, and thought likely he could buy them for less money. I considered $4.50 a big price, and told him not to go beyond $4.50—that I would give him $15 to buy the hogs and load them. I went then and ordered two cars for Friday. As to getting the rest of the hogs in, he said he could not get them in Thursday, but would have them in by Friday. The hogs were to be weighed at McLain's, except some that he thought would have to be weighed at Argobast's. Further than what was said about the $20 to pay Watson, nothing was said about money in any shape, to pay on those hogs. I don't recollect that I saw Owens any further at all. I think the next day he told me what hogs he had bought, and that he would have them in on Friday morning."

Weedman further testified, that on Friday he came to town, about 11 o'clock in the forenoon; went first to the bank; inquired for Owens, but he was not there. He afterwards went to the yards to find Owens. He was not there. He says he found about 90 hogs there, but did not learn where Owens was, though he made inquiries of three or four persons. He testifies that he waited about the bank until about 2 o'clock, *then* rode to the depot to seek Owens, and remained until about 3 o'clock, and then went down to the bank, and while there paid one of Owens' checks, and told Lewis, the clerk at the bank, to pay no more of Owens' checks, and said to Lewis, he would be down in the morning and tend to the hogs himself, as it was then too late to ship the hogs that evening. He left no message for Owens. He merely told Lewis not to pay Owens' checks. Weedman adds: "I expected to get the hogs in, and when delivered to pay for them." He then went home, and did not return the next day, but on the next day (some of his family being ill) he sent a messenger (Mr. Houston) to Owens, "to ship one load of hogs (I told him to bill them to Conover

& Hall), and to hold the others until I came down—to hold the lighter hogs and ship the heavier ones." Houston, when he returned, told me Owens was out of humor—that he said, "he would manage that thing to suit himself," and got upon the train, and said: "If John's folks are sick, tell him we will do what is right about the hogs."

Weedman further testified, that he "paid on the hogs $730.55." He further testified, that "Owens was not worth anything financially, although I had trusted Owens before with money, and he had bought stock for me. I gave Lewis instructions on Thursday evening, that if I did not come down in time, if any of these hogs came in, to pay for them until I came down. There was nothing passed between Owens and myself at all, in reference to the payment for the hogs. I paid out on these hogs $730.55, and never got anything out of them."

On cross-examination Weedman testified: "I told Owens I would not buy the hogs he had bought unless he would buy enough for two loads, and then he agreed to buy two car loads. I was to pay him $15 in addition to what the hogs cost. I made this contract on Wednesday, and the hogs were to be delivered on Friday. The bigger portion of them were to be delivered at McLain's scales, and a portion of them, he thought, he would have to weigh out at Argobast's. I consented to it. I was to receive the hogs at McLain's scales. On the day the hogs were to be delivered, I was at home in the morning, and at the scales about 11 o'clock. It was the calculation that I was to pay for the hogs on delivery. I think nothing was said about it. I did not tender to Owens any money for these hogs, nor authorize any one to do so. I did not know but what Owens had made arrangements with the farmers. We frequently make arrangements not to pay for hogs until we ship them. I should say that Owens could not raise the money to pay for the hogs unless some one let him have money, or made some arrangements with him some way. The hogs were shipped Saturday evening."

Lewis, the clerk in the bank, testifies that he was present

when Weedman and Owens made their bargain about the hogs. He swears: "Mr. Weedman bought the hogs of Owens, what he had on hand, and objected to the amount on the score that it was neither one or two car loads, and said he did not care about them unless Owens made up two car loads, which Owens agreed to do. I understood he was to have $15 for his services. I understood the $15 was a bonus over and above the price of the hogs. It was for buying the hogs. The hogs were to come in on Friday. Owens came in on Thursday, and wanted me to pay his checks. I told him I could not do it—that I had no instructions from any one to pay his checks. I believe I did not give Owens any reason, but that was my reason for refusing. On Thursday evening I saw Mr. Weedman, and asked him if it would be right to pay Owens' checks. He told me, yes, to go on and pay until he came down. These checks were to be in payment for the hogs—to the parties to whom Owens gave them for payment for the hogs—John Weedman's hogs—hogs that John Weedman had bought of Owens. On Friday evening, after Weedman had told me not to pay any more checks until he came back, I had paid out $710.55, including one check which I did not pay. When I told Owens, on Friday evening, that Weedman had directed me not to pay any more checks until he came down, Owens said he thought that was a great way to do business—that the men were there waiting for their money for their hogs."

On cross-examination he said, that the money he paid on Owens' checks was charged to Owens on the bank books, and was afterwards charged to Mr. Weedman. The idea was, that the checks were to be charged to Owens for the time being, and as soon as Owens and Weedman settled, Weedman would give his own check for the amount. That was the understanding with Weedman and myself. We had a talk about it. For the time being, Owens was to check and I was to pay his checks. After the transaction was over, and it was settled for, Weedman was to take these up and give his check for the amount. That was the agreement between Weedman and me, but as the thing terminated as it did, it was carried for some

time against Owens, but it was afterwards charged to Weedman by the bank.

Houston testified, that on Saturday, at Weedman's house, Weedman told me to go down and tell Owens that his family was so that he could not leave, and to ship a car load of hogs, 15,500 pounds in a car, and he would make it all right when he came down. I went down and told Owens, and Owens said: "I am going to ship them hogs." Mr. Drybread spoke up, and said he was going to ship the hogs; that he was going with Owens; that he was interested in the hogs. When I first saw Owens the hogs were not in the car, but were in the pen. I went on and sent the doctor out, and when I got back the hogs were all in the cars. It was afternoon when I first got there. I told Owens to bill the hogs to Conover & Hall, but I suppose the hogs were already billed.

Being cross-examined, witness said: When Weedman sent me down there, he said "he had bought two car loads of hogs of Owens—he had contracted two car loads of hogs of Owens; that there was to be two car loads of hogs in there."

On re-direct, he said, Weedman told me he had two car loads of hogs to go from Farmer City that evening. He said he had employed Owens to buy him two car loads of hogs, and he was to ship them that evening.

On cross-examination, witness said he did not remember whether or not he had, at first, testified that Weedman said "he had bought two car loads of hogs of Owens."

Testimony was also given, in behalf of plaintiff, that these two car loads of hogs were shipped on Saturday evening by Owens and Drybread, in their names, to Chicago, with the consent of those farmers who had let Owens have hogs, which were not paid for; and that these hogs were sold in Chicago for over $1100, and that Drybread received some $800 of the money, and, in a conversation had with Owens after his return, gave him to understand that, after paying the farmers' bills, he would pay over the residue of the money to Weedman, but that, instead, he paid it all out to creditors of Owens, in obedi-

ence to alleged garnishee proceedings demanding that he should do so.

Jones, a witness called for plaintiff, says that, about 2 or 3 o'clock on Friday, there was considerable confusion about the refusal to pay the checks at the bank, and Owens said if Weedman would come down it would be all right.

Witnesses for the defense showed that the hogs weighed at Argobast's scales were driven down to the yards, near the place of shipment, in the afternoon of Friday, and that all these hogs were sold by the farmers to Owens.

Owens testified: "I was buying hogs in the neighborhood, as usual, and I had a couple of car loads bought, with the exception of a few, and I saw Mr. Weedman and proposed to sell them to him. He said he would buy them, and asked when I could bring them in. I told him they were to be brought in on Friday. He and I traded. I told him what I gave for them. We agreed on the price, and he bought the hogs of me. I lacked, I think, 15 hogs when he made the purchase, but I agreed, in the trade, to put in them 15 hogs, and have them ready Friday morning. He was going to ship them Friday evening. I bought my hogs, and had them all in hand according to my contract. When Friday morning came, the hogs came in. I went to the scales, and there was nobody there to receive them. I went to weighing the hogs—what I got of them. I weighed until 11 o'clock. I weighed about 99 head at McLean's scales, in Farmer City. Then I had about 40 head to weigh at Argobast's scales, north of town. This was nearer to the shipping pens. I saw nothing of Weedman. I held the hogs all day Friday, and then took the hogs and put them in the pen. I fed them Saturday morning, and still nobody appeared. I kept them until Saturday afternoon, till it got pretty near shipping time, still nobody came. I turned the hogs out, and took them to the shipping pens. I had part of them in the shipping pens—those weighed at Argobast's. I turned all the hogs in there, and had them ready. I held them there until time to ship Saturday evening,

and then loaded them and shipped them. I had two car loads there on Friday. I should judge it was between 2 and 3 o'clock on Friday when I had the last of the hogs ready to deliver. I inquired for Weedman on Friday. I went into the bank in the morning, as soon as it was open, and inquired for him. The clerk could not tell me anything about him. I then asked the clerk if Weedman had made any arrangements about paying for the hogs. He said, he had not. Lewis said to me, can't you weigh the hogs? I said I did not like to do so without Mr. Weedman being there. He told me to go on and weigh them; he thought Weedman would be down after a while, and it will be all right. He said: 'Take some of these blanks off the books, and *check*, and *I will pay*.' I did so. I went to McLean's scales, and received the hogs from the farmers, and weighed them, giving each a check for what his hogs came to. When I got through at McLean's scales, I went to Argobast's scales to weigh the hogs there. I weighed part of the hogs there, and checked on the bank as I had been doing. After we got through weighing there, we drove those hogs out, down to the shipping pens. Between 3 and 4 o'clock on Friday it was reported to me that the bank refused to pay the checks. At this time I had moved the hogs weighed at McLean's scales to McCord's lot, in town, where there was water and a convenient pasture to feed them. The hogs weighed at Argobast's were in the shipping pens."

On cross-examination, Owens testified: "I never made any agreement at all with Weedman to buy any hogs. I bargained to sell him two car loads of hogs. He was to give me $15 over and above what I paid for the hogs. The hogs were to be delivered on Friday. We got through weighing at McLean's Friday about 11 o'clock. I then went home and ate my dinner, and from there I went to Argobast's. I think I got there about 12 o'clock. I judge it was between 2 and 3 o'clock when we started the hogs down from Argobast's. I went down with them all the way. They were put in the shipping pens. We got to the pens with the hogs from Argobast's

about 3 o'clock, as near as I can tell by guessing. I then went down town."

There was much other testimony, but none other relating to the nature or substance of the contract between Owens and Weedman, or relating to the question of the payments made by Weedman, or to the question of the delivery of the hogs to Weedman, or to any other material fact which occurred before or at the time that Owens and Drybread shipped the whole of the hogs to Chicago in their own names.

Messrs. FULLER & GRAHAM, and Messrs. LEMON & HERRICK, for the appellants.

Mr. A. HAYNIE, Mr. DONAHUE KELLEY, and Messrs. MOORE & WARNER, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

To maintain trover, the plaintiff must show a tortious conversion of personal property by defendant, and that, at the time of such conversion, the plaintiff had a right of property in the chattel converted, and also had the possession thereof, or a right to the immediate possession.

This right to possession must be absolute and unconditional. It is said in 1 Chitty's Pleadings, 167: "To support this action the plaintiff must, at the time of the conversion, have had a complete property, either general or special, in the chattel, and also the actual possession thereof, or the right to the immediate possession of it." In the second volume of the same work, 618, it is said: "It is essential in trover that the plaintiff should have the possessory title—that is, the right to the immediate possession of the goods."

In *Bloxom* v. *Saunders*, 4 Barn. & Cres. 941, it was held, that the vendee of undelivered goods who has not paid or tendered the price, and has not, therefore, acquired the right of possession, can not maintain trover against the vendor who wrongfully sells them. Saunders sold hops to Saxby, to be paid for, by the usage of the trade, on the second Saturday after the sale, and gave him bills of sale, but the hops remained

in possession of Saunders until Saxby became bankrupt, and Bloxom was made his assignee. Saunders then sold the hops, rendering account of sale as made on account of Saxby, and charging warehouse rent from the date of purchase by Saxby. Bloxom brought trover. Held, it would not lie for want of right of possession in plaintiff at the time of the conversion. The court assume that the right of property passed by the sale, but his right of possession was not absolute. In such case, it is said, the property is vested in the buyer by such sale, so as to subject him to the risk of accidents, but he has not an indefeasible right to the possession.

Again, in the case of *Bloxom* v. *Morley*, (Eng. C. L. 872,) certain hops were sold by Morley to one Saxby, on a credit. The hops remained in the possession of Morley until the time for payment expired. Saxby had paid £700 towards the price, but a part of the price remained unpaid. Saxby, in this condition of affairs, became bankrupt, and Bloxom became his assignee in bankruptcy. Morley afterwards sold the hops to a stranger without demanding payment of the balance due upon the hops, and without returning or offering to return the £700. Bloxom brought trover, and it was held by the court that the right of property in the hops passed to Saxby by the sale, and the right of possession also, but on the failure to pay the full price, the property remaining in Morley's possession at the expiration of the time of the credit, Saxby lost his right to possession, and had no right to possession until the full price was paid or tendered. It was also held, that the sale by Morley without returning the £700 was wrongful, but the court held that an action of trover would not lie in the case, because, at the time of the conversion, the right of possession was not in the plaintiff. The court say, in substance, that a special action on the case might have been maintained against Morley for the wrongful sale, but not trover.

In the case of *Wilmshurst* v. *Bowker*, 5 Bingh. N. C. 541, defendant had sold to plaintiff a quantity of wheat, and shipped the same to plaintiff, and sent plaintiff the invoice and bills of lading. The wheat was, by the contract, to be paid

for by plaintiff by remitting to defendant a draft of a London banker, on the receipt by plaintiff of the invoice and bill of lading. The plaintiff received the invoice and bills of lading, but failed to send the banker's draft on London, but sent in lieu his own draft. The defendant, without further notice, stopped the wheat *in transitu*, and sold the same to a stranger, and Wilmshurst brought trover. The court say, admitting that the contract of sale vested the property in the wheat in the plaintiff, * * * the failure of plaintiff to send the banker's draft prevented the right of possession from vesting in him, and held that the action of trover could not be maintained.

In the case at bar, the evidence tends to show that the contract of sale under which plaintiff claims right, was for two car loads of hogs, to be delivered on Friday and to be paid for on delivery. Weedman and Owens, who made the contract, so testify, and the testimony of Lewis, the only other witness who testifies on the subject, is to the same effect.

The hogs were all weighed and set apart for Weedman under this contract, and it may well be that the right of property thereby became vested in Weedman, so as to render him liable to loss or injury by accident; but he did not pay the whole price, and hence never had the right of possession.

It is insisted, that, from the nature of the transaction and the circumstances, it was a part of the agreement that the hogs were to be delivered in installments, and paid for in instal-ments as the weighing progressed, and that, so far as concerns the hogs weighed at McLain's scales, the placing of them in McLain's yard for the plaintiff, and the payment of the checks for the price of the same by plaintiff's agent, gave plaintiff the actual possession and the right to retain the possession of these hogs—and so the court charged the jury.

This position is not sound. The contract was an entirety, and embraced the two car loads. The parties did not make separate contracts as to each installment of hogs. The plaintiff, in such case, did not, under the most favorable view of the circumstances, get an indefeasible right to possession even

of these hogs. It may be conceded that the delivery of the whole two car loads was begun, and that the payments kept pace with the delivery a while, and even that the entire delivery to Weedman was completed, under the supposition that the concurrent acts of payment were in course of execution; still, when Owens found that Weedman had failed to perform the concurrent act of full payment, he had the lawful right to resume the possession of all the hogs which were the subject of the contract, and hold them until full payment was made. He did resume the possession—and that he had lawful right to do—and, having done so, the plaintiff had neither the possession nor the right to immediate possession.

This was the condition of this property when Drybread united with Owens and shipped all the hogs to Chicago. It may be conceded that Owens had not the lawful right to thus dispose of this property, without first refunding to Weedman the money he had received under the contract, but, as was held in *Bloxom* v. *Morley*, *supra*, for this wrong trover will not lie, for the simple reason that, at the time of the conversion, Weedman did not, in any view of the subject, have the lawful right to the immediate possession of the property.

The court instructed the jury:

"1st. That if they believe, from the evidence, that Owens sold to Weedman about ninety head of hogs, that said hogs were weighed and put in the pen for Weedman, and that checks to the amount of $710 were drawn by Owens upon the banking house of Thomas Bros. & Weedman, and were paid at said bank out of money belonging to Weedman, and $20 in addition was paid to Owens by Weedman, and if they believe, from the evidence, that defendants took said hogs from said pen without the consent of Weedman, and that they sold said hogs and converted the proceeds thereof, then they should find for the plaintiff the value of the hogs in Chicago, less the necessary expenses of disposing of them."

The proof shows that the sum of $730.55 paid by Weedman was not the full price of the two car loads which he agreed to

take (and of which this lot of about ninety hogs was a part), and tends to show that it was not full payment, even for the hogs so weighed and put in the pen from McLain's scales.

The instruction, then, is erroneous, in telling the jury that if $730 was paid on this lot of hogs (though not the full price even of *that* lot of hogs), and the hogs were weighed and put in the pen for Weedman, that invested Weedman with such possession and absolute right of possession, that, although he neglected to pay the full price, Owens had no right to stop the hogs *in transitu*, before Weedman had assumed control of them, and resume the possession until full payment was made.

If, in the case of *Wilmshurst* v. *Bowker*, *supra*, the vendor, after he had delivered the wheat on a ship for the vendee, and sent him the bill of lading, had the right, on the failure of the vendee to send him the London banker's draft, to resume the possession of the wheat, surely Owens, on the failure of Weedman to make full payment, had a right to resume the possession of the hogs, which, as suggested, he had put in the pen for Weedman, and especially as Weedman had done no act accepting the supposed delivery.

In the fourth instruction, the jury were told that Drybread and Owens had no right to intermeddle with Weedman's hogs, if the hogs were Weedman's, unless so directed by Weedman; and if the jury believe, from the evidence, that Drybread and Owens did, without the consent of Weedman, ship to Chicago and sell *the hogs* that belonged to Weedman, then they are liable to Weedman for the value of the hogs so shipped, less, etc.

This instruction is erroneous in assuming, as an ascertained fact, that some of the hogs mentioned at the trial were Weedman's hogs. The court speaks of "the hogs that belonged to Weedman," when it was, on the evidence, a mooted question whether Weedman had, at any time, the right of property in any of these hogs.

But the great error in the instruction consists in assuming that the right of *property* in plaintiff was sufficient to support this action, without showing a right to possession in plain-

tiff and a tortious conversion. The court says, in substance, that "if defendants, without the consent of Weedman, did ship to Chicago and sell the hogs that belonged to Weedman, then they are liable." This is not the law of this case. It may be that Weedman, by his contract of purchase, and by the weighing and setting apart in pens of the hogs for him, became the general owner of these hogs, and yet it may be that his contract was for the purchase of two car loads of hogs to be paid for on delivery, and that, by his failure to make payment, he failed to acquire the right to the possession. There is surely proof tending to show that this was so. If Weedman, by the contract, bought two car loads of hogs, to be delivered on Friday to him, by Owens, and the mode of delivery was to be made in parcels as they were received from the farmers, and Owens had the hogs at the places agreed upon, and the delivery begun, and the payments kept pace for a while with the progress of delivering, and, before it was completed. Weedman stopped the payment, and Owens went on and weighed all of the hogs, and still Weedman neglected to complete the full payment, in such case, Owens had the lawful right to resume the possession of all the hogs, and hold them as Weedman's hogs, and at Weedman's expense, until full payment was made; and if payment was not made in a reasonable time, he would have the right to dispose of the hogs, and account to Weedman for the proceeds.

If he, in such case, should make an improper sale (wrongful, by reason of being too hasty or without proper notice), he would be liable to a special action on the case, but not in trover; for, at the time of the wrong, Weedman, in the case supposed, could not show a right to the possession. If he should fail to account for the proceeds, he might be sued in assumpsit, and possibly in trover, for a conversion of the money. This action is for the conversion of the hogs, and not for the conversion of the money.

This fourth instruction is fatally wrong.

The fifth instruction is equally faulty. The court there tells the jury, in substance, that if any of the hogs had been

paid for and received by Weedman, and defendants took these hogs and shipped them with other hogs belonging to defendants, and sold them on their own account, and failed properly to account to plaintiff, then the verdict should be for the plaintiff.

This instruction, like the fourth, ignores the proofs tending to show the entirety of the contract of purchase, and the right of the vendor to reclaim the hogs paid for and received, if, before the whole transaction was completed, Weedman refused to make the payments required. By receiving and paying for part of the hogs as the delivery proceeded, Weedman did not get an indefeasible right to the possession of the hogs so received.

The sixth instruction was calculated to mislead the jury. It had no relation to any matter in issue. The action was for the conversion of the hogs, not for failure to properly account for the money received.

The two instructions given by the court, on its own motion, are faulty, in ignoring the right of Owens to resume possession of all the hogs, for failure to pay in full for the hogs, or, perhaps, in failing to recognize the rule that, to maintain trover, the plaintiff must have had the unconditional right to possession at the time of the alleged conversion. It is the more important that this rule of law should be enforced in behalf of Mr. Drybread, who seems to have been drawn into the complication of this case by the failure of plaintiff to comply with his contract with Owens, and seems to have embarked in the matter with no other motive than to secure himself and some of his neighbors from apprehended loss. It is not clearly shown that he committed any error in paying out the proceeds, or that he acted in bad faith. If it be so, he can be held in assumpsit, for what is justly due, but can not be held in trover where the measure of damages is the full value of the property taken, and opposing accounts can not be adjusted.

The judgment of the circuit court is reversed, and the cause remanded.

Judgment reversed.

ISAAC R. BENNETT

v.

WILLIAM PIERSON.

ADDITIONAL APPEAL BOND. It is within the discretion of the circuit court, on an appeal from a justice of the peace, to require the party appealing to file an additional appeal bond, and it is not error to dismiss his appeal in case of non-compliance with a rule to that effect.

WRIT OF ERROR to the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

Mr. OSCAR A. DELEUW, for the plaintiff in error.

Mr. WILLIAM A. CRAWLEY, for the defendant in error.

Per CURIAM: This suit was commenced before a justice of the peace, and from the judgment rendered against him defendant prayed and perfected an appeal to the circuit court. At the May term of the circuit court, a rule was laid upon defendant, who was appellant in that court, to give an additional appeal bond by the first day of August next thereafter, and the cause continued to the ensuing August term. Although ample opportunity was afforded for that purpose, the rule to file an additional appeal bond was never complied with. The cause was continued to the ensuing November term, when it was dismissed for non-compliance with the rule. It was within the discretion of the court to require defendant to give an additional appeal bond, and there was no error in dismissing his appeal for a non-compliance with the rule.

No error appearing in the record, the judgment will be affirmed.

Judgment affirmed.

JOHN C. KRIBS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. EMBEZZLEMENT—*what constitutes.* If money is placed in the hands of a person to be loaned for the owner for a specified time, upon a certain specified character of security, and at a stipulated rate of interest, and the person so intrusted with the money fraudulently converts the same to his own use, he will be guilty of embezzlement, under the Criminal Code.

2. But where one places his money in the hands of another, relying upon his honesty or responsibility for its return, with the stipulated interest, then a failure of the party to properly account for the money so received will not subject him to a criminal prosecution for embezzlement.

3. EVIDENCE *in criminal cases—as to other like offenses.* Upon the trial of a party charged with embezzlement, by the fraudulent conversion to his own use of money placed in his hands to be loaned for the owner, it is not competent for the prosecution to prove that the defendant had collected or secured money belonging to other parties, and on several occasions, which he had fraudulently converted to his own use. The evidence should be confined to the charge set forth in the indictment.

WRIT OF ERROR to the Circuit Court of Kane county; the Hon. H. H. CODY, Judge, presiding.

Mr. J. F. FARNSWORTH, and Mr. B. F. PARKS, for the plaintiff in error.

Mr. JAMES K. EDSALL, Attorney General, for the People.

Per CURIAM: This was an indictment in the circuit court of Kane county, against John C. Kribs, for embezzlement. On a trial of the cause the defendant was found guilty, and sentenced to the penitentiary for one year.

It appears, from the evidence introduced on the trial of the cause, that George W. Shaver, on the 26th day of June, 1874, placed in the hands of the defendant $550, to be loaned at the rate of ten per cent for one year. A receipt was given for the money, which was as follows:

"ELGIN, ILL., *June* 26, 1874.

"Received of George W. Shaver five hundred and fifty dollars, to be loaned at ten per cent, for one year, from this date.

"JOHN C. KRIBS."

One hundred and fifty dollars was paid back to Shaver on the 9th day of November, 1874, and at the same time interest was paid on the entire amount to the 1st day of December, 1874. The balance of the money the defendant converted to his own use.

If the money was placed in the hands of the defendant to be loaned for one year, upon real estate security, at ten per cent per annum, and he fraudulently converted the same to his own use, the defendant would, no doubt, be guilty of the offense charged. If, on the other hand, Shaver placed the money in the hands of the defendant, and looked to him for a repayment, and relied upon the guaranty of the defendant for ten per cent interest, from the time the money was paid over, then no conviction could be had. While we do not propose to express any opinion upon the evidence, yet, from the fact that the defendant guaranteed ten per cent interest from the date the money was received, and the subsequent payment of interest on the money to December 1, 1874, in connection with the agreement to repay the $400 on thirty days' notice, may properly raise a well founded doubt in regard to the guilt of defendant.

The proposition is too plain to admit of argument, that if Shaver, when he gave the money to the defendant, relied upon his honesty or responsibility to return it, with ten per cent interest, he can not resort to the criminal laws of the State to assist him to collect the debt.

But, aside from these considerations, the record discloses an error for which the judgment of the circuit court must be reversed.

On the trial, the court allowed the people, over the objection of the defendant, to prove that the defendant had collected or received money belonging to other parties, and on several

occasions, which he had fraudulently converted to his own use. This was error. The evidence should have been confined to the charge for which the defendant was indicted. On the trial of this indictment, the law did not require him to come prepared to meet other charges, nor does it follow, because he may have been guilty of other like offenses, that he was guilty of the offense charged in the indictment.

The evidence should have been confined strictly to the offense charged in the indictment. This was not, however, done, but improper testimony was allowed to go to the jury, which could not fail to prejudice the rights of the defendant.

For the error in the admission of improper evidence, the judgment will be reversed and the cause remanded.

Judgment reversed.

HUGH CLINTON

v.

LUCY C. KIDWELL.

1. EXEMPTION—*in favor of married woman.* In an action by a married woman residing with her husband on her land, against an officer, for levying upon her property under execution, on the ground that it is exempt, no presumption can be indulged that she is the head of the family, but that fact must be shown by proof that clearly rebuts the presumption that her husband is the head of the family, and it must be shown that the officer had notice of such anomalous relation.

2. SAME—*sufficiency of proof of wife being head of family.* An agreed statement that the residence of the family, in a suit by the wife for levying on her property claimed as exempt, is "on her own premises;" that "the property on the premises is her sole and separate property," and that "she has children by her former husband residing with her," fails to show that the plaintiff is the head of the family, and, as such, entitled to recover double the value of the property taken, especially where it further appears that she is residing "with her husband."

APPEAL from the Circuit Court of Edgar county; the Hon. OLIVER L. DAVIS, Judge, presiding.

This was an action, brought by Lucy C. Kidwell, against Hugh Clinton. The trial in the circuit court was, by consent, had without the intervention of a jury. On the trial, no testimony was given, but the issue was determined upon an agreed statement of facts submitted to the court by the parties, as follows: "The plaintiff herein was, and is now, a married woman, residing with her husband, and not deserted by him, on her own premises, and that the property on her said premises was her own sole and separate property; that she had children by a former husband, they residing with her on her own premises, but none by her present husband; that, while she was so residing with her husband and her said children, on her own premises, the defendant, who was a constable, by virtue of an execution in his hands, issued by a justice of the peace of said county on a judgment rendered against her on the 19th of April, 1875, levied upon and sold a cow and bull of plaintiff, of the value of $26.75, which plaintiff claimed to be exempt from sale on execution on account of her being the head of a family, and which property was exempt if she, by law, was entitled to an exemption as the head of a family; the debt upon which judgment was rendered and execution issued on was the separate debt of said plaintiff, and accrued during the marriage to her present husband."

Messrs. BISHOP & MCKINLAY, for the appellant.

Messrs. DULANEY & GOLDEN, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

The finding of the court was not sustained by the written statement of facts. This action is penal. The finding is for double the value of the property. In such cases, the proofs, to sustain the action, must be clear and satisfactory. It is not necessary to the decision of this case to hold that a married woman, living with her husband, can not, under *any* circumstances, be regarded as the head of the family. The only facts relied upon to sustain the proposition that the appellee in this

case was, at the time in question, the head of a family, are, that the residence of the family was "on her own premises;" that "the property on the premises was her own sole and separate property," and that "she had children by her former husband residing with her." These facts, alone, are surely not sufficient to show clearly that she was, at the time, "the head of the family," especially when it is said, in the same statement, that she was, at the time, residing "with her husband." Ordinarily, at least, where the wife lives with the husband, he must be regarded as the head of the family. If, in fact, he has not control of the family, and is not the head thereof, such fact must be shown by proof. The inference that he is the head must be rebutted by proof, and, in a penal action, that proof must clearly rebut such inference.

It may well be that this man and his wife were living upon her land, and that the personal property on the place was her property, and that her children constituted a part of the family, and yet the husband may have had the most complete control of the family and of all the business transacted upon the land. For aught that is here shown, he may have been a man of wealth, and may have been supporting his wife and her children in affluence.

Again, it is not shown by the statement that the constable had notice that any anomalous relations existed in this family, constituting the wife the head of the family. Presumptions must not be too freely indulged in penal actions.

The judgment of the circuit court is reversed, and the cause remanded for another trial.

Judgment reversed.

SCOTT, CRAIG and WALKER, JJ: Under the present statute and the facts in this record, we must hold that the judgment of the court below should be affirmed.

Statement of the case.

LEANDER HAINES

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. EVIDENCE—*where parties give conflicting testimony—rule for determining weight.* Where parties to a suit testify, the one affirming and the other denying a fact, then the jury are to determine the truth of the matter from the circumstances usually attending such transactions, from the reasonableness of the testimony, and from all circumstances in evidence bearing upon the issue.

2. CREDIBILITY OF WITNESS—*jury to determine.* In a prosecution for bastardy, the defendant asked the court to instruct the jury that if they believed, from the evidence, the prosecuting witness had made contradictory statements in regard to the time of criminal connection with the defendant, they should consider this in determining upon the credibility of her testimony. It was *held*, on the authority of the case of *Otmer* v. *The People*, 76 Ill. 149, the instruction was properly refused. The jury should be left free to determine as to the credibility of the witness for themselves.

WRIT OF ERROR to the County Court of McLean county; the Hon. R. M. BENJAMIN, Judge, presiding.

This was a prosecution for bastardy, against Leander Haines.

Upon the trial below, the court gave, among others, the following instruction on behalf of the people:

"*Fourth*—The court instructs the jury, that when parties to a suit testify, the one affirming, the other denying a fact, then the jury are to determine from the circumstances usually attending such transactions, from the reasonableness of the testimony, and from all circumstances in evidence bearing upon the issue, in determining the truth of the matter."

The first of a series of instructions asked by the defendant, and refused, was as follows:

"The court instructs the jury, for the defendant, that if they believe, from the evidence, the prosecuting witness has made contradictory statements in regard to the time of criminal connection with the defendant, the jury should consider this in determining upon the credibility of her testimony."

The trial resulted in a judgment against the defendant, to reverse which he sued out this writ of error.

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

Messrs. ROWELL & HAMILTON, for the People.

Per CURIAM: A reversal of the judgment is asked in this case mainly on the ground that the verdict is contrary to the evidence.

The prosecuting witness testifies that the defendant is the father of the child. This he denies. We are not, however, prepared to say the jury, by their verdict, disregarded the weight of the evidence.

The prosecuting witness went to the house of the defendant, who resided in the country, ten miles east of Bloomington, to work for him, on the 20th day of September, 1874. She remained there until the 7th day of the following January. During this time she was absent only on one occasion, when she went to her father's place, ten miles north of Bloomington, on Saturday, and returned the following Thursday. The child was born on the 9th day of July, 1875. It is a conceded fact that the child was begotten during the time the prosecuting witness was working at the house of the defendant. She was a deaf mute, in the country among strangers, with but little facility and opportunity to form the acquaintance of young men by whom she might become pregnant.

The record is barren of any evidence pointing in the direction of any person as the probable father of the child except the defendant.

It is urged by the defendant, that the prosecuting witness, on the preliminary examination, fixed the date upon which she had connection with the defendant as the 18th of December, and the child, at birth, was mature and full grown. The attending physician when the child was born, gave it as his opinion that the birth was premature—that it was a "seven months' child." Others present at the time testify to the same. About one month after the child was born, several

physicians examined it, and gave a different opinion. The evidence, therefore, upon this point, was conflicting, and it was for the jury to settle.

We do not, however, attach much importance to this position of the defendant. The witness, before the justice and on the trial in the county court, had to speak through an interpreter, and it was difficult to get her true meaning. On the trial, however, in the county court, as we understand her evidence, she testified that the defendant had connection with her several times, and if she stated December 18th, as the time before the justice, it was a mistake.

When all the evidence is considered, and in view of its conflicting character, under the uniform ruling of this court, the verdict of the jury must be regarded as final.

It is also urged, that the fourth instruction given for the people was calculated to mislead the jury. We do not so regard it. It is in accord with what is said in *Bonnell* v. *Wilder*, 67 Ill. 327.

The defendant's first instruction was properly refused, on the authority of *Otmer* v. *The People*, 76 Ill. 149.

We perceive no error in the modification of defendant's second and third instructions. The modifications were slight, and seemed fully warranted by the facts in the case.

Upon consideration of the whole case, we perceive no substantial error in the record, and the judgment will be affirmed.

Judgment affirmed.

NICHOLAS STAADEN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. INDICTMENT—*for setting fire to a building to the injury of the insurer.* In an indictment against a party for setting on fire a building which was insured, to the injury of the insurer, it is necessary to aver the guilty intent, namely, that the building was insured against loss by fire, and that the accused set it on fire with intent to injure the insurer.

Statement of the case.

2. Where the charge is, the intent was to injure a body of persons by a company name, unless such company is incorporated it should be averred the accused set the building on fire with intent to injure the persons composing that company, stating the names of such persons.

WRIT OF ERROR to the Circuit Court of DuPage county; the Hon. H. H. CODY, Judge, presiding.

This was an indictment against Nicholas Staaden, as follows:

"*First count*—Grand jurors present that Nicholas Staaden, late of Cook county, on the 28th day of July, A. D. 1874, in Cook county, Illinois, unlawfully, wilfully, feloniously and maliciously did set fire to a certain building therein situate, which said building was then and there used as and for a store and dwelling house, and which said building was then and there insured against loss by fire in and by the Ætna Insurance Company of Hartford, Connecticut, with the intent then and there to injure the said insurance company, contrary to the statute and against the peace and dignity of the same people of the State of Illinois.

"*Second count*—The grand jurors present that Nicholas Staaden, late of the county of Cook, on the said 28th day of July, A. D. 1874, in said county of Cook, in State of Illinois, with the intent to injure the said Ætna Insurance Company of Hartford, Connecticut, did then and there unlawfully, feloniously, wilfully and maliciously set fire to the building aforesaid, and that said building was then and there insured against loss by fire in and by the said insurance company, and that said building was then and there used as and for a store and dwelling house, and that said building was then and there the property of said Nicholas Staaden, and was then and there occupied by him, the said Staaden, contrary to the statute and against the peace and dignity of the same people of the State of Illinois."

Mr. THOMAS SHIRLEY, for the plaintiff in error.

Mr. JAMES K. EDSALL, Attorney General, for the People.

Per CURIAM: The indictment in this case was found under section 14, division 1, of the Criminal Code, and charges that plaintiff in error unlawfully, wilfully, feloniously and maliciously set fire to a building used as and for a store room and dwelling, which building was insured against loss by fire in the Ætna Insurance Company of Hartford, Connecticut, with intent to injure that insurance company, contrary to the form of the statute. R. S. 1874, p. 354, sec. 14.

One objection taken is fatal to the present indictment. It was necessary to aver the guilty intent, viz: that the building was insured against loss by fire, and that the accused set it on fire with intent to injure the insurer. Although the pleader has attempted to make such an averment in this indictment, it is defectively done. It is apprehended the insurer must be a natural person or a body corporate—some party capable of being injured. It is not alleged the Ætna Insurance Company of Hartford, Connecticut, is an incorporated company under the laws of that State.

Where the charge is, the intent was to injure a body of persons by a company name, unless such company is incorporated it should be averred the accused set the building on fire with intent to injure the persons composing that company, stating the names of such persons. The case of *Wallace* v. *The People*, 63 Ill. 451, is an authority for this view of the law.

This was not done, and the motion to quash the indictment ought to have been allowed.

The judgment will be reversed and the cause remanded.

Judgment reversed.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, 1876

Board of Supervisors of Peoria County

v.

Austin H. Gordon.

1. Mandamus—*to compel payment of judgment.* A petition for a *mandamus* to compel a county to pay a judgment, is an action, within the meaning of the Limitation Law of 1849, requiring all actions founded upon judgments to be commenced within sixteen years.

2. Statute of Limitations—*continues when it has once begun to run.* Where a Statute of Limitations begins to run, it will continue to run until it operates as a complete bar, unless there is some saving or qualification in the statute itself.

3. Same—*appeal does not prevent running of, against judgment appealed from.* Where a judgment is rendered in the circuit court, and an appeal prayed, but the appeal is not perfected until after the adjournment of the court for the term, the Statute of Limitations begins to run from the last day of the term, and the fact that the appeal is afterwards perfected and the cause heard upon such appeal in the Supreme Court, will not stop its running, but the bar will be complete at the expiration of the time limited by the statute from the last day of the term, notwithstanding the appeal.

Appeal from the Circuit Court of Peoria county; the Hon. Joseph W. Cochran, Judge, presiding.

Mr. D. MCCULLOCH, and Mr. JOHN MUCKLE, for the appellant.

Mr. E. G. JOHNSON, for the appellee.

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

An act passed the General Assembly of this State on the 13th day of February, 1853, (Laws 1853, p. 155,) providing for the laying out and location of a State road from Peoria, in the county of Peoria, to Rock Island.

The commissioners appointed by the act, in pursuance of its provisions, located the road over the land of Austin H. Gordon, in Peoria county, and assessed his damages at the sum of $50. On appeal from the assessment to the circuit court of Peoria county, Gordon, at the May term, 1856, recovered an absolute judgment against the county of Peoria for the sum of $548, and costs, which judgment, on appeal by the county of Peoria to this court, was affirmed at the April term, 1857. *The County of Peoria* v. *Harvey et al.* 18 Ill. 364.

This was a petition for a *mandamus*, filed by Gordon against The Board of Supervisors of Peoria County, October 22, 1872, to compel the payment of said judgment.

The petitioner did not own the land at the time of filing the petition, but had sold it several years before. The road had never been opened or worked through the same. At the time of the laying out of the road, the land was partly open and partly fenced, but since that time it had all been fenced, and had remained so.

The court below awarded a peremptory writ of *mandamus*, and the defendant appealed.

Several defenses are set up. We find it necessary to consider but one, that of the Statute of Limitations. The issue in the case upon that plea, presents the simple question whether or not the recovery was had more than sixteen years before the commencement of this proceeding.

By the act of Nov. 5, 1849, the one applying to this case,

"all actions founded upon any * * * judgment shall be commenced within sixteen years after the cause of action accrued, and not thereafter."

The judgment was rendered in the circuit court May 17, 1856. The court adjourned, for the term, June 4, 1856. The petition in this case was filed October 22, 1872, more than sixteen years after the term had closed at which the judgment was rendered. Upon these facts alone, the statute presents a plain bar.

But it is insisted, that, by the taking of the appeal from that judgment to the Supreme Court, the right of action upon the judgment was thereby suspended, and that the Statute of Limitations did not commence to run until the final adjudication in the latter court.

As before stated, the circuit court adjourned on the fourth day of June, 1856. The appeal bond was not filed until June 28, 1856. That was the perfecting of the appeal. The statute gives the right of appeal only upon the condition of giving an appeal bond. The prayer for an appeal was allowed by the circuit court, upon the defendant entering into the appeal bond; and, although the circuit court gave leave to file the appeal bond in thirty days, the appeal was not effected until the giving of the appeal bond, until which time there was no stay of any proceeding whatever, but any proceeding might have been taken upon the judgment, the same as if there had been no appeal prayed or allowed.

There was, then, a period of twenty-four days between the adjournment of the court and the time of the filing of the appeal bond, during which the judgment was in full force, and no appeal pending, and during which period an action upon the judgment clearly could have been commenced. Within this time, the Statute of Limitations certainly commenced to run, and it is the general rule, that when a Statute of Limitations begins to run, it will continue to run until it operates as a complete bar, unless there is some saving or qualification in the statute itself. *The People* v. *White*, 11 Ill. 342.

Upon appeal from the circuit court to the Supreme Court,

an appeal bond, with surety, is required and given for the payment of the judgment, in the event of its affirmance. The statute itself is silent as to what shall be the effect upon the judgment of taking the appeal or giving the appeal bond. It does not vacate the judgment. In *Curtiss* v. *Root*, 28 Ill. 367, it was held, that the appeal did not vacate or destroy the lien of the judgment appealed from, but merely suspended its execution; that the judgment was in full force all the time, as a vital judgment of the court, and not only held its lien at the term of its rendition, but would extend it over property acquired pending the appeal.

On appeal to the Supreme Court, under our laws, there is no trial *de novo*, but the appeal is in the nature of a writ of error, carrying up the case for the correction of errors which may have intervened in the progress of the suit in the court below, there being only a revision of the rulings of the lower court, as they may appear upon an inspection of the record alone.

Appellee's counsel refers to the following provision of the Practice Act: "In all cases of appeal and writs of error, the Supreme Court may give final judgment, and issue execution, or remand the cause to the circuit court, in order that an execution may be there issued, or that other proceedings may be had thereon," insisting that this makes the judgment of the appellate court the final judgment, and that if the judgment of the circuit court is affirmed, the affirmance is really the final judgment. In the ordinary practice of the court, this provision of the statute for giving final judgment is not acted upon, but, in case of affirmance, there is simply a judgment of affirmance, leaving with the lower court the execution of its judgment. Such was the case in the present instance. The judgment of the circuit court, then, remained all the while, from the time of its rendition, a judgment of that court, undiminished in its binding force, and the affirmance of it in this court was but a determination that it was a valid judgment. We do not regard the provision cited as affecting the question.

It is a judgment of the circuit court of Peoria county, rendered on the 17th day of May, 1856, which is here sought to

be enforced; and without saying how it might have been had the appeal been perfected at the time it was allowed, the Statute of Limitations unquestionably ran against the judgment during the interval of time above mentioned, between the last day of the term of the circuit court at which the judgment was rendered and the perfecting of the appeal; and we are of opinion that the appeal did not interrupt the running of the statute, and there being no saving clause in the statute to affect the case, that the general rule before mentioned applies here, that when a statute of limitations begins to run it will continue to run until it becomes a complete bar—that the period of limitation, here, had fully run before the time when this suit was commenced, and the statute forms a complete bar. Obviously, this proceeding is comprehended within the term "action," used in the statute.

The judgment is reversed.

Judgment reversed.

Mr. JUSTICE BREESE: I am of opinion the *mandamus* should be refused, for the reason the land was never taken for a highway, but remained the property of the petitioner, and was sold by him for its value, and the proceeds appropriated to his own use.

CONRAD SCHNELL

v.

JOSEPH SCHLERNITZAUER.

1. RETAINING FEE—*only one properly chargeable.* It is not usual for an attorney to charge more than one retaining fee in the same case, and if he charges more than one, he will not be allowed to recover such extra charge in a suit for his services.

2. ATTORNEY AT LAW—*fees.* A charge of fifty dollars by an attorney, for drawing and filing an appeal bond, is exorbitant; and where an attorney recovered a judgment in a suit on an account for professional services rendered, in which account were three retainers in the same case, and a charge of fifty dollars for preparing and filing an appeal bond, the judgment will

be reversed for reason that only one retainer is allowable, and the charge for the appeal bond was unreasonable.

3. EVIDENCE—*it is proper for party to explain his acts, by showing a misapprehension of facts.* It is proper for a defendant, who is shown to have promised to pay the plaintiff's bill, to testify that, at the time he made such promise, he had not discovered errors in the bill which he afterwards discovered, and the court should permit such testimony to go to the jury.

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

Mr. A. D. CARTER, for the appellant.

Mr. JOSEPH SCHLERNITZAUER, *pro se.*

Mr. JUSTICE BREESE delivered the opinion of the Court:

This action was originally brought before a justice of the peace of Cook county, and taken, by appeal, to the circuit court, where a judgment was rendered in favor of the plaintiff, and against the defendant, on the finding of a jury, for one hundred and thirteen dollars, to reverse which the defendant appeals.

The claim of plaintiff, it appears, was for professional services as a lawyer. The plaintiff was his own and principal witness on the main facts, and his testimony exhibits a case not very favorable to him. It does not appear, from the record, that plaintiff had more than one case in his charge much litigated, in which the defendant was interested, and that was a simple case of a mechanic's lien, involving no difficulties and requiring no particular skill in its management. Nominally, there were two such cases, one in favor of Clements, the other in favor of Ellickson, but they were consolidated and tried as one, and became one case, and, as far as the record shows, were by no means troublesome or intricate. For his services rendered appellant in all his cases, he made out a bill against him of six hundred and sixty-five dollars. To make up this amount, he charged two hundred dollars for trying the Clements case in the circuit court, in relation to which he claimed twenty-five dollars per day attending the trial, and claimed he was

employed six and one-half days therein. Abundant testimony, as well as the records of the court, show, most conclusively, but three and one-half days were so consumed, which would amount to eighty-seven and one-half dollars, a difference of one hundred and twelve dollars fifty cents against appellee. This difference deducted from his bill of six hundred and sixty-five dollars, leaves five hundred and fifty-two dollars fifty cents, from which is to be deducted the amount appellee admits appellant had paid on account, which was five hundred and thirty-two dollars. A balance of twenty dollars and fifty cents only would remain. The jury found a verdict for one hundred and thirteen dollars.

Among the items of plaintiff's account, is a charge of fifty dollars for drawing and filing an appeal bond, a sum seemingly grossly in excess of what is just and right.

The several accounts made out by appellee against appellant are before us, in one of which charges are made for moneys paid out, which plaintiff admitted he had never paid, and he also admits an error of fifty dollars in adding up the several items. The accounts exhibited show extraordinary and exorbitant charges. For instance, on April 16, 1872, the plaintiff made a charge of twenty-five dollars, "for retainer and pleas in case of A. F. Suberger against Schnell;" on May 15, another charge of twenty-five dollars, " for retainer and answer" in the same case; and on June 30, a like charge to "retainer and pleas" in the same case. It is believed it is not usual to charge against a party more than one retaining fee in a given case; all beyond that is not allowable. Consequently, instead of seventy-five dollars being charged against appellant, he should have been charged with only one retaining fee.

We can not but think, appellant, in paying to appellee five hundred and thirty-two dollars for professional services, in which was included these extra retaining fees, and fifty dollars for filing an appeal bond, has paid appellee much more than he was entitled to receive, and he ought to be compelled to refund it.

A point is made, by appellant, on the refusal of the court

to permit the defendant, when on the stand, to answer this question: "When the plaintiff presented his bill to you, and you promised to pay the same, had you then discovered the errors in his bill, and did you believe at that time that said bill was correct?"

We can not perceive any objection to this question. It is always allowable to show a mistake of fact, and to urge that an admission claimed to have been made by a party sought to be charged was made under a misapprehension of the facts. In this case, it is very apparent appellant could never have made the admission, had he known the true state of the facts, which appellee failed to state in his bill.

We are of opinion, great injustice has been done in this case. The judgment in favor of appellee ought not to stand, as the facts show a balance fairly due appellant of near seventy dollars.

The judgment is reversed, and the cause remanded, that a new trial may be had.

Judgment reversed.

HANNAH RESSOR

v.

MOSES RESSOR.

1. ALIMONY—*not limited to one-third of income from husband's property.* In fixing the amount of alimony which a woman should be allowed, the court is not limited to one-third of the increase or product of the husband's property. Natural justice would require that when the wife has contributed equally with her husband to the accumulation of property, she should have an equal right to its enjoyment.

2. SAME—*ability of woman to work not to be considered in fixing amount.* Where a husband and wife have lived together until they are too old to perform hard work, and have, by their joint labor, management and economy, acquired property sufficient to support them both comfortably, and the wife then obtains a divorce, she will be entitled to such an amount of alimony as will support her comfortably, without reference to her ability to labor, and thereby contribute to her own support.

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

Mr. GEORGE E. WAIT, and Mr. GEORGE W. SHAW, for the appellant.

Mr. C. DUNHAM, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellant filed her bill against appellee to procure a divorce, and charged extreme and repeated cruelty, drunkenness and adultery. The defendant having failed to answer, the bill was taken as confessed, and a decree of divorce was rendered, and, at a subsequent time, the question of alimony was heard, when the court found and decreed that defendant pay to complainant $350 yearly, in semi-annual payments. Complainant brings the case to this court on appeal, and asks a reversal, because the amount allowed is too small.

It appears that the parties were married and lived together for thirty-seven years, and raised a family of seven children. They were married in the State of Pennsylvania, and were, at the time, poor, neither of them having much, if any, property. The evidence shows that the parties were both industrious and economical, and that they, by their joint efforts, had accumulated, as appellant claims, $22,000, and appellee admits $15,000 worth of property, real and personal, and he claims that he owes $4000, which is not admitted by appellant.

We are inclined to the opinion that the evidence shows, when all considered, that his property, over and above all indebtedness, is worth from $18,000 to $19,000. It, however, consists principally of real estate, being two farms, containing in the aggregate over 500 acres. It appears, however, that only a portion of these are in cultivation, and the evidence varies as to its rental value. There is an orchard of 400 or 500 bearing trees, but the evidence shows that it is not in very good condition.

It appears that appellee, before he left Pennsylvania, left

his wife in possession of a little farm of 60 acres, which he had purchased on credit, and that he was in debt to the extent of all he had, and went to and remained in California for three years. On his return he brought with him $1000. Whilst there, all the personal property he left with appellant was sold to pay his debts. Appellant, during this time, by her own efforts, and without any assistance from him, supported herself and children. After his return they removed to this State, and the land was purchased. She inherited from her father's estate $560, nearly $400 of which is shown she gave to two of her sons. It is not claimed that any of this money was invested in or paid for these lands.

Appellant is shown to have been a very capable, industrious woman, attending to her family, her house, cooking, and working on the farm, doing a man's work besides, and to have been a good manager. She supported herself, costing her husband almost nothing for doctor's bills, they not having been $20 during their married life. In ten years she had but one dress bonnet and but one alpaca dress. With such industry, economy and management on her part, equal if not superior to his, it was but natural that they would be prosperous, and that at least moderate wealth would be the result.

It is urged that she brought him no money, and that his was invested in the land and he received no portion of the money she inherited from her father. This may all be true, but it does not, therefore, follow, that she has not contributed to its accumulation. She made and saved him money, which was quite as important. Whilst in California, she relieved him entirely from the support of his family, which, had it fallen on him, would, in all probability, have consumed all that he earned and brought home, and which purchased these lands. By her economy, management and industry, added to his, means were made to improve the lands and add to their value. Who can say that she has not contributed quite as much as he in its acquisition, and its improvement and increased value? Whilst he was earning the money in California, she was saving it in Pennsylvania. She in every way

contributed equally to its improvement, and is fully entitled in equity, and the broadest principles of justice, in her declining years, to a comfortable support from it. She should not be put off with what will barely prolong her existence.

It appears that she was fifty-nine years old at the time of the hearing, and was not in her former vigorous and robust health. She has probably passed the period when she will be able to perform much more physical labor. The infirmities of age must soon, according to the course of nature, render her at least comparatively helpless, and she must look to other sources than her own efforts for support. As we have seen, she has earned and is entitled to a comfortable support out of the joint accumulations of herself and her husband.

In consideration of all the evidence, we regard the amount fixed by the court as being too small. Her board, we presume, would cost her two-thirds of the amount; and the remainder would seem to be a scant allowance to purchase and make her clothing, pay doctor's bills, and other contingent expenses. At her age, her ability to work should not be taken into account, as the infirmities of age may and soon will prevent that, and even if it were not so, she, after her life of hard and incessant toil to accumulate this property, has the right to spend her declining years in ease and comfort, freed from toil and effort. This she has earned, and is entitled to it.

Nor is it an answer to say that she, by the decree, would get a third of the rents and profits arising from the property. The court is not bound by such considerations, but may look to what the property is capable of yielding. Converted into money, it could be made to yield a much larger sum; and if rented for cultivation and pasture, it would be reasonable to suppose that it might be made to yield $3 annually per acre. If so, one-third of the sum would be $500 per annum. But the court is not limited to a third of its income. This amount would not be unfair, unjust or unreasonable, even if it should require a sale of a portion of this property. Natural justice would say, that if she contributed equally to its acquisition, she has an equal right to its enjoyment. Independent of con-

ventional law or usage, such would be the decision. We are of opinion that $500 a year would be a moderate allowance, under the evidence in this case, and it would even justify the allowance of a larger sum.

If appellee thinks it difficult and embarrassing to pay that sum annually, he can relieve himself of it in this case by permitting the court to decree a gross sum or a portion of the real estate in lieu of annual alimony. This can be done on just and fair principles, and leave appellee with an ample competency to provide for the infirmities of age, and to render him comfortable in his declining years. Appellant being willing to receive a gross sum or a portion of the land, appellee can, if he choose, by consenting thereto, relieve himself from the payment of annual alimony.

The court below having fixed the alimony too low, the decree finding the amount will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

ANNIE V. JOHNSON, Admx.

v.

ANGELINE DIVERSEY *et al.*

CHANCERY—*delay in prosecuting a suit, if good cause appears, will not defeat a new suit, as to same matter.* The administratrix of a deceased partner filed a bill soon after his death, against the surviving partner, for an account of the partnership funds. The civil war broke out soon after, and the complainant, being a resident of one of the disloyal States, could not have ready communication with her counsel, and the defendant, who resided in the county where the suit was pending, did nothing to bring the cause to a hearing, and no steps were taken therein from 1862 to 1869. In the latter year the defendant died, and complainant revived the suit against his personal representatives, and, from that time up to the fire of October, 1871, in Chicago, the suit was actively prosecuted, and the record had become very voluminous, when it was destroyed by that fire. It being found impracticable to supply the lost record, the suit was dismissed, and another suit instituted, being, in reality, a revival of the original suit, the dismissal

having been made to avoid the difficulties arising from the inability of parties to substitute the lost records: *Held*, that there was no such *laches* shown on the part of the complainant as to deprive her of a standing in a court of equity; and that it was error to refuse to hear evidence on the merits of the case and to dismiss the bill.

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

Francis Johnson and Michael Diversey, when living, were partners in the wholesale and retail liquor business. By the terms of the written articles of co-partnership, the survivor had two years in which to close up the affairs of the firm, after the death of the other partner. Johnson died in 1860, and Diversey at once assumed exclusive control of the business and effects of the concern. No account was ever rendered to the administratrix of the estate of the deceased partner.

In 1861 complainant, who had previously been administratrix of her husband's estate, exhibited a bill against Diversey, asking the appointment of a receiver, and that an account be taken of the effects of the firm. The prayer of the bill, so far as it asked for the appointment of a receiver, was disallowed, but the court entertained it as a bill for an account. Answers were filed and proofs taken. In the meantime, complainant had become a resident in one of the States in rebellion against the Government. Communication with her attorneys was, in a measure, cut off, and, from 1862 to 1869, but little was done, by either party, towards securing a final trial. In the latter year Diversey died, and the suit was revived by making his personal representative a party. Service was had on the administratrix and the cause again progressed, but no hearing was had before the fire of 1871, which destroyed all the records. Notice was given and efforts made to restore the record, but delays occurred and the time extended to complete the work, sometimes by order of court, and sometimes by stipulation of parties.

On account of the complications and difficulties experienced, it was found to be impracticable to restore the former pleadings, and that suit was dismissed and the present one com-

menced. This bill contains a succinct history of the proceedings in the former suit and the reasons for dismissing the bill.

On the hearing of this cause, the court required the parties to produce evidence on the question whether the bill should be dismissed for want of equity, on account of the alleged *laches* of complainant in prosecuting her suit, and refused to hear testimony touching the merits of the matters in controversy. The court dismissed the bill, and that decision is the only matter brought before this court on the appeal.

Mr. EPHRAIM BANNING, and Mr. HARRY HARRISON, for the appellant.

Mr. F. LACKNER, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

We think the court erred in its decision dismissing the bill. All the facts and circumstances considered, it does not appear complainant has been guilty of such *laches* as would deprive her of any standing in a court of equity. Soon after the death of her husband and her appointment as administratrix of his estate, she exhibited her bill, calling upon the surviving partner of the firm of which her husband was a member, to render an account of the affairs of the concern. It is conceded, this bill was prematurely filed, for the reason the two years allowed by the articles of co-partnership to the surviving partner to close up the business had not then expired. Nevertheless, the court retained the bill so far as it asked for an account. Answers were filed and proofs taken. But complainant residing in one of the disloyal States, and not having ready communication with her resident counsel, it seems the cause was not brought to a hearing. Diversey resided in the county where the suit was pending, and had he desired a speedy trial it was his privilege to have it, and, no doubt, on application the court would have awarded it to him. But he did nothing to advance the cause. No steps seem to have been taken by either party in the cause from 1862 to 1869. After the death of Diversey,

which occurred in 1869, complainant revived the cause against his personal representative. The difficulties occasioned by the existence of the civil war had ceased, and thereafter no unreasonable delay was suffered in the prosecution of the case. Service was obtained on the administratrix of Diversey's estate as soon as was practicable. Every preparation was being made for a final disposition of the cause, when all the records and pleadings were destroyed by fire, in 1871. According to the testimony, the papers in the cause had become very voluminous, and one witness, whose judgment is entitled to great weight, says, in view of that fact he would not have undertaken to restore them for any reasonable consideration. Nevertheless, complainant and her counsel were doing all they reasonably could in the prosecution of the suit. It may be said complainant was persistent in her individual efforts. Negotiations for a compromise were entertained, as counsel assured the court, with reasonable prospect of successful termination. When it was found to be impracticable to restore the records and files in the former suit with any degree of accuracy, it was dismissed and the present bill filed. It is, in effect, but a revivor of the former suit, a continuation of the same litigation, although the bill is nominally a new one. The filing of the new bill was the speediest and best way out of the difficulties occasioned by the destruction of the records. It would be attended by the least delay, and we do not understand how it could prejudice either party, certainly not the defendants. It is true this litigation has been pending many years, but it is not altogether the fault of complainant. Complications and difficulties, arising out of the civil war and the destruction of the records, were the causes of the chief delay. No delay arising out of either of those causes could be imputed to her as *laches*. It was in the power of the surviving partner, in his lifetime, to have put an end to this litigation by rendering an account of the trust funds that came to his hands. That effects belonging to the firm came to his possession as surviving partner, is not denied; but how they were disposed of is not known. So far as this record discloses he rendered no account, and the court decline to hear

evidence touching the matters in dispute. Had Diversey, in his lifetime, shown a tithe of the anxiety manifested by complainant to settle the partnership transactions, they could have been adjusted long before his death.

All the delay that has occurred since the destruction of the records has been sufficiently explained by the difficulties in the way of the restoration of the records, in no way attributable to complainant, and by negotiations for a compromise between the parties, which, at one time, it was thought would result in a successful termination.

Sustaining, in some degree, the views we have expressed, are the following cases: *Smith* v. *Ramsey*, 1 Gilm. 373; *Davenport* v. *Henderson*, 47 Ill. 74; *Clark* v. *Hogle*, 52 id. 427; *Logan* v. *Simmons*, 3 Md. Eq. 487.

The difficulties in the way of taking an accurate account, in consequence of the death of the parties and of some important witnesses, we apprehend will be quite as embarrassing to complainant as to defendants. But were it otherwise, that fact constitutes no insuperable objection to adjusting accounts of trust funds that ought to have been done sooner. It is, perhaps, the misfortune of defendants, arising out of the neglect of their ancestor to render an account of funds with which he is charged as having in his possession.

The decree will be reversed, and the cause remanded.

Decree reversed.

CELESTIA L. BURCHARD

v.

AARON DUNBAR.

1. CONFLICT OF LAWS—*of the right and the remedy—by what law governed.* The law of the place where a contract is made will control in ascertaining the rights and liabilities of the parties, but no further. When these are ascertained, the law of the place where its enforcement is sought will govern as to the remedy.

Statement of the case.

2. Where, by the law of another State, the liability of a party to a contract, executed in that State, is of an equitable character, it can be enforced in this State only in a court of equity, although, by the laws of the State where it was executed, it could be enforced in a court of law.

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

This was assumpsit, by appellee, against appellant and her husband, Patrick H. Burchard, on an instrument in writing, of which the following is a copy:

"$403.44 HAMILTON, *January* 1, 1866.

"For value received, we, jointly and severally, promise to pay A. D. Dunbar, or bearer, $403.44, in three equal annual payments, the first payment to become due January 1, 1867, with annual interest on all sums remaining unpaid, and the whole to become due January 1, 1869.

"The undersigned, Celestia L. Burchard, wife of the undersigned P. H. Burchard, for value received, further promises and agrees that her separate estate, both real and personal, shall be charged with the payment of the said sum of $403.44 and interest; and that the said moneys hereby agreed to be paid shall be a lien and charge upon her separate estate, and she hereby declares it to be her intention to charge, and hereby does charge, her separate estate with the payment of said sum of $403.44 and interest.

CELESTIA L. BURCHARD.
P. H. BURCHARD."

Appellant filed a separate plea, in which she avers that "the said plaintiff ought not to have or maintain his action, etc., because the several causes of action in the declaration are one and the same, viz: the note set out in first count, and not other or different; that she, before and at the time of making said supposed promises, was the wife of her co-defendant, Patrick H. Burchard, and hath so ever since been, and still is; that the sole consideration for said note was the sole and individual indebtedness of the said Patrick H. Burchard to the said plaintiff, for money due upon an account stated between them, and that

she signed the said note only, in fact, as security for the said Patrick H. Burchard, her husband, and for no other cause or consideration whatever, and denies that, by the laws of the State of New York, she thereby charged her separate estate, and wherefore she prays judgment, etc."

The following stipulation between the parties was read in evidence, on the trial, without objection:

"It is hereby stipulated between the parties that, upon the trial of said cause, the parties may offer in evidence, under the pleadings upon file, any matter, or thing, or defense, or reply any matter or thing, as if any other pleas, pleadings, defenses or replications were filed therein; and it is further stipulated that the said Celestia L. Burchard was the wife of P. H. Burchard at the time said instrument in first count of plaintiff's declaration was made, and that the same was made in the State of New York; and that the printed Statutes of New York and decisions of the Court of Appeals, or Commission of Appeals, may be introduced upon argument, by either party, to show what the law of New York was and is on said note and matters in dispute in said cause; and that the allegations in the plea filed herein as to said note in suit being given solely for the individual indebtedness of the said defendant Patrick H. Burchard, and signed by said Celestia L. Burchard as security for him, and for no other consideration, as in said plea alleged, is true, and if it shall become material to them that Celestia L. Burchard, at the time of the execution of said note, or at any time since then, had property, at any time before final judgment, proof thereof may be introduced as controverting the same, and either party may introduce such proof before the final determination of said cause, or next term of this court; that nothing in this stipulation shall bind either party in any other suit, trial or litigation between said parties, or either of them.

"Dated September 27, 1875.

BONFIELD & PADDOCK,
Attorneys for plaintiff.
G. S. ELDRIDGE,
Attorney for defendants."

Certain statutes and decisions of courts of New York were read on the argument, but such of them as are deemed material to the questions arising in the case are referred to in the opinion, and therefore need no mention here.

Judgment was given for the plaintiff, against both defendants, for $465.20 and costs, and Celestia L. Burchard, after moving for a new trial, which was refused, appeals to this court.

Mr. G. S. ELDRIDGE, for the appellant.

Messrs. BONFIELD & PADDOCK, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The instrument on which suit is brought having been executed in the State of New York, we must resort to the law of that State to determine the nature of the obligation it imposes on the appellant. Prior to the enactment of recent statutes, and decisions thereunder, it is quite clear there was no substantial difference in the law, in this respect, in the State of New York and this State. Thus, it was held in *Yale* v. *Dederer*, 18 N. Y. 265, and 22 id. 454, that the signing of a promissory note by a married woman, as surety for her husband, merely, did not, even in equity, bind her separate estate, notwithstanding she, in fact, intended it to have that effect; and this ruling is referred to with approval and followed in *Carpenter* v. *Mitchell*, 50 Ill. 470; *Williams* v. *Hugunin*, 69 id. 214; *Bressler et al.* v. *Kent*, 61 id. 426. But in *Yale* v. *Dederer*, *supra*, the court went further, and held that, in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself; thus, by implication, holding that a charge upon the separate estate of a married woman might be created where the intention to do so is declared in the contract which is the foundation of the charge, or the consideration is for the direct benefit

of the estate itself. And in *The Corn Exchange Insurance Co.* v. *Babcock*, 42 N. Y. (Appx.) 613, the Commission of Appeals so expressly ruled, and, also, that it was unnecessary that the contract should contain a description of the property to be charged. This point has never arisen for adjudication in this court, nor is it now necessary to indicate what our conclusion would be were the question one for our determination. It is sufficient, for the present, that such is the law of the place where the contract was made. In the case last referred to, a judgment was sustained, under the New York code of procedure—in form, a judgment at law—without indicating any property out of which it was to be satisfied; and Commissioner HUNT, in the majority opinion, says, alluding to objections to the form of the proceedings: "I have considered these points with reference to our statutes. As, in my judgment, this case comes within those statutes and the form of the action, the form of the judgment and the execution upon it are to be regulated by them. They are right, in form, under the provisions of our statutes."

The court below held, on the authority of this case, we infer, that the obligation of appellant was valid and binding at law in the State of New York, and, consequently, that it can be enforced here as a legal undertaking.

It would seem that the quotation we have made from the opinion of Commissioner HUNT, itself, shows that the form of the remedy in that case was approved solely because it was authorized by the New York Statutes; but he again says, at page 638: "Where the proceeding was strictly one in equity, it may have been necessary that the judgment should specify the property against which the process should issue. Under our statutes, the suit, the judgment and the execution are in the ordinary manner of suits at law."

EARL, Com'r, in his separate opinion in the same case, at page 642, says: "The position of a *feme covert*, then, in this State, in reference to her contracts, is as follows: She is bound, like a *feme sole*, by all her contracts made in her separate business, or relating to her separate estate, within the

meaning of the acts of 1848, 1849, 1860 and 1862; and such contracts can be enforced in law or equity, as the case may be, just as if she were a *feme sole*. All her other contracts are void at law, and do not bind her personally, but may be enforced in equity against her separate estate, provided the intention to charge the estate be stated in the contract." He comes to the conclusion that the defendant, by her contract of indorsement, charged her separate estate, in equity, and that it might, under their statutes, be reached through the form of proceeding then before the court, first, however, amending the judgment so as to require a satisfaction out of the defendant's separate estate.

As we understand the opinion of Commissioner HUNT, he does not claim that, under the laws of that State, a married woman incurs a general indebtedness by such an instrument, but simply that she creates a charge upon her separate estate, which may be enforced by a form of proceeding like that then under consideration. The basis of the liability is, therefore, still of an equitable nature, though materially modified by statute.

In *Loomis* v. *Ruck et al.* 56 N. Y. 462, suit was brought on an instrument having the form of an ordinary promissory note, except that it concluded by charging the amount upon the separate estate of the maker, and stating that the consideration had been incurred for the benefit thereof. The defense was interposed that the signature was obtained by duress; and, in determining whether this defense could be set up against the plaintiff, who was an assignee, the court said: "The note, so far as Mrs. Ruck was concerned, was void at common law, by reason of her coverture, and it is not helped by any of the statutes of this State in respect to married women. These statutes render valid, at law, such contracts, only, of *femes covert* as relate to their separate estates, or are made in the course of their separate business. As to the last mentioned contracts, married women, under our statutes, stand, at law, on the same footing as if unmarried, and can, therefore, make negotiable paper, which will be governed by the law mer-

chant; but as to other obligations, they still stand on the same footing as before the enactment of these statutes. Their contracts are void at law, but if they have separate estates, courts of equity will enforce them as against such estates. According to the late decisions in this State, an express charge upon the separate estate is required to be contained in the contract. The law merchant, which gives to the *bona fide* transferee of negotiable paper greater rights than those of the transferrer, has no application to this class of obligations. They are not recognized at law, and we have been referred to no authority tending to sustain the position that the transferree of an obligation of a married woman, obtained from her by fraud or duress, and against which she had a good defense, when in the hands of the original holder, can be enforced, in equity, out of her separate estate, simply because it has passed into the hands of a *bona fide* transferree. The rules applicable to commercial paper can not govern this case. It must be governed by the rules of equity, which, in case of equal equities, and in the absence of sufficient grounds of estoppel, give preference to the equity which is prior in point of time."

This decision was rendered nearly four years after the announcement of the decision in *The Corn Exchange Ins. Co.* v. *Babcock*, *supra*, and was concurred in by all the members of the Court of Appeals, and must be regarded as conclusive that the liability of a married woman, in such cases, is purely equitable, and that what was said in *The Corn Exchange Ins. Co.* v. *Babcock*, in regard to enforcing it as a judgment at law, had relation to the form of the remedy as provided by statute in that State, only.

But the law of the remedy is no part of the contract. *Wood et al.* v. *Child et al.* 20 Ill. 209. "When the question is settled that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in framing it, the *lex loci* ceases its functions, and the *lex fori* steps in and determines the time, the mode and the extent of the remedy." *Sherman et al.* v. *Gassett et al.* 4 Gilm. 531; *Chenot* v. *Lefevre*, 3 id. 643.

That appellant charged her separate estate with the payment of the amount of the note, by the law of New York, is beyond question, under the authority of *The Corn Exchange Ins. Co.* v. *Babcock*, *supra*, which the Court of Appeals, in *Maxon* v. *Scott*, 55 N. Y. 251, says must now be regarded as the established law of that State. But this is in equity only; and, although by our present statutes (R. L. of 1874, p. 576,) married women may sue and be sued, either with or without joining their husbands, and defend without regard to whether the husband shall defend or not, and judgments may be recovered against them and satisfied out of their separate estates, we still preserve the distinctions between actions at law and suits in equity; and there is no authority for suing and obtaining judgments against them in actions at law on purely equitable liabilities.

The liability of the husband, here, is at law, on the promissory note. The promissory note, as to appellant, is void at law, and the only ground of proceeding against her is in equity. She has charged her estate with its payment. It is absurd, therefore, that, still observing the distinctions between courts of law and courts of equity in administering remedies, there should be a joint judgment against them at law.

The judgment is reversed.

Judgment reversed.

THE PEOPLE *ex rel.* James M. Wallace

v.

THE STERLING BURIAL CASE MANF. CO. *et al.*

1. CORPORATIONS—*by-laws binding, if adopted by all parties in interest.* Where the charter of an incorporated company provides that the corporate powers of the company shall be exercised by a board of directors or managers, who may adopt by-laws for the government of the officers and affairs of the company, a by-law adopted at the first meeting of the stockholders, all of whom were present and participated therein, and who were the only persons interested in the company, either as officers, managers or stockhold-

ers, is binding, notwithstanding they may, in the adoption thereof, have designated themselves as stockholders, instead of managers.

2. ESTOPPEL—*stockholder is estopped to deny validity of by-law which he assisted to adopt.* Where a stockholder in an incorporated company participates in the adoption of by-laws and acts, and acquires rights under them, and, through his instrumentality, they are held out to the public as the laws of the corporation, and outside parties acquire rights in the corporation, on the faith of the validity of such by-laws, such stockholder is estopped to deny their validity.

3. STOCK—*issued in violation of law is void.* Stock issued in violation of the law under which the company is incorporated is illegal and void, and the corporation can not be required to transfer the same upon its books, notwithstanding it may have been issued with the consent of all the stockholders of the company at the time.

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

Messrs. SACKETT & BENNETT, for the appellant.

Mr. W. E. LEFFINGWELL, and Messrs. HENRY & JOHNSON, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a petition, in the name of the people, on the relation of James M. Wallace, for a *mandamus* to compel the Sterling Burial Case Manufacturing Company to allow him to transfer, on the books of the company, fifty-two shares of its capital stock to himself, and to require the company to issue certain other shares for dividends, which he claims have been declared upon said shares in stock.

An answer was filed to the petition, the material portions of which were put in issue by pleas interposed by the petitioner, and upon a hearing on the evidence the *mandamus* was denied.

It appears, from the record, that the corporation was organized on the 16th day of December, 1872, under the act of April 18, 1872, entitled "Corporations." When the corporation was organized, its capital stock was declared to be $30.000, consisting of three hundred shares of $100 each. On the 16th

day of December, 1872, Henry Hoover subscribed $19,250 to the capital stock of the company; Jonas Windom, $4250; Charles Saxton, $4000; and Silas S. Anckmoody, $2500. Hoover paid upon his subscription $5875, and the company issued to him one hundred and sixty-five shares of what purported to be full paid shares of stock, for the amount which he had paid. To the other three parties who had subscribed for stock, the company issued what purported to be paid up stock, in the same proportion upon which they had actually paid; the whole amount paid on the subscriptions being $9250, for which they received the three hundred shares representing the entire $30,000. Subsequently, the four persons composing the corporation adopted a by-law increasing the capital stock to $60,000.

The corporation, finding that it could not induce others to take stock in the company while the fictitious stock was out, on the 3d day of October, 1873, at a meeting of the company, adopted a resolution requiring all the fictitious stock to be returned, delivered up and canceled.

In pursuance of this action, all the stockholders, except Hoover, returned the fictitious stock by them held, and it was canceled. Hoover, however, transferred eighty-three of the shares by him held to Louisa Hoover, thirty shares to Frank Maynard, and the remaining fifty-two shares to the petitioner, Wallace.

A number of questions have been presented and discussed by the attorneys in this case, but, in the view we take of the facts presented by the record, we are inclined to the opinion that a disposition of the question whether the 12th article of the by-laws was legally adopted, and was in force when the stock issued, will settle the legality of the stock, and the rights and obligations of the parties in regard to its transfer upon the books of the company.

The respondents set up, in the answer, that, by the 12th article of the by-laws of said corporation, it is required that the president and secretary shall sign and issue certificates of stock only upon payment of the full amount of such stock,

and that the said Henry Hoover did not pay to the said corporation the full amount of said stock, nor any part thereof, except for nine shares, to-wit: those described in the following certificates: No. 10, for two shares; No. 13, for one share; No. 15, for one share; No. 16, for one share; No. 14, for one share; and No. 22, for three shares; which said shares were fully paid for; and the shares so numbered, they are ready and willing to be allowed to be transferred upon the books of said corporation. But as to all the other shares of stock described in the relator's petition, they aver that the same were issued without any consideration whatever having been, or to be, paid therefor; that the same were and are fictitious, and were issued to the said Henry Hoover without authority, and in direct violation of the articles of incorporation, and the by-laws thereof.

To this portion of the answer, the relator replied that the said 12th article of said by-laws had not been adopted and was not in force, at the time the said certificates of stock, in the petition mentioned, or any of them, were issued and delivered to the said Hoover.

Section 6 of the act under which the company was organized provides: "The corporate powers shall be exercised by a board of directors or managers, provided the number of directors or managers shall not be increased or diminished, or their term of office changed, without the consent of the owners of a majority of the shares of stock. The officers of the company shall consist of a president, secretary and treasurer, and such other officers and agents as shall be determined by the directors or managers, and the directors or managers may adopt by-laws for the government of the officers and affairs of the company."

It is true, the record of the proceedings of the company, introduced in evidence, says the by-laws were adopted at the first meeting of the stockholders after the company was organized, which, as appears, was held on the 26th day of December, 1872. But at this time, it appears that Windom was president, Hoover treasurer, and Anckmoody secretary, and they, in connection with Saxton, all being present, and being

the only persons who composed the corporation or had any interest therein, either as officers, managers or stockholders, prepared and adopted the by-laws.

The corporation, when the by-laws were adopted, consisted of but four persons. These four were not only stockholders, but were the officers and managers. The mere fact, therefore, that they designated themselves stockholders in the adoption of the by-laws, instead of managers, can not affect the validity of the proceedings. The stockholders were the officers and managers of the corporation, and the managers were the stockholders.

Had the corporation consisted of say twenty stockholders, who had elected five of their number managers or directors, in such a case, no doubt, the act under which the company was organized would require the by-laws to be adopted by the managers or directors; but here, the stockholders and officers are the same persons, and when they all met and adopted a code of by-laws for the government of the company, to hold that the proceedings were void merely on the ground that they failed in the record to style themselves managers, would give more prominence to nice, technical distinctions, where no practical benefit would result, than we feel called upon to give. These by-laws were adopted by the persons who were in fact the managers of the corporation. The company never had any other code of by-laws, except so far as they were subsequently amended to meet the necessities of the company as its business increased.

There is another view that might be taken of the question. Hoover assisted in the adoption of the by-laws. He acted and acquired rights under them. Through his instrumentality they were held out to the public as the laws of the corporation. Outside parties have acquired rights in the corporation, on the faith of the validity of the by-laws. Under such circumstances we are inclined to hold that he is now estopped from denying the validity of a code of by-laws which he himself adopted and held out as valid; and as the relator, Wallace, stands in the

shoes of Hoover, so far as the shares of stock are concerned, he is in no position to dispute the legality of the by-laws.

The position of the relator in this case is not only peculiar, but inconsistent with itself. He prays for a *mandamus* to compel a corporation to transfer stock on the books of the company, under and by virtue of a code of by-laws which he is compelled, in order to obtain the relief asked, to urge have never been legally adopted. We can not sanction a position so inconsistent, but we are satisfied the by-law in question was properly adopted; and as it provides that the stock certificates can only be issued on the payment of the full amount of stock, it necessarily follows that these fictitious certificates issued to Hoover without payment were illegal, and of no force or effect whatever.

But it is urged, that as this stock was issued under an agreement of all the stockholders in interest at the time, although shares were issued for double the amount actually paid, the overissue would not be fraudulent or void.

A reference to a few provisions of the act under which the company was organized, will, we think, dispose of the question.

The 13th section requires the corporation to keep, at its principal office, correct books of account of all its business.

The 18th section prohibits, under a penalty, the exercise of corporate powers without complying with the provisions of the act, before all stock named in the articles of incorporation shall be subscribed in good faith.

The 21st section prohibits the making of false reports or statements of the affairs of the corporation.

Can it be said this company kept correct books of its affairs, when the books showed a subscription to the capital stock, purporting to be valid, for $30,000, when, by a secret agreement, this was mostly fictitious? The books represented the shares of stock worth $100 each, and that Hoover had a certain number of shares of paid up stock, when, in truth, a larger portion of these shares had never been paid for and were not to be paid for.

We are satisfied the arrangement under which the overissue

of stock was made was contrary to the spirit of the act under which the company was organized, and that all stock issued without payment was illegal and void, and the corporation could not be required to transfer the same upon its books.

The decision of the circuit court will be affirmed.

Judgment affirmed.

SUSAN MILLER

v.

KATE L. MILLER.

1. WIDOW'S AWARD—*not barred because not confirmed by the court within two years.* The widow's award, although in one sense a demand against the estate of her husband, is not such a demand as is required to be exhibited against the estate within two years, or be forever barred.

2. ADMINISTRATION—*only demands required to be presented by party owning them, barred in two years.* The seventh clause of section 70, page 116, R. S. 1874, which provides that all demands not exhibited within two years shall be forever barred, has relation only to such demands as are required to be exhibited to the court by the parties to whom they belong, and does not embrace the widow's award.

3. SAME—*power of county court as to appraisement.* The county court, from its general powers in supervising the administration of estates, has the power, for cause shown, to set aside an appraisement bill or a report of appraisers, making out and certifying to that court an estimate of the value of the items of property mentioned in the statute as the widow's award.

4. But whilst the county court has this supervisory power, it has no power to revise and modify the appraisement bill or appraisers' estimate of the value of the property allowed as the widow's award, and substitute the judgment of the court for the judgment of the appraisers.

5. SAME—*power of circuit court in matter of, on appeal from the county court.* On an appeal from a judgment of the county court approving the appraisers' estimate of the value of property allowed as a widow's award, the circuit court can not exercise any power in the case, except such as the county court could and should have done; and a judgment rendered by the circuit court, allowing the widow a sum in gross less than the amount fixed by the appraisers, is erroneous, as substituting the judgment of the judge presiding for the judgment of the appraisers.

Statement of the case.

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

Orrin Miller died intestate in Chicago, on the 8th day of December, 1872. The only estate left by him was an interest of one-third in partnership property and effects of the firm of McDonald Brothers & Miller, the value of which interest was from $1600 to $2000.

On the 23d of December, 1872, letters of administration upon his estate were issued to Susan Miller, the appellant, and she qualified as such.

On the 15th of November, 1873, appellant was removed as administratrix, and one Wilder was appointed in her place. Up to this time no steps had been taken to settle this estate. No inventory or appraisement bill was rendered, and no adjudication term had been fixed upon.

On the 2d day of December, 1874, Wilder, as administrator, filed an inventory, showing that there was no real estate and no personal property, but that the entire assets of the estate consisted in the interest in the partnership effects above stated, and this was put down on the inventory as worth $2000.

On the 8th day of December, 1874, appellant filed a claim as a creditor of the estate (which was afterwards allowed), amounting to $4500.

On the 9th of December, 1874, the appraisers were appointed, and on the 19th of January, 1875, the report of the appraisers, dated December 11, 1874, was filed with the clerk of the county court, which appraisers' report states that no property belonging to said estate has come to their sight or knowledge. On the same day was filed the certificate of the appraisers, etc.

The appraisers' estimate of the value of property allowed to widow, filed in the county court January 19, 1875, is as follows:

The family pictures and wearing apparel, jewels and ornaments of the widow and minor children..	.....
School books and family library.....	$100.00
One sewing machine.....	75.00

Necessary beds, bedsteads and bedding, for widow and family	$100.00
The stoves and pipe used in the family, with the necessary cooking utensils (or, in case they have none, $50 in money)	50.00
Household and kitchen furniture	100.00
One milch cow and calf (being one for every four members of the family)	50.00
Two sheep and fleeces (being two for each member of the family)	15.00
One horse, saddle and bridle	145.00
Provisions for the widow and family for one year	200.00
Food for stock above specified for six months	75.00
Fuel for the widow and family for three months	45.00
Other property	100.00
Total	$1,055.00

On the same day appeared in the county court Susan Miller, as a creditor of said estate, and presented objections against the allowance of a widow's award to Kate L. Miller, widow of said Orrin. The entry of record is as follows:

"And now comes Susan Miller, and respectfully represents unto said court that she is a creditor of said deceased; that she has filed her claim in this court for allowance against said estate; that such claim has not yet been allowed, for the reason that no adjudication term has ever been fixed upon; that she is ready and willing, and hereby offers, to prove her said claim in such way as the court may direct. And she objects to the allowance of the award this day presented to said court by one Kate L. Miller, claiming to be the widow of said deceased, for the following reasons:

"Because said Kate L. Miller, at the time of the death of said Orrin Miller, was not his wife.

"Because she is not his widow.

"Because, at the time of the death of said Miller, said Kate L. was not a resident of the State of Illinois, and had not re-

sided in said State for a long time prior to his death, and has not since resided here.

"Because said Kate L. Miller, under the laws of this State, is not entitled to a widow's award.

"Because the appraisers who made said award made the same upon the representations and request of the attorneys of said Kate L., and not at the request of said Kate L.; that they had no knowledge, save as informed by said attorneys, concerning the condition in life of and manner in which said deceased lived prior to his death; have never seen the said Kate L., and because said award is not made upon their own judgment.

"Because said appraisers were not authorized by law to make an award to said Kate L. Miller, she being a non-resident of this State at the time of the death of said Orrin Miller.

"Because said award is too large, said Miller having left no children."

Afterwards, on February 17, 1875, these objections of appellant came up for hearing in the county court, and all parties in interest being present, the proofs offered were heard, and the county court adjudged and decided "that said award be approved, and that it be paid to said Kate L. Miller, widow of said decedent, in due course of administration." From this order of the county court Susan Miller appealed to the circuit court, and on the 1st of July, 1876, a trial *de novo*, upon a hearing of evidence, was had of the objections of appellant, and the following judgment was entered:

"And now come the parties to the above entitled cause, by their respective attorneys, and said cause having been submitted to be tried by the court, Judge John G. Rogers, without a jury, the said cause was tried on the 1st day of July, A. D. 1876, being one of the days of the June term, 1876, by said court, *de novo*, and the court, upon hearing the evidence and argument of the respective counsel, find for Kate L. Miller, the claimant, the sum of eight hundred dollars ($800), her widow's award, as the widow of said Orrin Miller, deceased, and orders the said sum of $800 to be paid out of the estate of said Orrin Miller, deceased."

From this judgment of the circuit court Susan Miller has taken an appeal to this court, and insists that the court erred in not setting aside entirely the award to said Kate L. Miller, as the widow of the intestate. Kate L. Miller, appellee, has assigned cross-errors, and insists that the judgment of the county court should, in all things, have been affirmed by the circuit court.

Mr. A. H. LAWRENCE, for the appellant.

Messrs. WILLETT & HERRING, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

Appellant contends that no widow's award can lawfully be allowed, because "the same was not presented to the county court for confirmation or approval within two years from the issuing of letters of administration."

The claim of a widow for "the widow's award," out of the personal property of an estate, is not, under our statute, a "demand" against the estate, in the same sense as the claim of a creditor. It may more properly be denominated a right to a portion of the personal property of the estate. (*Cruce* v. *Cruce et al.* 21 Ill. 47.) In a certain sense it may be called a demand against the estate, and it is so called in the second clause of section 70, of the chapter on "The Administration of Estates," R. S. 1874, page 116; but the reasons applicable to the provision which bars all demands not presented within two years from the granting of letters, have no application to the widow's award. The administrator is not presumed to be cognizant of all claims of mere creditors of deceased, and therefore a necessity existed that such claims should be exhibited within some limited time, so that a definite basis might be had on which to dispose of the assets. The widow's award, however, requires no such presentation. The whole tenor of the statute shows that the preservation of the same requires no action on the part of the widow whatever, until she has notice that the award has been made by the appraisers.

In chapter 3, of Revised Statutes of 1874, it is provided, that whenever letters of administration are granted, the administrator shall make out a full inventory of the property of the estate, which shall be returned to the office of the clerk of the county court within three months from the date of the letters of administration. It is also provided, that on granting letters of administration, the county court shall appoint three appraisers to appraise the personal estate, and, after taking the oath prescribed, it is provided that "the appraisers shall proceed, as soon as conveniently may be, to the discharge of their duty, and when the bill of appraisement is completed, the appraisers are required, by statute, to certify the same, and deliver the same to the administrator, to be by him returned to the clerk's office within three months from the date of the letters of administration.

It is further enacted that "*the widow* residing in this State, of a deceased husband whose estate is administered in this State, *shall*, *in all cases*, (in exclusion of debts, claims, charges, legacies and bequests, except funeral expenses,) be allowed, as her sole and exclusive property forever, the following" (enumerating the list of personal property), "which shall be known as the widow's award." * * * "The appraisers shall make out and certify to the county court an estimate of the value of each of the several items of property allowed to the widow, and it shall be lawful for the widow to elect whether she will take the specific articles set apart to her, or take the amount thereof out of other personal property at the appraised value thereof, or whether she will take the amount thereof in money. * * * And in *all such cases*, it shall be the duty of the * * * administrator to *notify the widow as soon as such appraisement shall be made*, and to set apart to her such article or articles of personal property, not exceeding the amount to which she may be entitled, and as she may select. * * * When there is not property of the estate of the kinds mentioned in the statute, the appraisers *may award* the widow a gross sum in lieu thereof, except for family pictures, jewels and ornaments. If the administrator discovers, at any time

after an inventory and appraisement is made, that the assets do not exceed the amount of the widow's allowance, after deducting the necessary expenses incurred, he shall report the facts to the court; and if the court finds the report to be true, he shall order said assets to be delivered to the widow by the administrator, and discharge the administrator from further duty."

It is plain, from the whole tenor of these statutory regulations, that, in the phrase (found in the seventh clause of section 70, page 116, R. S. of 1874,) "and all demands not exhibited within two years, as aforesaid, shall be forever barred," the word "demands" was not intended to embrace what is known as "the widow's award." The word "demands," in that phrase, as will appear by the context, has relation alone to such demands against the administrator as are required to be exhibited to the court *by the parties* to whom they belong. In one sense, "the widow's award" is undoubtedly a "demand against the estate," and it is mentioned as such in the second clause of this section 70, but the same words in the seventh clause of the section, it is evident, are not used in the same sense. We are all of opinion that the limitation of two years found in this section 70 has no reference whatever to the matter of "the widow's award."

In passing upon this question, and upon another question to be hereafter mentioned, it is well to inquire what meaning is to be attached to the word "allowed," as used in this statute, in reference to the matter of "the widow's award." Does the statute require, as an essential, that the county court shall make an order of allowance, in order to invest the widow with an available and definite right to "the widow's award?" In section 74 it is said, "the widow * * * shall (in all cases, in exclusion of debts, claims, charges, legacies and bequests, except for funeral expenses,) be allowed, as her sole and exclusive property forever," etc., "which shall be known as the widow's award."

By whom is this allowance to be made? Is it by the appraisers, or by the administrator, or by the order of the county

court, or is it by the effect of the statute, that she is allowed this widow's award by law, and that her right is not dependent upon the action of the administrator, appraisers, or the court? Has either the administrator, or the appraisers, or the county court, the jurisdiction to determine that she shall not be allowed this award?

Section 75 provides that "the appraisers shall make out and certify to the county court an estimate of the *value* of each of the several items of property *allowed to the widow*." The county court is not required, by the statute, to make any order *prior to this certificate*, adjudging that the widow shall be allowed "the widow's award," or adjudging what are the articles of property of which the appraisers are to make an estimate of the value, and certify the same. That is fixed by statute. Again, it is enacted in the same section, that, where there is not property of the estate of the kinds mentioned in the enumeration of the articles which are to constitute the widow's award, "*the appraisers may award* the widow a gross sum in lieu thereof," etc. The law gives her certain articles of property, or their value. The judgment of the appraisers is, by law, to fix the value of the items of personal property so allowed by statute to the widow, and, so far as we are advised, it is the universal practice that this estimate be approved or set aside by the court.

While the statute does not, in express words, require that this estimate of value by the appraisers should be approved by the court, in order to give it binding force as such, it has long been the practice to do so, and it seems very appropriate that it should be so.

The county court, from its general powers in supervising the administration of estates, has the power, for cause shown, to set aside an appraisement bill, or a report of appraisers making out and certifying to that court an estimate of the value of the items of property mentioned in the statute as "the widow's award," and to order the appraisers to consider the subject again, and make another appraisement bill, or another estimate of the value of the items allowed by statute to the widow

as the widow's award, and for cause shown, the court might remove the appraisers and appoint other appraisers, and charge them with these duties. But, while the county court has this supervisory authority, it has no power to revise and *modify* the appraisement bill or the appraisers' estimate of the value of the property allowed as the widow's award. The county court has no power to substitute the judgment of the court for the judgment of the appraisers, for the statute has made the estimate of the appraisers effective, and not an estimate made by the county court. As well might the circuit court, where a verdict of a jury has been returned, take up the verdict and revise and modify it, and enter this modified verdict as the verdict in the case.

The form of the judgment in the county court in this case is, "that said award be approved, and that it be paid to said Kate L. Miller, widow of said decedent, in due course of administration." The issue tried in this case was made upon objections interposed by appellant against the approval of the award, which was, in substance, a motion or application on the part of appellant for an order of the county court setting aside the award, and the judgment, in substance, is a judgment refusing to set the same aside.

When the case came to the circuit court by appeal, the circuit court could not properly exercise any power in the case save that which the county court could and should have done. The circuit court, properly, could only have ordered the estimate of the appraisers to be set aside, or have refused to make such order.

The matter was tried *de novo* in the circuit court, and all the evidence given is preserved in the bill of exceptions.

After a careful examination of the proofs, we find no proof tending to show that the estimate of the appraisers should be set aside. There is no proof whatever bearing upon the question of the value of any of the items of property, or tending to show any misconduct on the part of the appraisers. In determining whether the award should be set aside, the value of each item may be examined, but no proof of that kind was

made. Upon the proofs, the judgment of the county court ought to have been affirmed.

The judgment entered in the circuit court is an allowance of a gross amount less by more than $200 than the sum of the items of the estimate approved by the county court. The circuit court seems (even without proof on that subject) to have substituted the judgment of the judge presiding for the judgment of the appraisers. This was clearly erroneous.

The appellant assigns for error the judgment of the circuit court in allowing a gross sum instead of passing on each item of the appraisers' estimate. This would indeed be an error, if the court had the power to revise and modify the estimate of the appraisers, but it is not perceived wherein the rights or interests of appellant are injuriously affected by this irregularity.

Appellee has assigned cross-errors upon this record, and complains that "the judgment of the circuit court in allowing said award is for an amount too small." The estimate of the appraisers amounted to $1050. The judgment of the circuit court, in effect, set aside this estimate to the extent of $250. For this error, the judgment must be reversed at the costs of appellant, and the cause remanded to the circuit court with directions that judgment be there entered affirming the judgment of the county court, and that appellee recover in the circuit court her costs in that court.

Judgment reversed.

ALEXANDER E. GUILD, JR.

v.

THE CITY OF CHICAGO.

1. STATUTE—*of the title of an act.* Where the title of an act is "An act to provide for the incorporation of cities and villages," anything legitimately appertaining to the incorporation of cities and villages is germane to the subject expressed in the title, and a provision in the act that applies to cities and towns already incorporated, as well as those to become incorporated

under the act, although, as to towns already incorporated, it may only have the effect of an amendment to their charters, is, nevertheless, germane to the subject expressed in the title, and is not unconstitutional.

2. CONSTITUTION—*construction of section* 22 *of article* 4. Section 22 of article 4 of the constitution, was not designed to repeal or change charters of cities, towns and villages in force at the adoption of the constitution, but merely to provide that no city, town or village should thereafter become incorporated or have its charter changed or amended, except by virtue of a general law; and all that is practicable or could have been intended, was, that the legislature should, by a general law, provide for the incorporation of cities, towns and villages, or the change or amendment of their charters, leaving it to those interested to bring themselves within its operation.

3. LEGISLATIVE AUTHORITY—*delegation.* The fact that a law depends upon a future event or contingency for its taking effect, and that contingency may arise from the voluntary act of others, does not render it liable to the objection that it is a delegation of legislative authority to them upon whose acts the taking effect of the law depends.

4. TOWNS AND CITIES—*amendment of charters must be under general law.* Amendments of the charters of cities, towns and villages must be by general law, which must apply alike to all cities, towns and villages desiring to amend their charters in that particular respect, so that one city, town or village may not amend its charter by adopting one provision, and another city, town or village amend its charter by adopting another and different law on the same subject. Whether the amendment to be adopted shall extend to a single or many subjects, is not within the regulation of the constitution. Its mandate is observed where the amendment, whether extensive or limited, is by general law.

5. SPECIAL ASSESSMENTS—*construction of statute in relation to, by cities.* Although it would seem that sec. 1, of article 9, of the act to provide for the incorporation of cities and villages, in force April 10, 1872, limits the power of the corporate authorities to make local improvements by special assessments or by special taxation to contiguous property only, yet, taking the whole article together, it is broad enough to authorize the making of special assessments upon property specially benefited without regard to its being contiguous.

6. SAME—*constitutional provision concerning.* The words "special assessment," as used in section 9 of article 9 of the constitution, mean an assessment upon property specially benefited, without regard to whether it is contiguous or not, and the words "contiguous property," as used in that section, do not apply to special assessments, but apply to special taxation only.

7. CITIES—*adopting provisions of a general law in regard to, governed by any amendment made to such law.* Where a city, under the provisions of a general law for the incorporation of cities, adopts such general law, it does

so subject to the power of the legislature to repeal or amend the same; and whenever the city takes any steps or institutes any proceedings under such law, after it has been amended, it will be regulated and governed therein by the law as amended, and not by the law as it was when adopted by the city

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

Mr. E. P. WEBER, for the appellant.

Mr. FRANCIS ADAMS, for the appellee.

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

This is an appeal from an order of confirmation by the Superior Court of Cook county, of a special assessment, which had been made by commissioners for the public improvement of opening and extending Dearborn street, in the city of Chicago, from Jackson street to Fourteenth street.

The assessment proceedings were had under the provisions of article 9 of an act of the General Assembly of this State, entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872. Laws 1871–2, p. 218.

Section 54, of said article 9, provides, that "any city or incorporated town or village may, if it shall so determine by ordinance, adopt the provisions of this article without adopting the whole of this act; and where it shall have so adopted this article, it shall have the right to take all proceedings in this article provided for, and have the benefit of all the provisions hereof." The common council of the city of Chicago adopted this article by ordinance, passed September 2, 1872.

The first objection taken to this assessment is, that the ordinance of adoption of this article is null and void, for the reason that said section 54, which provides for such adoption of the article, is unconstitutional, because—

1. The subject of that section is not expressed in the title of the act, and so the section is in violation of that provision of the constitution, that "no act hereafter passed shall embrace

more than one subject, and that shall be expressed in the title."

The argument is, that the title of the act is for the incorporation of cities and villages—the organization of municipalities—but that section 54 does not respect the organization of any municipality, but the amendment only of existing charters, which is a different subject. The act provides not only that existing cities and incorporated towns may adopt this 9th article of the act, but that they may become incorporated under the act. The argument employed would lead to the extent that the whole act is unconstitutional, so far as it relates to existing cities and incorporated towns, it being in effect amendatory of prior laws applicable to them, inasmuch as it makes a change in respect of such laws, if adopted. By the adoption of the entire act, any existing city or incorporated town would become incorporated under the act, to the extent of the whole act. By the adoption of the 9th article alone, it might be regarded as incorporating to that extent under the act. Anything legitimately appertaining to the incorporation of cities and villages we regard as germane to the subject expressed in the title, and that this section does pertain to such purpose. See *The People* v. *Wright*, 70 Ill. 388.

2. Again, said section 54 is claimed to be unconstitutional, for the reason that the legislature therein delegate the power of legislation to cities, towns and villages, which, by the constitution, the legislature alone can exercise.

This objection, and the further one, that the section is within the prohibition of section 22 of article 4 of the constitution, that the General Assembly shall not pass local or special laws incorporating cities, towns or villages, or changing or amending the charter of any town, city or village, may be considered together.

We have said, in *The People ex rel.* v. *Cooper*, 83 Ill. 585, that it was not designed by this provision to repeal or change charters of cities, towns or villages, in force at the adoption of the constitution, but merely that no city, town or village should thereafter become incorporated or have its charter

changed or amended except by virtue of a general law. It would be absurd to suppose that it was intended that, when the general law was enacted, it should bring into being all the corporations that could ever be organized under it, or that every time a necessity should subsequently exist for the incorporation of a city, town or village, a general law should be enacted by the General Assembly for that purpose. All that is practicable, or could have been intended, was that the legislature should, by a general law, provide for the incorporation of cities, towns and villages, or the change or amendment of their charters, leaving it to those interested to bring them within its operation, and this has never, in this State, been held to be a delegation of legislative authority. *The People* v. *Reynolds*, 5 Gilm. 12; *The People* v. *Salomon*, 51 Ill. 37. These cases holding that a law may depend upon a future event or contingency for its taking effect, and that contingency may arise from the voluntary act of others.

This section of the constitution relates to two classes of cases: first, to cities, towns and villages thereafter to be incorporated; second, to those thereafter to have their charters changed or amended—and thus contemplates the probable continuance, for some time, of the existing want of uniformity in such charters, but intending that all future legislation in respect to such charters should be with a view of producing, ultimately, uniformity, so far as that would result from the law being general. But no obligation is imposed as to the extent that amendments to existing charters shall be adopted. It is only required that the amendment shall be by a general law, which, of course, must apply alike to all cities, towns, etc., incorporated under the general law, and to all desiring to amend their charters in that particular respect; so that one city, town, etc., may not amend its charter by adopting one provision, and another city, town, etc., amend its charter by adopting another and different law on the same subject. Whether the amendment to be adopted shall extend to a single or many subjects, is not within the regulation of the constitution. Its mandate is

observed when the amendment, whether extensive or limited, is by a general law.

It is objected that the ordinance providing for this improvement is void, as it provides for the exercise of the taxing power in another and different manner from that prescribed by law.

Section 9 of article 9 of the constitution provides: "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements, by special assessment or by special taxation of contiguous property or otherwise."

Section 1 of article 9 of the act in question provides: "That the corporate authorities of cities and villages are hereby vested with power to make local improvements, by special assessment or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall, by ordinance, prescribe." The ordinance directing the improvement provides: That said improvement shall be made, and the cost thereof paid by special assessment, to be levied upon the property benefited thereby, to the amount that the same may be legally assessed therefor, and the remainder of such cost to be paid by general taxation. The point of the objection is, that the law conferring the power to make local improvements by special assessment, limits its exercise to contiguous property, and that the ordinance entirely disregards this limitation. Looking only to the section quoted, there would appear to be foundation for the objection; but there are other portions of this article 9, especially those sections prescribing the proceedings for the making of special assessments, which contemplate that the assessment is to be made upon such property as may be specially benefited, without regard to whether it be contiguous property or not. Without citing particularly the various provisions to be found in other sections of this article 9 which so indicate, we can have no doubt that, taking the whole of the article together, it contemplates the making of the special assessments upon the property benefited, whether contiguous or not, and that it is broad enough in its scope to authorize

the making of special assessments upon property that may be specially benefited, without regard to its being contiguous; and we think the authority given by the law, in this particular, should be taken to be such as may be warranted by the constitution and will harmonize therewith in this regard. The inquiry, then, is to be as to the construction of the constitutional provision giving the power "to make local improvements by special assessment or by special taxation." Do the words "contiguous property" apply only to special taxation, or to special assessment as well, so that both special assessments and special taxation are to be of contiguous property, or is it only special taxation which is to be of contiguous property, leaving improvements to be made by special assessment simply, without confinement to contiguous property? The language itself, perhaps, may admit of either interpretation. The words "special assessment" had a received and well-defined meaning, under the decisions of this court prior to the adoption of the constitution, as assessments upon all property specially benefited by the improvement, not more than the special benefits conferred, without limitation to contiguous property. There is no sufficient indication that the words were intended to be used in the constitution in any different sense. Allowing to them their former meaning, it is an established one. Admitting the limitation to contiguous property, a field of uncertainty of construction is opened, with liability to have arise, in almost any case of special assessment coming up, a question of dispute in regard to what is or is not contiguous property.

A majority of the court think the better interpretation to be that the words "special assessment," in this constitutional provision were used in the sense as had previously been defined by this court, an assessment on property specially benefited, without regard to whether it was contiguous or not, and that the words "contiguous property," in the provision, do not apply to special assessment, but apply to special taxation only.

They do not find, then, the objection to be well taken, that the ordinance is invalid, as being unauthorized by law in

directing the special assessment to be made upon property specially benefited, without limitation to contiguous property.

A point is made that the constitution does not confer the power to authorize local improvements to be made by "general taxation," and that the ordinance for the improvement, in so far as it provides that any part of the cost shall be paid by general taxation, is void. Were that even so, we fail to see the force of the objection as bearing upon the question here involved, which is not one respecting the imposition of any general tax, but a special assessment solely, and the point is dismissed without further notice.

It is further objected, that the assessment roll, as returned by the commissioners making the assessment, is defective, in the respect that there is no map accompanying the same, as by law required.

Section 25 of article 9 of the act, as originally passed, did require the commissioners to make a map showing the lots to be benefited by the improvement, and to mark on each lot shown in the map the amount assessed against it. Laws 1871–2, p. 251. This section was repealed by an act approved April 25, 1873, in force July 1, 1873. Laws 1873, p. 66. Section 26 of article 9, which, as originally passed, required the commissioners to certify the map, with the assessment roll, to the court, was amended by an act which took effect March 30, 1874, and by the section, as amended, no map is necessary to accompany the roll. Rev. Stat. 1874, sec. 140. The assessment in question was made in 1875. The title of the repealing act of 1873 is, "An act to repeal section 25, and to amend sections 27 and 28 of an act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872."

The position taken is, that this repeal and amendment do not change the law as respects the city of Chicago; that upon the adoption by the common council of the city of Chicago of article 9 of the act, that article, as respects the city of Chicago, ceased to be article 9 of an act entitled "An act to provide for the incorporation of cities and villages," but be-

came, from that time forth, a part of, and one of, the provisions in the city charter of the city of Chicago; that the repealing act is limited to the general law, as it does not profess to extend to any city charter where the city had adopted and made article 9 a part of its charter; and that, upon the familiar principles applicable to general and particular statutes, the repeal can not be held to extend to any such city charter. The same argument would apply to the case of a city which had become incorporated under, and adopted the whole of, the act; and according thereto no amendment, simply, of the act, or repeal of any of its provisions, would apply to such city, unless it were included by express reference.

We know of no good ground upon which to rest for support such a position. By the process of adoption by a city of this article of the act, the article is not taken out of the act, and no longer a part thereof, and incorporated into, and made a component part of, a different law, to-wit: the city charter. The act still remains operative in all its parts in respect to all cities and villages in the State. Any unqualified amendment of the article, or repeal of any of its provisions, affects the article in its application universally to all the cities and villages in the State, irrespective of the circumstance of its having or not been previously adopted by any city or village. The only effect, in this wise, of any such adoption of the article, is, to make it operative in a city or village where it was not operative before.

The heading and subject matter of this article 9 is, "Special assessments for local improvements." In the making whereof, since the adoption of this article, the city of Chicago, for its authority and guide of action, looks to article 9 of "An act to provide for the incorporation of cities and villages," and not to its city charter, as a distinct thing therefrom; and it is governed by article 9, not as it was at the time of its adoption by the city, but as it is at the time when action comes to be taken thereunder.

At the time of the making of the assessment in question, the commissioners, for information as to their duty, had recur-

rence to article 9 of this act of the General Assembly. They found there no provision requiring a map to be made or returned with the assessment roll. True, there was such a provision therein at the time of its adoption by the city, but it had since been repealed, and the article contained no such provision at the time when the commissioners acted, and they were not required to make or return a map with the assessment roll. The effect of the construction contended for would be to thwart the purpose of the act in securing uniformity in the charters of cities and villages, as every change in the law, by the legislature, would operate to produce differences in such charters.

It is claimed that the ordinance directing this improvement was void, for the reason that the board of public works of the city of Chicago had never made a report recommending or disapproving the work, with a statement of the expense thereof, as formerly required by the charter of the city. According to section 20 of article 9, the city council are required to appoint three of its members, or any other three competent persons, to estimate and report the cost of the improvement contemplated.

Whether or not the city council might have pursued, in this respect, the former provision of the city charter, we can have no doubt there was a right here to proceed under article 9, and there was no more required than to follow the mode there prescribed. The report of the board of public works was not necessary—it was not required under any of the provisions of article 9.

It is objected that there is no proof showing that the common council ever passed any ordinance directing this improvement. The court excluded the ordinance when it was offered in evidence before the jury, and rightly. It was not competent evidence to go to the jury, under the issues. The only issues to be determined by the jury were, whether the property of the appellant was assessed more or less than it was benefited, or more or less than its proportionate share of the cost

of the improvement, and the amount for which it ought to be assessed. Section 31, article 9.

The same remarks are applicable to the exclusion of the report of the board of public works as evidence before the jury. The ground of its exclusion by the court was, "that the report was already before the court and jury as pleadings." Any question arising upon the report, as well as the ordinance, was one for the court. The transcript of the record does not contain the original petition in the condemnation proceeding, nor the supplemental petition in the assessment proceeding, nor does it purport to be a complete copy of the record.

A certified copy of the ordinance must have been a part of the original petition for condemnation; section 5 of article 9 requiring that the petition shall contain the same. This assessment was in that *same proceeding*. Section 53, article 9. The supplemental petition for the assessment is required to recite the ordinance for the improvement and the report of the commissioners as to its cost. Section 22, article 9.

Appellant, in the court below, recognized and treated the ordinance as a part of the record. Before the impanneling of the jury, he moved to dismiss the proceedings, because the ordinance providing for the improvement was illegal and void, and the same reason was made one of the grounds of his motion in arrest of judgment. The objection is without merit.

It is insisted that the court below erred in not awarding appellant a separate trial. The language of section 34, article 9, taken in connection with prior sections relative to the proceedings on application for judgment, would seem to show that a single hearing and a single judgment, several in effect, was contemplated by the law.

We think, at most, that the allowing or not of a separate trial was but a matter of discretion with the court below, and there is no ground to think the discretion of the court was improperly exercised.

It is assigned as error that the witness Benze, one of the commissioners who made the assessment, was not permitted to answer the questions whether, in the assessments of prop-

erty along the line of Dearborn street, he had established some scale increasing and decreasing as he went toward or from the contemplated improvement, and how, in assessing the north and south half of appellant's lot, he arrived at a difference of one dollar and twelve cents.

Appellant's counsel state that they rest the propriety of these questions upon the decisions of this court, in *City of Chicago* v. *Larned*, 34 Ill. 203, and *Creote* v. *City of Chicago*, 56 id. 428, where, in the former case, it is held that an assessment not in proportion to benefits, but in proportion to frontage, is unconstitutional; and in the latter, that evidence offered to show that the cost of an improvement was assessed in proportion to frontage, was competent. The application of the cases is not perceived. The questions asked here were not whether the assessment was made in proportion to frontage. Those decisions were under a different law. Section 24, article 9, prescribes the basis upon which assessments shall be made, which conforms to the decisions of this court as to what is the right basis.

Even if the commissioners, in making their assessment, proceeded upon a wrong basis, their assessment was not controlling. Section 31, article 9, provides that, on the hearing, either party may introduce such other evidence as may tend to establish the right of the matter.

The question upon the hearing was, whether appellant's land had been assessed more than it was benefited, or more than its proportionate share, and it was gone into at large by the evidence of quite a number of witnesses on both sides introduced before the jury. There is no ground for the objection.

We find no error in the record, and the judgment is affirmed.

Judgment affirmed.

Mr. JUSTICE DICKEY: I do not concur in the suggestion that ultimate uniformity in charters of existing cities, was one of the objects of the constitution.

CHARLES GOTTSCHALK

v.

LOVE HUGHES.

NEW TRIAL—*newly discovered evidence.* Where there is evidence sufficient to sustain the verdict, and a new trial is asked for on the ground of newly discovered evidence, which is only cumulative, and this court can not see, upon the whole record, that justice has not been done, the judgment below will not be disturbed.

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

Mr. COLUMBUS GOTTSCHALK, and Mr. M. D. BROWN, for the appellant.

Messrs. HOLDEN & MOORE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the Cook circuit court, by Love Hughes, plaintiff, against Charles Gottschalk and Simon Koch, defendants, to recover for plaintiff's services as a malster of barley for the defendants. The action was dismissed as to Koch, and the defendant Gottschalk pleaded the general issue with notice of set-off, on which the parties went to trial by a jury, who found for the plaintiff, assessing the damages at two hundred and thirty-two dollars and forty cents.

The defendant entered his motion for a new trial, for the reason the verdict was against the law and the evidence, and for newly discovered evidence since the trial, setting out the same. The motion was denied, and judgment entered on the verdict, to reverse which defendant appeals.

The set-off claimed by appellant was a claim for damages in making the malt, he alleging there was a contract that the plaintiff should make good malt out of the barley, but, instead thereof, he made bad malt, and in an unskillful manner, and overheated the same, whereby the malt was scorched and burned, and rendered worthless.

The proof is, appellee agreed to malt the barley for twenty cents per bushel, and to make as good malt as could be made from the barley appellant furnished.

There was great contrariety of testimony on the last point. The contract was made in May, and it was in evidence malt could not be as well made at that season as in colder weather. Appellant watched the operations as they were going on, and, on one occasion, thought appellee was browning it too much, and appellee said he would make it of a lighter color, if desired. There is evidence the malt was as good, made at that season of the year, as could be made of No. 3 barley, the quality furnished.

There is evidence sufficient to sustain the verdict, on all the points made. There is no such preponderance, either way, as requires this court to interfere.

The newly discovered evidence amounts to nothing more than cumulation. It is by no means decisive. We can not see justice has not been done by the verdict, and see no error in the record, and the judgment must be affirmed.

Judgment affirmed.

EZRA S. BALDWIN

v.

M. S. MURPHY *et al.*

1. APPEARANCE—*as waiving defective process.* Where a party appears and submits himself to the jurisdiction of the court, it is a matter of no consequence whether the summons is void or not, or even whether there is any process at all.

2. REMEDY—*for illegal arrest.* The remedy of a party who has been unlawfully arrested, and against whom a judgment has been entered upon such arrest, is in an action at law for such unlawful arrest, and not by a bill in a court of equity to enjoin the collection of the judgment.

3. ARREST—DURESS—*what constitutes.* Where an officer serves a warrant for the arrest of a defendant for violation of a city ordinance, by reading the same, and requests him to appear before the magistrate, and leaves him with-

out taking him into custody, such service does not amount to an arrest; and if the defendant appears before the magistrate and confesses judgment, he can not afterwards enjoin the collection of the judgment on the ground that he confessed the judgment under duress.

4. INTOXICATING LIQUORS—*towns not restricted to the same penalty provided by the general law for sale of.* Where a special charter of a town, granted before the adoption of the present constitution, confers power upon the corporate authorities to impose fines or penalties for the unauthorized sale of intoxicating liquors, they are not limited or restricted to the same penalties imposed by the general law.

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

Mr. M. MARVIN, Mr. H. B. AMERLING, and Mr. E. L. BEDFORD, for the appellant.

Mr. J. W. LUKE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The record in this case shows that appellant was a druggist in the town of Warren, in the county of Jo Daviess, in this State. On the 17th of December, 1874, one Jesse Wells filed a complaint, under oath, that, as he verily believed, appellant had violated an ordinance of the town by selling or giving away intoxicating liquors. The police magistrate thereupon issued a *capias* for the body of appellant, returnable forthwith, and delivered it to a constable of the town to execute. It was returned served by reading to the defendant, and he appeared before the police magistrate on the same day. The entry on the docket is this: "Defendant came into court and confessed himself guilty to the complaint, and authorized the court to fine him for the same, whereupon it is considered by the court that the defendant pay a fine of $100, and costs of suit, taxed at $4.55."

Defendant afterwards filed a bill to enjoin the collection of this judgment. The bill alleges that the magistrate had no jurisdiction to render the judgment, and all the proceedings in the case were void; that appellant was under duress and restraint of his liberty, and did not voluntarily consent to the

judgment against him; that the charter of the town only authorized a recovery of fines and penalties by an action of debt; that the ordinance of the town prescribed a penalty of not less than $25 nor more than $100 for each of such offenses; that the magistrate issued an execution on the judgment on the 27th day of February, 1875, and delivered the same to a constable to collect, who had levied it on the goods and chattels of appellant, and had advertised them for sale under the execution.

The answer admits the filing of the complaint, the issuing of the warrant and its delivery to the constable; but it is denied that appellant was arrested by the constable, but that the warrant was read to him, and he was not taken into custody. It admits the rendition of the judgment, the issuing of the execution, its levy, and advertisement for the sale of the property, etc.

On a hearing on bill, answer and proofs, the court below dismissed the bill, and from that decree complainant appeals, and assigns various errors.

We fail to perceive the slightest ground for maintaining this bill. All there is of it is, that a warrant was sued out for the arrest of appellant, for the violation of an ordinance, which was read to him, and he was requested to go to the police magistrate's office, which he did. When he arrived there, he pleaded guilty to the charge, and requested that officer to enter the fine. Now, this is the substance of the whole matter, and how it can be held to be a false arrest, or an imprisonment, or the compelling appellant, under duress, to confess a breach of the ordinance, is to us incomprehensible.

Appellant did not testify that the constable arrested him. He says that the officer went to his store and read the warrant to him, and said he must go to the magistrate's office, but on his requesting time to wait on customers, it was granted, and the officer left on his promising to go to the magistrate's office; that he went and saw the attorney for the town, who threatened him with other prosecutions if he would not settle the

case by confessing judgment for $100; but he says he felt like he was arrested.

The constable testified that he did not arrest appellant; that he read the warrant to him, and appellant asked the constable if he wanted him to go at once, and he replied, to try and get there in the course of twenty minutes or half an hour, and that he left and went to subpœna witnesses in the case. This is corroborated by the officer's return. It states that he served the warrant by reading, but there is not a word about an arrest. The constable testified that he would not have arrested him on that warrant without first taking counsel. This is all the pretense that an arrest was made, and we do not see that it has any semblance of an arrest.

As to the coercion to compel appellant to confess the judgment, the evidence shows it is equally baseless. It is true, he talked with the town attorney, and he says that officer threatened to commence other prosecutions if he did not settle the case, and he admits that he consented that the judgment might be entered. The justice testified that he informed appellant that he could have a trial if he desired it, and could have time to employ counsel, procure witnesses and make other preparations for trial, but he declined. The justice testified in a manner to produce conviction, and is fully corroborated. He and another witness say that appellant replied that he supposed he had better settle it as the attorney proposed. The justice informed him that he could not enter a judgment by confession unless he consented, and asked him if he consented, and he replied that he did, and the judgment was entered up for the amount.

This evidence, of the truth of which we do not entertain a doubt, so far from showing coercion, shows that the justice treated appellant fairly and honestly, and cautioned him as to every right he had. He seems to have acted freely and voluntarily in everything he did. If it be said that the attorney threatened other prosecutions, the answer is, he knew whether or not he was guilty, and we must presume his knowledge of his guilt, alone, acted as a coercive power. If innocent, it can

not be fairly supposed that he would have pleaded guilty, and have consented that the fine might be entered. Such a supposition would be unreasonable. There is no pretense for saying that coercion was used, or that he was under duress.

As to all the objections taken to the complaint and warrant, it is only necessary to say, the only use of process is, to bring parties into court. Where, therefore, a party appears and submits himself to the jurisdiction of the court, that is all that is required, and it does not, in the least, matter whether the summons or warrant is void or not, or even whether there is a process or not, for the purposes of acquiring jurisdiction. Our reports are full of decisions to this effect. Then, whether the affidavit and writ were regular or void, is not of the slightest importance, as appellant voluntarily appeared, submitted himself to the jurisdiction of the court and confessed the judgment. It was his privilege to stand upon his rights and demand a trial, or waive them, which he chose to do, and must be barred by his action in the case.

Many authorities are referred to for the purpose of showing what constitutes an illegal arrest, and the liability incurred by an officer making such an arrest. Even if there was an illegal arrest, appellant should, if he desired redress, have brought his action at law. A court of equity is not the forum in which to seek relief against an illegal arrest.

It is urged that the trustees of the town transcended the powers granted them by their charter, in adopting the ordinance under which this proceeding was had. The charter provides that the president and trustees of the town shall have power to license, tax and regulate all places where spirituous and fermented liquors are sold in less quantity than one quart; and the board of trustees are given power to provide penalties, by ordinance, for the violation of the provisions of the charter. The ordinance adopted under the charter prohibits the sale or giving away intoxicating liquors, ale or beer. It prohibits druggists from selling or giving away intoxicating liquors, ale or beer, except for medicinal or sacramental purposes, and for the mechanical arts, and provides that they shall label and mark

the article containing the liquor, distinctly, as poisons and medicines are marked, and to keep a registry of the same, showing date, etc.; and any person found guilty of violating any provision of the ordinance, to be fined not less than $25 nor more than $100, etc.

This ordinance is fully authorized by the charter. The trustees are empowered to license the sale of liquors, and to regulate the traffic. Appellant was not required to accept a license on the terms the ordinance prescribed. If not satisfactory to him, he could decline to sell on the terms prescribed. We fail to see that the requirement that druggists should only sell for the purposes enumerated, or on the terms of labeling the package as prescribed, or of making the registry, and its production for inspection when required, was not authorized. This was not an unreasonable regulation of this traffic. In fact, the trustees, no doubt, had power to impose more onerous conditions, had they chose to inflict them.

It is said that this ordinance violates, or is repugnant to, the dram shop law of the State, as that imposes a fine of not less than $20 nor more than $100, and therefore the ordinance is void. The corporation is acting under a special charter, which gives the corporate authorities power to impose fines or penalties, but it is not limited or restricted to the same penalties imposed by the general law. This question is fully considered in the case of *City of Pekin* v. *Smelzel*, 21 Ill. 464, and in the cases there referred to and considered. Those cases hold that an ordinance imposing a penalty like this is not repugnant to the general law, and is not void.

The fact that the ordinances of the various cities, towns and villages, acting under special charters granted before the present constitution, differ in these provisions, and therefore violate the provision requiring uniform legislation, can not be raised to the dignity of a constitutional question. Hence, we deem it unnecessary to give it any further notice.

An examination of this record fails to disclose any error, and the decree of the court below is affirmed.

Decree affirmed.

JOHN A. TEMPLETON *et al.*

v.

WILLIAM S. HORNE.

1. IMPAIRING OBLIGATION OF CONTRACT—*changing remedy.* Remedies which the law affords to enforce contracts constitute no part of the contracts themselves, and any mere change thereof by the legislature that does not amount to a deprivation of all effectual remedy, is in no just sense impairing the obligation of the contracts.

2. SAME—*redemption from sale—as to prior contracts.* Where a contract, under which parties became entitled to enforce a mechanic's lien, was made, and proceedings to establish the lien were instituted, but no decree pronounced before the act of 1869 allowing redemption from sales under such proceedings was in force, and after that act took effect a decree was rendered declaring the lien, and ordering a sale of the property, the decree properly conformed to the provisions of that act, and provided for a redemption from any sale made thereunder.

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

Mr. JOHN J. GLENN, for the appellants.

Messrs. MARSHALL & STREET, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Both parties claim to own the title to the premises in controversy that was in the Mechanic's Manufacturing Company. The title which defendants insist is paramount, is derived through a sale under a trust deed executed by that company, and also under a master's sale on a decree establishing a mechanic's lien against the manufacturing company, in favor of certain creditors, and which were declared to be prior liens to the trust deed. On the other hand, the title plaintiff is seeking to maintain comes to him under a sheriff's sale of the premises on executions in favor of judgment creditors of the manufacturing company, who had caused their executions to be levied upon the property, and had redeemed it from the sale under the mechanic's lien decree.

The contracts made by the mechanics and material-men with the manufacturing company were made before the act of 1869, allowing redemption from sales under such decrees, was in force. Proceedings to establish their respective liens had been instituted, but no decree was pronounced until after that act took effect. The decree then made allowed redemption of the property sold according to the provisions of the statute. That portion of the decree, it is now assumed, was invalid, and the reason assigned is, that it impairs the obligation of the contracts made with the manufacturing company by the several mechanics and material-men.

The parties whose rights it is insisted are affected are not before this court complaining that the obligation of their contracts with the manufacturing company has been impaired by any action of the legislature, and it seems illogical that defendants can avail of that which most materially affects others. The purchaser at that sale knew he was buying the property subject to redemption, and we are at a loss to understand what right he has to complain. He gets all he bought, and, in justice, he can claim no more. His title, whatever it is, was obtained under that decree, and it would seem he ought to be estopped to deny it was valid.

But leaving out of view this consideration, we do not think the position taken can be maintained. No doubt the law of 1869, if it had the effect to impair the obligation of contracts previously made, to that extent would be inoperative and void. But no such results flow from it. All it does, is simply to change the mode by which the lien given by statute for enforcing performance of the contract is to be established. Other remedies of which the parties might have availed were not changed. Contracts previously made were in nowise affected. Their terms were neither enlarged nor abridged. The lien given the mechanic is purely statutory, and does not arise out of any contract. Remedies which the law affords to enforce contracts constitute no part of the contracts themselves. This principle is put at rest, in this State at least, by the former decisions of this court, and need not now be dis-

cussed as a new question. *Williams* v. *Waldo*, 3 Scam. 264; *Smith* v. *Bryan*, 34 Ill. 364.

Our understanding is, all remedies for enforcing contracts and obligations are within the control of the legislature, and any mere change that does not amount to a deprivation of all efficient remedy, is in no just sense impairing the obligation of contracts. As we have seen, the lien given by the statute to mechanics and material-men is but a cumulative remedy to enforce their respective contracts, and is as much within legislative control as any other remedy afforded by law. Independently of the lien given by statute, such creditors may enforce their contracts in any appropriate common law action. Other courts of the highest authority have taken the same view of the law with our own on this subject. *Hall* v. *Brente*, 20 Ind. 304; *Frost* v. *Illsly*, 54 Maine, 345; *Martin* v. *Hewitt*, 44 Ala. 418.

Holding, as we do, the decree declaring the mechanic's lien was correct in providing the property be sold with the privilege of redemption under the act of 1869 then in force, it is conclusive of the whole case, and other points suggested need not be discussed.

The judgment will be affirmed.

Judgment affirmed.

Chicago, Danville and Vincennes Railroad Co.

v.

The Bank of North America.

1. Corporations—*residence is where their principal office is.* In a suit against a corporation, an affidavit of claim, filed with the declaration, stating the amount due from defendant to plaintiff, and that the principal office of defendant is in the county where the suit is brought, is sufficient to show that the defendant is a resident of that county, within the meaning of the act providing for the filing of such affidavit.

2. Practice—*affidavit of merits.* Where the declaration in an action of assumpsit contains a special count upon a promissory note, and the common

counts, and the plaintiff files with his declaration an affidavit of claim, in accordance with the Practice Act, a plea denying the execution of the note, verified by affidavit, is not a compliance with the statute requiring an affidavit of merits, and it is not error to strike such plea from the files.

Appeal from the Superior Court of Cook county; the Hon. Joseph E. Gary, Judge, presiding.

Mr. E. Walker, for the appellant.

Messrs. McCagg, Culver & Butler, for the appellee.

Mr. Justice Scholfield delivered the opinion of the Court:

Our first conclusion in the present case was, that the court below erred in striking the defendant's plea from the files, and that its judgment should be reversed, and we, accordingly, so adjudged. A rehearing having been ordered, on further and more mature deliberation we have come to the conclusion that our former judgment should be changed, and the judgment of the court below affirmed.

The form of action is assumpsit, and the declaration contains a special count on a promissory note of the defendant, executed by J. E. Young, its manager, bearing date July 29, 1873, payable to one S. J. Walker, four months after date, for $8000, and by Walker assigned to the plaintiff, and also the common counts.

Annexed to the declaration was the affidavit of J. W. Culver, one of plaintiff's attorneys, that the demand of the plaintiff was for the whole amount due on the promissory note, which was copied in full, and that there was due from the defendant to the plaintiff, after allowing to defendant all its just credits, deductions and set-offs upon the promissory note, the full and just sum of $8383.92, at the date of the affidavit, and that the defendant's principal office was in Cook county.

The defendant filed a plea denying the execution of the note, verified by the affidavit of its president. This plea was, on motion of plaintiff's attorney, ordered by the court to be stricken from the files for want of an affidavit of merits, and

judgment was thereupon rendered in favor of the plaintiff against the defendant, by default, for $8414.67.

Proper exceptions were taken, and the errors assigned bring these rulings of the court before us for review.

The objection that the affidavit of Culver, annexed to the declaration, was insufficient, because he was but an agent or attorney of the plaintiff, and not the plaintiff in the action, is answered by *Young* v. *Browning*, 71 Ill. 44, and *The Bank of Chicago* v. *Hall*, 74 Ill. 106, where we held an objection of the same character untenable, and we are not convinced by the arguments in the present case that we were in error in so holding.

But, it is further insisted, no affidavit of merits was required to be filed with the plea, because the defendant is a corporation organized and doing business under and by virtue of the laws of the State of Indiana, and therefore comes within the exception in the statute requiring an affidavit of merits to be filed with the plea.

The language of the statute is: "If the plaintiff, in any suit upon a contract, expressed or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant, or his agent or attorney, *if the defendant is a resident of the county in which the suit is brought*, shall file with his plea an affidavit, stating that he verily believes he has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and if a portion, specifying the amount (according to the best of his judgment and belief.)"

The affidavit annexed to the declaration alleged that the defendant's principal office was in Cook county. The citizenship (if that term may strictly be applied to a corporation) of the defendant, it will be seen, is unimportant—it will be sufficient if it is a *resident* of the county; and for the purposes of this question, we think, the well known distinction between

citizen and *resident*, as applicable to persons, should be observed. The rule laid down, and since recognized by this court, in *Bristol* v. *The Chicago and Aurora Railroad Co.* 15 Ill. 436, is this: "The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised." And it was, therefore, held, that the corporation, in that case, had a legal residence in any county in which it operated its road. While the citizenship of the corporation would depend upon the place of the law of its creation, its residence might, manifestly, upon the principle above stated, be in any State where it was, by comity, permitted to exercise its franchise. The defendant, therefore, having, as we must accept from the plaintiff's affidavit, its principal office in Cook county, is, to all intents and purposes, within the meaning of the act, a resident of that county, and is not within the exception.

The remaining question is, whether the affidavit that the defendant did not execute and deliver the note in manner and form, etc., is a sufficient affidavit that the defendant has a good defense to the merits of the action, within the contemplation of the statute.

We do not regard *Castle et al.* v. *Judson et al.* 17 Ill. 381, and *Wilborn* v. *Blackstone et al.* 41 id. 264, as sustaining plaintiff's position. In the first of these cases the affidavit was held to be more than equivalent to that required by the statute, and in the other case the affidavit followed the language of the statute; but the objection was, that it was not entitled of the court or term to which the cause was appealed, and the court held, that being properly entitled in the case and regularly filed, it was sufficient, without specifying the court and term. What was said in *Castle et al.* v. *Judson et al.*, as to the object of the act and the rule of construction, although that was a local act, confined to Cook county, will apply as well to the act before us. It was there said: "The object of the act seems to be to facilitate and expedite the disposition and trial of causes brought there, so as to prevent un-

necessary delay to suitors from the great accumulation of causes, upon frivolous defenses, as is very manifest. * * * We should keep this object in view in interpreting the provisions of this act, and give it a liberal interpretation to accomplish that end."

It is true, also, as was said in *Wilborn* v. *Blackstone et al.*, "The statute was not designed to cut off meritorious defenses, but to prevent unjust delays in the administration of justice." And we have therefore held that the affidavit will be sufficient, although not in the precise phraseology of the statute, if, in substance, it is equivalent. *Harrison* v. *Willett*, 79 Ill. 482.

The plea puts in issue only the note as it is described in the special count, and if, therefore, the note offered in evidence should be so materially variant therefrom as to be inadmissible in evidence under that count, the plea would be sustained; and yet the plaintiff, by making proof of its execution, might recover the amount due upon it under the common counts. But again, the plea would be sustained if it should appear that Young, as manager, had no legal authority to bind the defendant by executing the note. Still, in this, he might have acted honestly and conscientiously—the defendant might have been indebted to Walker in the amount of the note, or it might have been indebted to the plaintiff in that amount, and the attempt to bind the defendant by the note have been for a sufficient and full valuable consideration, but unavailing only for the want of legal authority in Young. In such case, the debt would remain unaffected by the void note, and if it was originally due from the defendant to the plaintiff, or if originally due from the defendant to Walker, but the defendant, for a sufficient, valuable consideration, after the creation of the debt and upon the request or with the assent of Walker, promised to pay the debt to the plaintiff, the plaintiff would be entitled to recover the amount under the common counts.

The language of the statute and the affidavit are not, therefore, equivalent. The one requires it to be stated there is a defense upon the merits to the whole or a part of the demand,

specifying the amount; the other presents a defense which does not, necessarily, go farther than to affect the character of the evidence admissible.

The judgment is affirmed.

Judgment affirmed.

Bartholomew McNamara

v.

James D. Seaton.

1. Boundary line—*parties concluded by, if established by agreement.* Where adjoining land owners agree upon a boundary line, and enter into possession and improve the lands according to the line thus agreed upon, they will be concluded from afterwards disputing that the line agreed upon is the true one, even when the Statute of Limitations has not run.

2. Limitation—*possession must be adverse, to bar a recovery under statute.* Where one of two adjoining land owners has possession for over twenty years of a portion of the other's land, by reason of the division fence not being on the line, such possession will not bar a recovery by the true owner, unless the fence was agreed upon as the boundary line, and the possession taken and held in pursuance of such agreement, or unless the possession is adverse to the title of the true owner.

3. Possession—*of part of adjoining tract, when adverse.* Where the owner of land, in inclosing the same, extends his inclosure and embraces therein a portion of an adjoining tract, and continues in the possession thereof for twenty years, asserting ownership, he can claim the benefit of the Statute of Limitations as to all land embraced within his inclosure.

4. Same—*without claim not adverse, so as to bar a suit for recovery.* But where the owners of adjoining tracts of land build a fence to separate them, without knowing where the line is, and without agreeing to the fence as a boundary line, and they afterwards have the lands surveyed without reference to the fence, and ascertain that the fence is not on the line, but that one has a strip of land on his side of the fence belonging to the other, and they both recognize the line established by the survey, and the one in whose inclosure the other's land is, makes no claim to the possession of it, the mere fact of its being in his inclosure is not such possession as will bar an action for its recovery by the true owner in twenty years.

Appeal from the Circuit Court of Warren county; the Hon. Arthur A. Smith, Judge, presiding.

Messrs. Stewart & Phelps, for the appellant.

Messrs. Porter & Mosher, for the appellee.

Mr. Justice Craig delivered the opinion of the Court:

This was an action of ejectment, brought by James D. Seaton, in the circuit court of Warren county, against Bartholomew McNamara, to recover a tract of land 100 rods long, and being 3 rods wide at the north end, and running to a point at the south end, the premises constituting a part of the west half of the south-west quarter of section 17, and the north half of the north-west quarter of the north-west quarter of section 20, in township 12 north, range 3 west of the fourth principal meridian.

A trial of the cause before a jury resulted in a verdict in favor of the plaintiff. The defendant brings the record here by appeal, and, in his argument, contends that the plaintiff's right of recovery was barred by twenty years' adverse possession of the land by the defendant and his grantor before the commencement of the action.

The east half of the south-west quarter of section 17, and the north half of the north-west quarter of the north-east quarter of section 20 originally belonged to James Maley, while the west half of the south-west quarter of section 17, and the north half of the north-west quarter of the north-west quarter of section 20 were owned by W. C. Maley. As early as 1853, these parties were in possession of their respective tracts of land, and had indicated the partition line between their lands by setting out a hedge which was supposed to be upon the line until 1857, when the division line of the lands was surveyed and established by a surveyor, when it turned out that the hedge run over on the lands of W. C. Maley, leaving the strip of land in question inclosed with the lands of James Maley. In 1868, James Maley sold and conveyed to the defendant, who has held the possession of the lands conveyed, in connection with the premises in question, until the bringing of this action.

While it is true the defendant and his grantor have held the possession of the strip of land in dispute for a period exceeding twenty years, yet the possession will not bar a recovery unless a boundary line was agreed upon, and the possession was taken and held in pursuance of such an agreement, or unless the possession of the defendant and his grantor of the strip of land in controversy was adverse to the title of the plaintiff.

It has been held, and the rule may be regarded as well settled, not only here but in other States, that, where adjoining land owners agree upon a boundary line, and enter into possession and improve the lands according to the line thus agreed upon, the parties will be concluded from afterwards disputing that the line thus agreed upon is the true one, even where the Statute of Limitations has not run. *Crowell* v. *Maughs*, 2 Gilm. 419; *Bauer* v. *Gottmanhausen*, 65 Ill. 499; *Yates* v. *Shaw*, 24 Ill. 367. But, slight acts of the parties from which an agreement might be inferred can not be regarded as conclusive. Where adjoining land owners have clearly agreed upon a division line, and upon the faith of that agreement possession has been taken, and money expended, it would be manifestly unjust to permit a line thus established to be set aside at the will of either party; but while this is true, justice and sound policy alike demand that a contract, before it should be conclusive, should be established by clear proof, and followed by possession according to the line agreed upon.

In this case the evidence entirely fails to show that the two Maleys who owned the adjoining lands agreed that the old hedge should be the permanent boundary line of their lands. When the hedge was set, they did not know where the true line was. It was set at random. They occupied, it is true, according to the hedge, but, as early as 1857, they had the line run and established. They did not then, or afterwards, recognize or agree that the old hedge should be the line between their lands, but, on the other hand, directed the surveyor to divide the lands equally between them, and they would plant a hedge on the line. The surveyor testified the "Maleys had no differ-

ence of opinion as to this line. James told me to divide the land equally; William also. They had a conversation, and said they would pay no attention to the old hedge."

If, then, the proof fails to show that a line was established by agreement, the only remaining question is, whether the possession of the premises in controversy by the defendant and his grantor, James Maley, can be regarded as adverse, so that the defendant can rely upon the Statute of Limitations to protect his possession.

In *Turney* v. *Chamberlain*, 15 Ill. 271, where the question arose in regard to what constituted an adverse possession, it was said: "To constitute an adverse possession sufficient to defeat the right of action of the party who has the legal title, the possession must be hostile in its inception, and so continue without interruption for the period of twenty years. It must be an actual, visible and exclusive possession, acquired and retained under claim of title inconsistent with that of the true owner. It need not, however, be under a rightful claim, nor even under a muniment of title. It is enough that a party takes possession of premises, claiming them to be his own, and that he holds the possession for the requisite length of time, with the continual assertion of ownership."

It is no doubt true, where an owner of a tract of land, in inclosing the same, extends his inclosure and embraces therein a portion of an adjoining tract, and continues in the possession thereof for twenty years, asserting ownership, he would be in a position to claim the protection of the Statute of Limitations as to all lands embraced within his inclosure.

If an adjoining owner would suffer another, in fencing his land, to inclose a portion of the adjoining tract, and occupy the same, claiming title coextensive with his inclosure, for twenty years, no reason is perceived why the bar provided by the statute would not be complete.

But such is not this case. James Maley, from the time of taking possession, in 1853, down to the time he sold to the defendant, in 1868, never, so far as the evidence shows, asserted title or claim to the disputed premises, but, on the other hand,

recognized the title of his brother, W. C. Maley. In his testimony he says: "W. C. Maley owned land on west side of the hedge; hedge fence was not considered as the true line between myself and W. C. Maley; I did not claim to own all land lying on the east side of the hedge; a strip running with said hedge I did not claim to own; I never used or worked said strip of land."

Again, the Maleys both testify that, when the defendant purchased, he was notified where the true line ran, and that the controverted strip of land did not belong to his grantor, but was the property of W. C. Maley.

We do not regard the evidence sufficient to establish an adverse possession of the land in dispute. The possession of James Maley was in no manner hostile to the title of his brother. He claimed no interest in the land, and did not even claim to be in possession of the disputed strip. So far as the proof shows, W. C. Maley was at liberty, at any time he saw proper, to use the land or control it in such manner as he desired.

As the possession relied upon by the defendant did not appear, from the evidence, to be adverse, the verdict of the jury was warranted by the evidence.

The judgment will therefore be affirmed.

Judgment affirmed.

WILLIAM H. HIGGINS *et al.*

v.

JOHN BICKNELL.

FRAUD—*false representations as to boundary of land, ground for rescinding contract of sale.* Where the vendor, pending negotiations for the sale of a lot with a house on it, points out, to the person proposing to buy, what he states are the boundaries of the lot, showing that the house is situated several feet from the boundary line, on either side, and the purchase is made on the strength of such representation, when, in fact, the boundary line on

one side runs through and cuts off a part of the house, which was known to the vendor when he made the representations, the purchaser will be entitled to have the contract of sale rescinded, or a conveyance made to him investing in him a good title to the ground embraced in the boundaries so pointed out.

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

Mr. W. H. RICHARDSON, and Mr. P. L. SHERMAN, for the appellants.

Mr. HENRY DECKER, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

Bicknell filed a bill, in the Superior Court of Cook county, against Higgins and wife, to foreclose a mortgage executed to him by the defendants, dated April 2, 1873, upon lot 50, in block 2 of McCagg's subdivision of out-lot 19 of the subdivision of south-west quarter of section 5, township 39 north, range 14 east, by the Board of Trustees of the Illinois and Michigan Canal, given to secure eight promissory notes of that date, given by Higgins to Bicknell, each for the sum of $400, and interest at 8 per cent per annum, and payable, respectively, six, twelve, eighteen, twenty-four, thirty, thirty-six, forty-two and forty-eight months from date.

The bill was filed after the fifth of October, 1874, and alleges that, of the amounts then past due, one note of $400, and interest thereon from date at the rate of 8 per cent, remained unpaid, and that there remained to become due the sum of $2000, and the prayer of the bill was for a decree of foreclosure and sale *for the amount due.* The bill charges that the notes mentioned in the mortgage were given for purchase money of the premises described in the bill.

Answers were filed, admitting the allegations of the bill.

Defendants filed a cross-bill, which was afterwards amended, on December 23, 1874, and to the cross-bill as amended the complainant interposed a general demurrer, for want of equity.

The case was not brought to a hearing until the next note (payable 24 months after date) had fallen due.

At the hearing, the demurrer to the cross-bill was sustained and the cross-bill dismissed by the order of the court, and a decree was entered finding $947.20 due, and ordering payment of that amount by defendants within 30 days, or, in default thereof, a sale of the premises to raise that amount. In case of a failure to realize that amount from the sale, then a judgment for the deficiency was ordered, and if a surplus was realized, it was ordered to be brought into court to abide its further order. The decree also found that there was still to become due upon the mortgage the sum of $1600, with interest at the rate of 8 per cent from April 2, 1873.

From this decree the defendants appeal to this court.

The cross-bill set up, in substance, that, pending the negotiations for the property, Bicknell took Higgins to see the property. It had a house upon it. Bicknell claimed to own the adjoining lot on the east of the lot on which the house stood, and pointed out to Higgins the boundaries of the property he proposed to sell in such position as to show a strip of ground lying east of the house, about two feet wide, as part of the property to be sold, and showed the west boundary in such position as to leave, of the property to be sold, a strip of ground about three feet wide on the west side of the house, when, in fact, the true boundary on the east of the lot, as conveyed, was so far west as to cut off a part of the house, and the true boundary on the west was so close to the house that no available space was left, between the house and the line.

It is charged that these false representations as to the boundaries of the lot were known by Bicknell to be false when made, and were fraudulently made by him, and that Higgins, relying upon them, accepted the deed, and that he did not discover their falsity until a few weeks before the filing of the cross-bill. All this is confessed by the demurrer, and, if true, constitutes such a case of fraud as entitles Higgins to have the contract rescinded or to have a conveyance made to him investing in

him a good title to the ground embraced in the boundaries so pointed out.

The cross-bill is not very artistically drawn, but the substance therein set up is a sufficient foundation for the relief sought. The decree must be reversed, and the cause remanded, with leave to complainant, Bicknell, to amend his bill, or file supplement to the same so as to ask foreclosure for the note due since the suit was begun, and with leave to defendant to amend the cross-bill, and for further proceedings consonant with this opinion.

Decree reversed.

JAMES BLACKLAWS

v.

ROBERT MILNE *et al.*

1. DESCENTS—*illegitimate children.* It is a rule of construction that, *prima facie*, the term "children" means lawful children, and the statute of descents, by which the property of an intestate is made to descend to and among the children and their descendants, has reference to lawful children only, and does not do away with the common law rule, which prevents illegitimate children from inheriting anything.

2. Prior to the adoption of the statute of 1872, illegitimate children could inherit from their mother only in case she was unmarried.

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

Mr. N. C. WARNER, for the appellant.

Mr. WILLIAM LATHROP, for the appellees.

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

The forty acres of land in controversy, situated in Winnebago county, in this State, was purchased from the United States, in the year 1851, by Robert Milne and William Milne, in their

names, with the money of their mother, Margaret Milne. She died intestate, in the year 1853, leaving several children, in one of whom, Margaret Merchant, the wife of James Merchant, the equitable title of Margaret Milne became vested. Margaret Merchant died intestate in 1863, and James Merchant, her husband, in 1874. Margaret Merchant left, surviving her, five children, two of whom were illegitimate, of which last class is James Blacklaws, the complainant in this suit. After the death of James Merchant, Robert and William Milne, the trustees under the resulting trust in favor of their mother, Margaret Milne, executed a quitclaim deed of their interest in the land to the three legitimate children of Margaret Milne, then Margaret Merchant.

This was a bill filed by James Blacklaws, one of the two illegitimate children of Margaret Merchant, claiming a one-fifth interest in the land as one of the five children she left surviving her, asking to have set aside the said quitclaim deed, and for a partition of the premises. The circuit court, on hearing, upon the pleadings and proofs, found that the complainant had no right or interest in the land, and dismissed the bill. The complainant took this appeal from the decree.

The chief question presented by the record is, whether, previously to the statute of 1872 declaring that an illegitimate child shall be heir of its mother, the illegitimate child of a married woman was capable, in law, of inheriting the estate of the deceased mother.

By the common law, the rights which appertained to a bastard were very few, being only such as he could *acquire;* for he could *inherit* nothing, being looked upon as the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi.* 1 Bl. Com. 458. And Mr. Christian, in his note thereto, says, he was considered *filius nullius* with respect to inheritances and successions, though the law took notice of his connection with his natural parents for some other purposes. But it is contended by appellant's counsel that this rule of the common law is superseded by our statute of descents, by which the property of an intestate is made to descend to and among

the *children* and their descendants; that the complainant is the child of his mother, Margaret Merchant, and is embraced within the plain words of the statute; that there is nothing restricting the customary meaning of the word "children;" that it should be allowed to have force, and the positive law of the statute should prevail over the common law rule; and the case of *Heath* v. *White*, 5 Conn. 231, is cited as sanctioning such a construction of the language of the statute. If there were simply the above provision and nothing more, in our statute of descents, previous to 1872, the point urged might be one worthy of consideration, though it is a rule of construction that, *prima facie*, the term "*children*" means lawful children. *Dorin* v. *Dorin*, 13 Eng. Rep. 90, L. R. 7. H. L. 568. But the 53d section of that statute provides, that the illegitimate child or children of any single or unmarried woman shall be deemed able and capable in law to inherit the estate of their deceased mother. This is an implied recognition of the existence of the rule of the common law upon the subject, and of its being in force, and is an abrogation of it to a certain extent, only.

It shows the understanding of the makers of the statute, that "children" did not embrace illegitimate, as well as legitimate children; and that, in order that a particular class of illegitimate children, those of any single or unmarried woman, might be able to inherit from their deceased mothers, it was necessary to go further and make an express provision to that effect. The General Assembly have legislated upon the very subject, expressly providing in what cases illegitimate children may inherit from their mothers; and such must be taken as being all the cases, and that, in all other cases, previous to the statute of 1872, their incapacity to inherit remains as at common law. And the appellant must be held to come within such incapacity, as his mother, Margaret Merchant, died before the passage of the act of 1872—in 1863.

Another claim set up in the bill is, that Margaret Merchant, during her last illness, and in apprehension of death, expressed the wish to make her will, devising the property to all her five

children, and that the trustees, Robert and William Milne, promised to hold the title in trust for them until the death of James Merchant, and then convey to them. The proof manifestly comes far short of establishing any such claim. All that there is of it, taking the competent testimony, is, that Mrs. Merchant said to Robert Milne, that she wanted all her children to share equally in this property after her death, and this not during her last illness, or in apprehension of death, or with any reference to the making of a will, and without any corresponding promise on the part of Robert Milne or his co-trustee. It amounts to nothing more than a verbal will, which is no recognized mode of the valid disposition of real estate.

Perceiving no error in the decree, it is affirmed.

Decree affirmed.

SIMON REID *et al.*

v.

LOUIS DEGENER *et al.*

1. INFANCY—*plea of by one of several defendants.* When the plea of infancy is interposed and maintained by one of two defendants, it can not avail the other defendant, as to whom the contract sued on is valid and binding.

2. CONTRACT—*to accept another as paymaster, must be supported by a consideration.* An agreement by the holder of a promissory note to take a claim which the maker holds against a third person in payment thereof, without any consideration being shown for such promise, is not binding.

3. NOVATION—*parties to.* Where the holder of a promissory note agrees to take a claim held by the maker against a third person, in payment of the note, it is necessary, to the validity of such agreement, that such third person should be a party to such agreement, and promise to pay what he owes the maker of the note, to the holder thereof.

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

Messrs. CARTER, BECKER & DALE, for the appellants.

Mr. M. D. BROWN, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

On the fifth day of January, 1874, Herman C. Degener and Louis Degener executed and delivered to Michael Brulebach their two promissory notes, one for one thousand dollars, the other for eight hundred dollars, bearing interest at ten per cent, and payable to Brulebach. At the November term, 1874, of the Superior Court of Cook county, the plaintiffs, to whom the notes had been assigned, filed their declaration, together with the *cognovit* of the makers of the notes, and obtained judgment on the notes to the amount of nineteen hundred and ninety dollars. At the same term, on November 17, 1874, an order was entered setting aside the judgment, except for the sum of six hundred and twenty-eight dollars and sixty-nine cents, and leave given the defendants to plead as to this balance.

Pleas were accordingly filed by the defendants, first, the general issue, second, infancy of Louis Degener. To the plea of infancy, a replication was filed setting up a promise by Louis Degener, after he became of age.

There was a verdict for defendants, which the court refused to set aside. A judgment for costs was rendered against the plaintiffs, to reverse which they appeal.

In support of the plea of infancy by Louis Degener, he testified he was twenty-one years of age on the 27th of September, 1874. The plaintiffs proved by Louis Stagmiller that he was present at an interview between Louis Degener and Michael Brulebach, the payees of the notes, in November, 1874, at Louis Degener's farm, in which Bruleback asked Louis Degener to pay the notes in question, when Louis said he had no money then, but would pay them when he got it. Herman C. Degener, the other maker of the notes, was present at this interview, and gives a coloring somewhat different. He says, Brulebach asked his brother for money, and his brother told

him he had no money, and could not pay him anything. He did not say he would not ever pay it; did not use the words, "I will never pay it," but simply said, "I haven't got the money, and I can not pay it." The jury, perhaps, on this testimony, might have justified a verdict for the defendant Louis Degener, on the issue of infancy, but as to the other joint maker of the notes, Herman C. Degener, it could not, on the authority of *Kimmel* v. *Shultz et al.* Breese, 169, avail him. His contract was a valid one, and binding on him. The only question is, under the pleadings, can this alleged agreement with Brulebach, to take Forlin for paymaster, discharge defendant?

The issue was *non assumpsit.* That is disproved by the production of the notes. There is no plea in avoidance of this contract, no release or accord and satisfaction, nor is the alleged parol agreement pleaded.

It appears Forlin, the debtor of Louis Degener, was not present at the agreement, and no promise was made by him to pay his indebtedness to Brulebach. He might, for aught we know, have a valid set-off to the claim of Degener, and it was necessary he should be a party to the alleged agreement. But the agreement, as proved, was of no binding effect upon Brulebach, as there was no consideration therefor, and no transfer of any kind was made to him by Degener of his claim on Forlin, and he was under no legal obligation to perform on his part, nor could Degener be compelled to perform. It is true, as this court has often held, a third party may maintain an action on a promise made to another for his benefit, but this is not such a case. *Bristow et al.* v. *Lane*, 21 Ill. 194, where the authorities are reviewed and the cases commented on. In this case, nothing is shown but a promise by Brulebach to take the claim on Forlin in discharge of Degener's notes. No consideration whatever is shown for such promise, and it can have no binding effect. As this reverses the judgment, it is unnecessary to pass upon the motion for a new trial on the ground of newly discovered evidence.

The judgment is reversed, and the cause remanded for a new trial.

Judgment reversed.

J. E. ROBERTSON

v.

ROBERT DEATHERAGE.

1. CONTRIBUTION—*as between co-sureties.* Although a surety may compel contribution from his co-sureties when he has paid a debt for which they are jointly liable, yet such sureties may, by agreement among themselves, so far sever their unity of interest and obligation as to terminate the right of contribution.

2. SAME—*relations of makers of note to each other may be shown by parol evidence.* It is competent for a maker of a note, in a suit against another maker for contribution, to prove by parol evidence the relations the parties to the note sustained to each other—whether principal and surety or co-sureties.

3. SAME—*surety not liable to his principal for contribution.* Where a party signs a note as security for one who is himself only a surety for the principal maker, he is not liable in a suit for contribution by the one for whom he signed as security.

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

Mr. P. H. SANFORD, for the appellant.

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

Mr. JUSTICE WALKER delivered the opinion of the Court:

Some time in June, 1871, The First National Bank of Knoxville was the holder of a note for $1000, against L. P. Robinson and Daniel Robertson, which was past due. The makers desired an extension of time for payment, to which the bank assented, provided further and satisfactory security should be given. L. P. Robinson was, as a matter of fact, the principal, and Daniel surety. A new note was made out and handed to the latter, who, about the 30th of July, returned it to the bank, signed by himself and L. P. Robinson and Elsia Robertson, when the president of the bank declined receiving it unless some responsible man would say that Elsia was good as surety for the amount. Thereupon, Daniel informed appellee what

the president of the bank desired, and he, thereupon, went with Daniel to the bank, when he said to the president: "Mr. Runkle, I understand what you want to know of me is, whether Elsia Robertson is good for $1000," to which Runkle replied, "Yes, that is what I want to know." Deatherage then said: "Elsia Robertson is as good for that amount as any man in the county." Thereupon Runkle pushed the note to him, and handed him a pen, and, as appellee says, Runkle said to him: "Then you would not be afraid to go his security for $1000?" Appellee replied, "No," and signed the note. Runkle seems not to distinctly remember what he said, but Daniel Robertson testifies that Runkle said: "Then you would not be afraid to sign a note with him or for him?"

Appellee swears he was not informed that L. P. Robinson was the principal, and he signed the note as surety for Elsia Robertson, but admits there was no express agreement to that effect, but says such was his understanding.

The note was not paid at maturity, and suit was brought on it, and judgment was recovered against all but appellee. Daniel and Elsia Robertson paid it, in about equal portions, and Elsia brought suit against appellee for contribution. A trial was had before the court and a jury, resulting in a verdict in favor of defendant, upon which, after overruling a motion for a new trial, the court rendered judgment, and plaintiff appeals to this court.

Appellee claims that he only became security for Elsia Robertson, and the jury have so found. On the other hand it is claimed, that, as L. P. Robinson was principal, appellee could not become a surety of one of the sureties, without an understanding with all parties to the note to that effect, and that verbal testimony can not be heard to show that such was the arrangement, or if it could, the evidence in this case is not sufficient to show that relation.

In the case of *Paul* v. *Berry*, 78 Ill. 158, it was held, that, "as between the makers, there arises no presumption, simply from the note or the judgment, that the first signer, or any other number less than the whole, is or are to be treated as

principal or principals, and the others are co-sureties; but it rests in evidence, to be introduced *aliunde* the note and judgment, to determine what relation they sustain towards each other—that the burthen is upon the plaintiff to prove he is surety, not only as between himself and another whom he claims to be principal, but also as between himself and another he claims to be a co-surety. Notwithstanding where it is established that two or more persons are co-sureties, and one of them pays the debt for which they are liable, he may have contribution from the others to the extent they are thereby relieved, it is well settled that co-sureties may, by agreement among themselves, so far sever their unity of interest and obligation as to terminate the right of contribution."

This we regard as conclusive on the question that parol evidence may be heard to determine the relations of the parties with each other, whether as principals or sureties. In that case we referred to *Norton* v. *Coons*, 6 N. Y. 33, and refused to follow the rule it announced; hence it can have no bearing on this case. Appellee, then, had the right to show that he only signed as the surety of Elsia Robertson, and if such was the fact, the latter has no legal right to recover, as there was no implied agreement on the part of appellee to make contribution to him.

Has appellee proved that he was but surety of appellant? Has he shown facts from which a jury might reasonably infer that such was his relation to the note? We think he has. All agree that nothing was said to him at the time as to L. P. Robinson being principal. All of the conversation was in reference to the solvency of appellant, and the note on which his name was signed. We are at a loss to see how any person could, from what was said and done, have drawn any other inference than appellant was the principal maker. The other parties, had they so intended, could not have adopted a more successful mode of producing that belief, unless they had so stated in terms. There can hardly be a reasonable doubt that he signed the note under the full belief that he was becoming a surety of appellant, nor did Daniel Robertson or Runkle do

or say anything to undeceive him. The evidence not only authorized but it required the jury to find as they did.

Nor is appellee estopped from insisting on the defense. He did not, directly or indirectly, agree with the others that he would become a co-surety, nor did he do anything from which it could be reasonably inferred by any one that he so intended. Appellant, on the contrary, did not know, for about two months afterwards, that appellee had signed the note. Appellant signed it with the expectation that no other person would sign it, and intending to incur the liability of co-surety with Daniel Robertson alone. Appellee's name was last on the note, and signed after appellant's, and he can have no claim that he was misled by supposing appellee was a co-surety with him. We are unable to see in what manner appellee can be held liable. Daniel Robertson, who had charge of the note and to whom it was intrusted by appellant, must have known that appellee had executed it supposing he was only desired to become surety for appellant. Had appellee, without the knowledge of appellant, stated on the note that he was only surety for the latter, could there be a doubt that appellee was only so liable? Then, in principle, what is the difference between the supposed case and the one at bar? We are unable to perceive any that should produce different results. We are, therefore, of the opinion that the facts proved establish a defense.

The instructions given are in harmony with the views here expressed, and those refused are the reverse of those given, and were, therefore, properly refused.

Failing to find any error in this record, the judgment of the court below must be affirmed.

Judgment affirmed.

Statement of the case.

JONATHAN CLARK

v.

CHRISTIAN BUSSE *et al.*

1. CONTRACT—*rights of contractors and sub-contractors.* Where a sub-contractor has performed substantially all the work his contract calls for, and, before the entire work to be performed by the original contractor is done, the building is destroyed by fire, and the owner of the building and the original contractor make a settlement, in which deductions are made of the value of whatever remained unperformed under the sub-contract, the sub-contractor will be entitled to recover from the original contractor for the work actually done by him, notwithstanding some things of minor importance may not have been performed in accordance with the sub-contract.

2. SAME—*effect of destruction of building before completion.* The rule that unless a contract for the erection of a building provides against contingencies that may happen during the progress of the work, the loss, if any occurs, will fall upon him who has agreed to do any given work that is possible to be done, because his agreement is to that effect, and he is not excused from performance by reason of its sudden destruction, can have no just application to a sub-contractor who has simply undertaken to do a distinct portion of the work.

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

Jonathan Clark had a contract with H. O. Stone to erect for him a four-story brick building. Clark was to furnish all materials and do all labor to finish the entire building, except, perhaps, the plastering, in consideration of $27,800. The work was to be done under supervision of T. V. Wadskill, architect, and 85 per cent to be paid, as the work progressed, upon estimates to be made by the architect, and the remainder to be paid on completion of the work, upon the architect's final certificate.

Afterwards, Clark let the masonry work to Busse & Stanvant, plaintiffs in this suit, for $10,150, who were to find all materials and do all work to the satisfaction of the architect, according to plans and specifications prepared for the build-

ing, for which they were to be paid in installments of 85 per cent, as the work progressed, and the balance on completion of contract. Whatever extra work or materials should be ordered by the architect, plaintiffs were to do and furnish, and for which defendant was to pay them so much as the work or materials were reasonably worth. All work plaintiffs agreed to do under their contract was done to the satisfaction of the architect, except concreting in provision cellar and whitewashing on walls of court. The concreting had been done, but, being dissatisfied with it, the architect directed it to be done over. It is averred, in a special count of the declaration, the work that remained to be done was trifling in amount, and that plaintiffs were hindered and delayed in doing it by the conduct of defendant by reason of his delay in work to be performed by him.

Before the building was entirely finished by Clark, it was destroyed by fire. The architect then made a certificate of deductions on account of things that had not been done, which formed the basis of a settlement between Clark and the owner. Accordingly, a settlement was made, and, after deducting items certified by the architect and 10 per cent on the entire contract, Stone paid Clark $21,038.25, in money and real estate, in full settlement of their accounts. Among deductions made from the contract price, in that settlement, were two items, one for concreting cellar, $30, and one for whitewashing court, $50 —work that was unfinished in plaintiffs' contract when the building was destroyed.

Mr. JOHN WOODBRIDGE, for the appellant.

Messrs. ALLEN, BARM & ALLEN, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The variance between the declaration and proof, insisted upon, on examination, is not found to exist. The averment the work was to be paid for in "installments from time to time," is sufficiently proven by evidence it was to be paid for by a certain per cent of the estimates made from time to

time as the work progressed. That was the agreement, and so all payments were made.

The contract between plaintiffs and defendant did not provide, nor was it in contemplation of the parties, the architect should give plaintiffs estimates of the value of work as it progressed, nor that they should be required to obtain his final certificate, as to completion of their sub-contract, as a condition precedent to payment. Defendant's contract with the owner contained such provisions, and it is obvious it was upon estimates made for him that plaintiffs were to be paid. That was the construction the parties themselves placed upon the contract as it was being performed. No estimates were ever made for plaintiffs of their work, but all payments were made upon certificates given to the principal contractor. Our understanding is, that proof that plaintiffs had, in fact, completed their work to the satisfaction of the architect superintending, no matter how made, whether by his certificate or otherwise, was all that was necessary to enable them to recover.

It may be conceded the certificate made by the architect was not in the form of a final certificate as contemplated by the agreement between defendant and the owner. The building had been destroyed by fire before it was finished, and no other certificate could be made. It was satisfactory when made to defendant and the owner, and as they were the parties most interested, if they were satisfied with it, we do not understand how it can be made a matter of contention between other parties. By it the principals to the contract were enabled to settle all difficulties that had arisen, and that is all the office a final certificate can perform.

The point most elaborated for the defense is, that plaintiffs never performed their contract. The proof, however, shows a substantial performance of the entire contract to the satisfaction of the architect, who, by the terms of the agreement, was constituted sole judge. All that remained to be done was of trifling importance, viz: concreting in provision cellar and whitewashing in rear court. Evidence offered tends to show that would have been done before destruction of the building

had it not been for delay caused by default of defendant. But be that as it may, whatever failure there was in the performance of the sub-contract on the part of plaintiffs was waived in the adjustment between the original contractor and the owner of the building. A deduction for these items was specifically made, and the architect's estimates of their value allowed. What was done between the principal contractor and the owner brings this case exactly within the principle of *Havighorst* v. *Lindberg*, 67 Ill. 463. In that case, as in this, the contract had been substantially performed, and the sub-contractor was permitted to have a lien established in his favor, notwithstanding some things of minor importance had not been done, on the ground the owner of the building, in his settlement with his principal contractor, had waived literal performance. It was his privilege to do so, and there can be no just complaint on that score.

The claim to have judgment over against plaintiffs, as set forth in a special plea, for the amount paid them under the contract, because the contract was not literally fulfilled, in the failure as to the two small items mentioned, has not a shadow of justice or equity in its favor. Cases cited in this and other courts as to the imperative obligation of a contractor to complete for his employer a projected work according to the terms of his agreement, are not in point. They declare the doctrine that, unless the contract provides against contingencies that may happen during its progress, the loss, if any occurs, will fall upon him who has agreed to do any given work that is possible to be done, because his agreement is to that extent, and he is not excused from performance by reason of its sudden destruction; but we apprehend that principle can have no just application to a sub-contractor who has simply undertaken to do a distinct portion of the work. He is not responsible for the destruction of the main work undertaken by the contractor, and, being prevented by no fault of his from completing his agreement, on the doctrine of *Schwartz* v. *Saunders*, 46 Ill. 18, he would be entitled to recover for work actually done. The case cited has many elements in common with the one in

hand, and is a strong authority for the affirmance of this judgment.

These views render it unnecessary to remark upon instructions given and refused. Our judgment is, defendant was not prejudiced by the action of the court in that particular, whether it was entirely correct in all its decisions, for we are satisfied, upon full consideration, justice has been done.

The judgment must be affirmed.

Judgment affirmed.

WILLIS M. HITT, Admr.

v.

JONATHAN Y. SCAMMON *et al.*

DOWER—*suit for, can not be revived by administrator, if party is entitled to.* Where a decree assigning dower to a widow, at her suit against the alienees of her husband, is reversed in the Supreme Court, and remanded for further proceedings, and, before any further proceedings are had in the circuit court, she dies, her administrator can not prosecute the suit for the recovery of damages and *mesne* profits.

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

Mr. B. S. MORRIS, for the appellant.

Messrs. SCOVILLE & BAYLEY, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Sarah A. Campbell, now deceased, filed her petition, in the court below, on the 19th day of February, 1874, against appellees, praying that dower be assigned her as the widow of James B. Campbell, deceased, out of certain real estate therein described. Decree passed in her favor, from which an appeal was taken to this court, at its September term, 1874.

On consideration here, that decree was reversed, and the cause remanded for further proceedings. See *Scammon et al.* v. *Campbell*, 75 Ill. 224. Subsequently, on the 12th of March,

1875, and before any further proceedings, after the reversal of the decree, were had in the cause, Sarah A. Campbell died intestate. Appellant was duly appointed her administrator, and, as such, filed his petition in the court below, praying that the suit be revived in his name, and that he recover damages and *mesne profits*, on account of the claim of dower of his intestate. The court below decreed in favor of appellees, and that the petition be dismissed.

Appellees claim title as alienees, and not as heirs of the husband of appellant's intestate; and, on the authority of *Turney* v. *Smith et al.* 14 Ill. 242, it is clear that, unless she established her right in her lifetime, the petition was properly dismissed. It was said in that case: "If the widow had died after a decree for the assignment of dower, the claim of the administratrix to *mesne* profits might, perhaps, be considered as within the equity of the statute; there would then be some basis for an assessment of damages. Here, a case has not arisen to authorize such a proceeding. The widow died without establishing her right, and the damages consequent upon the recovery of dower can not be assessed. The principal thing was extinguished by the death of the widow, and with it fell the incident."

What basis is there here for an assessment of damages? The decree of the court below was not modified merely, nor was the cause remanded with directions to enter a new decree based upon the facts determined by the first decree; but the decree was reversed without qualification, and the cause remanded. The case then stood, for all practical purposes, precisely as if there had been no hearing, and no decree entered, and until there should, thereafter, be a decree assigning dower, there could be no basis for an assessment of damages in behalf of the administrator. Until it can be demonstrated that a decree which has been reversed has, notwithstanding its reversal, the legal effect of a valid, subsisting decree, it will be impossible to discriminate, in principle, between the present case and that of *Turney* v. *Smith et al. supra.*

The decree is affirmed. *Decree affirmed.*

WILLIAM ROBINSON *et al.*

v.

OLIVIA J. RANDALL.

1. JUROR—*competency.* In a suit against a liquor dealer for damages occasioned by selling liquor to one in the habit of getting intoxicated, the fact that a juror has a prejudice against persons engaged in the sale of intoxicating liquors, does not disqualify him, if he says he can give the defendant the same kind of a trial as in any other case, and will be governed by the law and evidence.

2. But a juror who will not give the same weight to the testimony of one engaged in the sale of intoxicating liquors that he would to those engaged in other business, is not a competent juror in a suit against a party for selling intoxicating liquors to one in the habit of getting intoxicated.

3. PRACTICE—*challenging jurors.* The fact that the court below erred in overruling a challenge of a juror for cause, will not be sufficient cause for reversal, although the objectionable juror is peremptorily challenged, if the party objecting to him is not compelled to exhaust his peremptory challenges on others.

4. EVIDENCE—*preponderance sufficient in civil suit for selling liquor.* In a suit by a wife for injury to her means of support, occasioned by the sale of intoxicating liquors to her husband, she is not required to make out a case to the satisfaction of the jury beyond a reasonable doubt, but only by a preponderance of the evidence.

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

Mr. J. J. HERRON, and Mr. JOHN SCOTT, for the appellants.

Messrs. HENDERSON & TRIMBLE, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by appellee, a married woman, to recover damages sustained in her means of support in consequence of the sale by appellants of spirituous liquors to her husband, who was in the habit of using intoxicating liquors to excess. A trial of the cause before a jury resulted in a verdict and judgment in favor of appellee, for $350, to reverse which appellants appealed.

The first error complained of is the decision of the court in overruling appellants' challenge, for cause, of the jurors, Bagden and Mercer. Bagden, on his *voir dire*, said he "had a prejudice against men engaged in the sale of intoxicating liquors; should be governed by the evidence and the law; don't know but what I would give defendants the same kind of a trial as in any other case."

Under our statute, the sale of spirituous liquors, under certain circumstances, is a crime for which a party may be indicted, fined and imprisoned. The mere fact, therefore, that a juror may have a prejudice against crime, does not disqualify him as a juror. A juror may be prejudiced against larceny, or burglary, or murder, and yet such fact would not in the least disqualify him from sitting upon a jury to try some person who might be charged with one of these crimes.

As to the other juror, we do not regard him competent. He said he had great prejudice against the traffic; could not give the testimony of a person engaged in the business the same weight he could a man engaged in other business. Under the law, the defendants were competent witnesses, and a juror who was so prejudiced that he could not give their evidence that weight which it was entitled to receive, could not be regarded as a person standing indifferent between the parties, free from all bias which might swerve his judgment from all impartiality.

But conceding that the court erred in not sustaining the challenge of the juror, it was an error that did appellants no harm. The jurors were challenged peremptorily, and excused, and appellants did not exhaust their challenges in the selection of the entire jury before whom the cause was tried, therefore appellants were not injured by the ruling of the court; and, as was held in *Winnesheik Ins. Co.* v. *Schneller*, 60 Ill. 465, we can not reverse for an error that worked no injury. If appellants, in consequence of the ruling of the court, had exhausted their peremptory challenges, and had been compelled to accept a juror whom they might have otherwise

rejected, the rule might be otherwise, but this record does not disclose such a state of facts.

It is also claimed by appellants that the verdict is contrary to the evidence. While it is true, upon some points the evidence is somewhat conflicting, yet, upon a consideration of the whole testimony, we can not say it is insufficient to sustain the verdict. The appellants persisted in selling appellee's husband intoxicating liquors after they had, on several occasions, been warned not to do so, in consequence of which he was incapacitated for labor, upon which appellee relied for the support of herself and family. These facts, and others of a kindred character, were proven, and if true, of which the jury were the judges, they were ample to justify the verdict.

The appellants also claim that improper testimony was admitted. We see nothing, however, in the ruling of the court in this regard which would justify a reversal of the judgment. Some evidence may have been admitted that had no legitimate bearing in the case, but it is apparent, from the verdict, that the jury was not misled.

The court, on behalf of appellee, gave an instruction appellants claim is erroneous, which is as follows:

"It is not necessary, in order to establish any material fact in this case, that the evidence should prove it to the satisfaction of the jury beyond all reasonable doubt; but if there is a conflict of evidence as to any material fact in the case, a clear preponderance, or clearly greater weight of evidence in favor of it, is sufficient legal proof of it in this case."

The instruction, so far as we understand it, announces the proposition that appellee was not required to establish her cause of action by proof which would satisfy the jury beyond all reasonable doubt, but a clear preponderance of the evidence was all that was required. If we are correct in our undering of the instruction, it was not objectionable. This was not a criminal or penal action, but a civil action, to recover dam-

ages, and the rule in relation to the proof in the former cases can not control here.

As we perceive no substantial error in the record, the judgment will be affirmed.

Judgment affirmed.

Mr. JUSTICE DICKEY: The position is taken that no injury can be done to a party where he challenges a juror for cause, and his challenge is improperly overruled, and the juror is challenged peremptorily, if it turns out afterwards that the party making such challenge does not, in selecting the other jurors, exhaust *all* his peremptory challenges. This position seems to me untenable. No one can tell how many of those subsequently accepted jurors he would have challenged peremptorily, if he had not already expended one of his challenges upon the offensive juror in question. Nor does the position seem sound that this court will not reverse where error is found, if the evidence is found sufficient to support the verdict. Before material error can be disregarded on matter growing out of the proofs, the evidence must be so overwhelming that this court would have reversed as contrary to the evidence, had the verdict been otherwise.

JOHN J. BAGLEY

v.

ALEXANDER FINDLAY.

1. MEASURE OF DAMAGES—*in suit by vendor against vendee, where the latter refuses to take and pay for goods.* Where the vendee of goods sold at a specific price refuses to take and pay for them, the vendor may store them for the vendee, give him notice that he has done so, and then recover the full contract price, or he may keep the goods and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery, or he may, upon notice to the vendee, proceed to sell the goods to the best advantage, and recover of the vendee the loss, if they fail to bring the contract price.

2. AGENCY—*when it exists—as between vendor and purchaser.* Where the vendor of goods which the vendee has refused to take and pay for, undertakes, upon notice to the vendee, to sell the goods, with a view to holding the vendee liable for the loss in case they fail to bring the contract price, he takes the position of agent for the vendee, and is held to the same degree of care, judgment and fidelity that is imposed by law upon an agent put in possession of goods, with instructions to sell them to the best advantage.

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

Mr. WILLIAM LAW, JR., for the appellant.

Messrs. TENNEYS, FLOWER & ABERCROMBIE, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This was an action of assumpsit, by Findlay against appellant, for damages for breach of contract in refusing to receive and pay for goods sold by appellee to appellant, the delivery of which was offered. The goods in question were part of them in Chicago and part of them in Milwaukee. Soon after the refusal of appellant to accept the goods, appellee gave him notice that he would proceed to sell the goods to the best advantage, and hold appellant responsible for all losses, if any. After this, appellant was again requested to accept the goods. The goods were sold. The net proceeds of this sale fell short of the contract price to the amount of $1629.86, not including $402.62 expenses for commissions and charges. The issue was, by consent, tried without the intervention of a jury. The finding was for appellee, and his damages were assessed at $1629.86, and judgment thereon.

It is contended by appellant, that the measure of damages adopted by the court below was wrong.

When a vendee of goods, sold at a specific price, refuses to take and pay for the goods, the vendor may store the goods for the vendee, give him notice that he has done so, and then recover the full contract price, or he may keep the goods and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery,

and this means the market price of such goods in such condition and in such quantity as the goods were at the time for delivery. In such case, if goods are bought in large quantities, the market price at retail is not the standard, but the market price in large quantities; or the vendor may, giving notice to the vendee, proceed to sell the goods, in their then condition and quantity, to the best advantage, and recover of the vendee the loss, if the goods fail to bring the amount of the contract price. The appellee adopted the latter course, and the only question of fact presented is, were the goods sold to the best advantage.

In such case, the vendor takes the position of agent for the vendee, and is held to the same degree of care, judgment and fidelity that is imposed by the law upon an agent put in the custody of such goods in such condition, with instructions to sell them to the best advantage.

Without reviewing the evidence in this case, it is sufficient for us to say that the evidence fully sustains the finding of the court—that the goods were fairly sold, with reasonable diligence, judgment and care.

Appellant insists that the sale must, in such case, be in the market where the goods are, and objects that the goods stored in Milwaukee were sold in Chicago. The purchaser was found in Chicago, but he bought the goods in their then condition in store in Milwaukee, and if these goods were taken to Chicago at all, it was after the sale.

The appellant has no just cause of complaint against the finding of the court. Upon the evidence shown in the record, the court below might, without impropriety, have included in the assessment of damages the $402 expenses incurred by the appellee for commissions and charges incurred in making the sale.

The judgment of the court below is affirmed.

Judgment affirmed.

ANDREW J. WRIGHT *et al.*

v.

JOHN SMITH.

1. PRACTICE—*when the specific objection to evidence should be made.* Where the proper foundation is laid for secondary evidence as to the execution and contents of a chattel mortgage, and everything necessary to establish the existence of a valid mortgage is proved, except that the justice before whom it was acknowledged was a justice of the district where the mortgagor resided, it is error for the court to exclude all the evidence in relation to the chattel mortgage, without that particular objection being raised by the opposite party, or intimated by the court at the time the motion to exclude is made.

2. PRACTICE IN SUPREME COURT—*specific objection to testimony—requisites of bill of exceptions.* Where a defendant in replevin relied upon a chattel mortgage, and the court below, on motion of the plaintiff, excluded all the testimony relating to the mortgage, upon which the defendant assigned error, it was held that an objection to the mortgage of such character as ought to have been specifically made in the court below, would not be considered in the Supreme Court unless the bill of exceptions showed that the objection had been specifically made.

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

Mr. I. D. ADAIR, for the plaintiffs in error.

Mr. JAMES ENNIS, for the defendant in error.

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

This was an action of replevin, wherein the plaintiff claimed the property replevied as a purchaser from one Samuel Cully, and the defendants claimed the same by virtue of a chattel mortgage thereof to them given by Cully prior to his sale to the plaintiff.

On the trial, secondary evidence was given of the mortgage and its contents, it having been admitted that the recorder's office of Cook county, in which the mortgage had been left to

be recorded, and all the records of Cook county, had been destroyed by the fire of October 9, 1871. Upon the conclusion of the whole testimony, the court below, on motion of the plaintiff's counsel, excluded all the testimony relating to the chattel mortgage. This ruling is assigned as error.

The evidence seems to have been sufficient as to the execution of the mortgage, its acknowledgment before a justice of the peace, its contents, and the depositing it in the recorder's office for record, and its not having been taken therefrom. The only defect of proof apparent to us is, the want of evidence that the mortgage was acknowledged before a justice of the peace of the justice's district in which the mortgagor resided, as is required by the statute. The record fails to show that any objection was taken in the court below to the mortgage on that ground, and the court, upon its ruling, stated no reason whatever for its exclusion of the testimony. Had the objection been in any way raised in the court below, either by the opposite party or intimation of the court, that there was a want of proof that the mortgage was acknowledged before the proper justice of the peace, the defect might have been readily supplied by further evidence. As the record fails to show that this objection was made in the court below, we think it is not now, for the first time, entitled to consideration in this court; that this is in conformity with previous rulings of this court in analogous cases. It has been held by this court that a party can not avail himself, here, of an objection to the receipt of a written instrument in evidence without proof of its execution, unless that specific objection to the introduction of the instrument in evidence had been taken in the court below, so as to have afforded the opposite party an opportunity to obviate the objection. In the case of *Funk* v. *Staats*, 24 Ill. 644, in answer to an objection that the evidence failed to show that the justice of the peace before whom the acknowledgment of a chattel mortgage was taken had made entry of the fact, or made any memorandum of the property embraced in the mortgage on his docket, the court said: "The record fails to show that any objection was made to reading the mort-

gage in evidence on that ground. Other objections were urged at the time, and the party can not now be heard, for the first time, to raise that question. To entitle it to consideration in this court, the question should have been raised on the trial below, and thus have afforded the opposite party an opportunity to obviate the objection."

As the bill of exceptions only recites, generally, that, on motion of plaintiff's counsel, all the testimony relating to the chattel mortgage was excluded, we take it to have been what it appears to be—a general motion for the exclusion of the testimony, and not one to exclude it for the specific objection that it was not acknowledged before the right justice of the peace; and that it was error to exclude the testimony, upon a general motion to do so, without making such specific objection.

The judgment will be reversed and the cause remanded.

Judgment reversed.

SCOTT, SCHOLFIELD and DICKEY, JJ., dissenting:

We are unable to yield our assent to the conclusion of the majority of the court. Had the court below overruled the motion to exclude the evidence in relation to the chattel mortgage, and defendant in error assigned that ruling for error, we concede that it would have been incumbent on him to have shown, by his bill of exceptions, that he predicated his motion upon the ground that the evidence failed to show the chattel mortgage was acknowledged in the proper district, upon the principle that the presumption is the court decided correctly, until the contrary is affirmatively made to appear, and it is the duty of the party excepting to show, by his bill of exceptions, wherein the court erred. *Reeve* v. *Mitchell*, 15 Ill. 297; *Gardner et al.* v. *Russell et al.* 78 id. 292; *Indianapolis and St. Louis Railroad Co.* v. *Miller*, 62 id. 468; *Bulger et al.* v. *Hoffman*, 45 id. 352; *McKee* v. *Ingalls*, 4 Scam. 30. But it is the plaintiffs in error who complain of the ruling of the court in sustaining the motion, and not defendant in error, that it has been overruled, and the burden is, therefore, cast upon him to overcome the pre-

sumption that the court decided correctly, and to show, by his bill of exceptions, wherein the court erred; and in an early case the rule laid down was: "The bill of exceptions is not to be considered as a writing of the judge, but it is to be esteemed as a pleading of the party alleging the exception; and if liable to the charge of ambiguity, uncertainty or omission, it ought, like any other pleading, to be construed most strongly against the party who prepared it." *Rogers* v. *Hall*, 3 Scam. 5.

Since a statement of the reasons for or against a motion is, necessarily, distinct and independent from a mere statement that a motion was made, it follows that the present bill of exceptions contains nothing inconsistent with the idea that the ground of the motion was distinctly stated to have been because the evidence failed to show that the mortgage was acknowledged in the proper district. The record simply shows that, "on motion of plaintiff's counsel, all the testimony relating to the chattel mortgage was excluded." Whether any reason was assigned therefor or not, does not appear. The majority of the court hold that the silence of the bill of exceptions in this respect requires us to assume that the reasons for the motion were not disclosed. We insist, on the authority of the cases above referred to, this silence of the bill of exceptions is to be taken most strongly against the party preparing it, and that in no previous case to which our attention has been called has this court ever presumed error, where none was affirmatively disclosed by the bill of exceptions, upon which to give a judgment of reversal.

JOHN S. WALLACE *et al.*

v.

CELIA W. WALLACE.

1. MARRIAGE SETTLEMENT—*construction.* The presumption is, that, in marriage settlements, the parties to the agreement intend to provide for the issue of the marriage, and such construction should be given as to effectuate

that intention, unless it be clearly overcome by the language of the agreement.

2. SAME—*power in, to wife to authorize a sale does not empower her to compel a sale by the trustee.* Where, in contemplation of marriage, the owner of land conveyed it to a trustee in trust for his intended wife during her life, with remainder to the issue of the marriage, if any, and, in case of her death without issue, the land to revert to the grantor, with a further provision in the deed that it should be lawful for the wife to enable the trustee, at any time, to sell or otherwise dispose of the land, it was *held*, that, whilst the wife could authorize the trustee to sell the land, she could not compel a sale thereof, and that no sale could be made without the concurrence of both the *cestui que trust* and the trustee.

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

Messrs. MONROE, BISBEE & BALL, for the appellants.

Mr. JAMES S. MURRAY, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This controversy grows out of the construction that should be given to a deed of marriage settlement. In February, 1865, John S. Wallace, contemplating a marriage with Celia Whipple, made and executed a deed of conveyance of certain real estate, in Chicago, to Henry S. Monroe, on trusts declared in the deed. It was conveyed to him for the sole and separate use of Celia during her natural life, free from the debts, obligations and contracts of any future husband, and, from and after her death, to hold the same for the benefit of any child or children of Celia by the grantor. It also provides for the manner in which the property shall be held and divided between such children and their descendants; and in case of the death of Celia without children, then the property to revert to the grantor.

Had the deed stopped at this, then there would be no question as to the nature and precise character of the estate created. It would have been obvious that it would have been a fee simple vested in the trustee to hold for the sole use of Celia during her natural life, in remainder to the children of the marriage and their descendants, and in the event that no chil-

dren had been born, or they or their descendants had not survived their mother, then the fee simple to revert to the grantor, when the life estate should be expended. There was an intention, clearly, first, to make provision for the wife, by settling this property on the trustee for the use of the wife for life, and next, to provide for the issue of the marriage, by limiting the remainder over to them, and in case there should be no issue, then the property, at the death of Celia, to return to the grantor. When the settlement was made and the deed executed, all these estates were contingent; but in equity, and according to the terms of the deed, the life estate became vested when the marriage was consummated, and the contingent remainder became vested when the son, who is still living, was born; nor did the subsequent divorce of the parties in any respect alter or change the rights of any of the parties. We entertain no doubt but the title vested as here indicated, as each event occurred to meet the contingency.

But, after making these provisions and declaring these trusts, the deed confers a power of sale, in these words:

"And it shall be lawful for said Celia, by her separate writing, acknowledged, as in case of an unmarried person, at any time hereafter, to enable the said Monroe, or his successor or successors in trust aforesaid, to sell, convey, mortgage, lease or otherwise incumber or dispose of any part or the whole of the above described premises; * * * and in case of selling, mortgaging, * * * the said trustee or trustees shall pay the purchase money, rents or other moneys into the hands of said Celia, or invest the same in other property, upon like trusts and with like powers, and in all respects as aforesaid, as she shall, in writing, elect or direct."

Independent of this clause, no one, we apprehend, would contend that Wallace, Monroe or Mrs. Wallace, could, separately or jointly, sell and convey the property, and destroy the trust. Hence, all power of sale is conferred by this provision in the deed. Appellee claims that it confers upon her the sole power to direct and compel the trustee to sell and convey, whilst appellants insist that the deed only intended to

confer a power to sell by the joint acts and consent of Mrs. Wallace and the trustee; that neither could act independently of the other, nor could either compel the other to act; that Mrs. Wallace could enable, but could not compel, the trustee to act. These are the positions the parties assume on the argument of the case.

In construing this, as all other written instruments, the intention of the parties executing it must, when ascertained, control in carrying into effect its provisions, and in determining that intention, the instrument must speak for itself. The first object, we have no doubt, from the instrument itself, was, to make provision for Mrs. Wallace during her life, and to settle the property on the issue of the marriage, and in case of her death, without issue of the marriage, the property to return to its original source. This was manifestly the moving object in making the settlement. We can not suppose he designed to give it to her, or he would have peremptorily required the trustee to sell or dispose of it as she might direct, and would have limited the remainder or reversion on the contingency of her dying without having sold or disposed of the property. If such had been his purpose, he would not, we suppose, have created a life estate in her favor. Then the object was to create a life estate as a provision for his wife, with remainder to children.

But whilst this seems to have been the primary and controlling motive, he seems to have also intended that, in case of necessity or interest, the property might be sold, and other property substituted, or the money applied as directed in the deed. Hence the power of sale was inserted. It will be observed that the language of the power is, that it may be lawful for the *cestui que trust* to enable the trustee to sell. It is not that she may require or compel him to sell. It is only the conferring an authority for him to do what the deed had failed to authorize. The conferring authority does not imply that it shall be exercised. The law enables persons having the requisite capacity, to sell and convey their real estate, and yet we presume no one would say, because the law enables them

to do so, they are required to exercise the power. The law enables men to perform thousands of acts, yet it does not compel them to perform them. A person may, by letter of attorney, authorize or enable another to sell his lands, but if the price is not fixed, the attorney is not compelled to sell to the first person who may make an offer, but it is his duty to exercise judgment and discretion. He is required to act for the best interest of his principal.

There are a large number and variety of powers conferred that are purely discretionary, and it would be, we apprehend, a new doctrine, to hold that, because a mere naked power was conferred, it must be executed. As a general rule, the creation of a power implies a discretion in the person enabled to act, as to the time and manner of its execution. Otherwise, the donor of the power would himself execute it. Here, the grantor enabled Mrs. Wallace to empower Monroe to sell, but we presume it would not be contended that she should be compelled to exercise the power thus conferred, and thus cut off the remainder to the son. If such was the case, why create a remainder, but simply have provided that Mrs. Wallace should require the trustee to sell, and that he should obey the requirement.

On the contrary, it is apparent that it was the purpose of the grantor to give Mrs. Wallace a discretion to consent to or prevent the trustee from selling the property. And only to enable him to sell when she, in the mode prescribed, should so empower him. The power to sell could only be exercised by the concurrent judgment of Mrs. Wallace and the trustee. Had the grantor intended that the trustee should have full power, the concurrent act of Mrs. Wallace would not have been required, or if it had been intended that Mrs. Wallace should have the sole discretion, then the deed would have been peremptory in requiring him to act on her directions.

It has been held that, in marriage settlements, the presumption is, that the parties to the agreement intended to provide for the issue of the marriage, and such construction should be given as to effectuate that intention, unless it is clearly over-

come by the agreement. See *Jurvis* v. *The Duke of Northumberland*, 1 Jacobs & Walker's R. 539, also, Perry on Trusts, sec. 360, where this rule seems to be recognized.

If, then, the *prima facie* presumption in marriage settlements is, that they are made for the benefit of the issue of the marriage, it should require clear language in the deed to overcome the presumption. Here, such a provision was made for the issue, and unless compelled by clear language, Mrs. Wallace should not be permitted to defeat the settlement.

On the birth of the son, the contingent remainder vested in him, and it can only be divested by force of the latter clause in the deed, and a fair interpretation of the clause requires the concurrent consent and action of both the mother and the trustee.

We are, therefore, of opinion the court below misconceived the meaning of this deed, and erred in requiring the trustee to sell, and the decree must be reversed, and the cause remanded with directions to dismiss the bill.

Decree reversed.

FREDERICK TRUDE, Admr.

v.

JOHN MEYER.

1. PLEADING AND EVIDENCE—*plaintiff should not recover upon a claim not made by the pleadings, nor insisted on at the trial.* Where the plaintiff declared specially upon a promissory note, and gave no notice, either by bill of particulars or otherwise, of any other note or claim, and the defendant claimed that he had paid the note sued on, partly in money and partly by giving another note for a less amount, and, on the trial, introduced the note for the less amount in evidence, (against plaintiff's objection,) in corroboration of his testimony that he had paid the note sued on, as claimed, and the plaintiff made no claim for the amount of the small note, on the trial, but the whole case turned upon the question of whether the note sued on had been paid, it was *held*, that a verdict for the defendant should not be set aside on the ground that the plaintiff was, in any event, entitled to recover the amount of the smaller note.

2. EVIDENCE—*as affecting the question of payment.* Where a defendant sought to prove payment of the debt sued for by an administrator, to the intestate in his lifetime, it was *held* proper to refuse testimony in behalf of the plaintiff as to how much money the intestate had two weeks before his death, as such proof would have no tendency to show the defendant had not paid him money.

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

Messrs. MILLER, WILLIAMSON & MILLER, and Mr. F. SACKETT, for the appellant.

Messrs. BRANDT & HOFFMAN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the Superior Court of Cook county, by Frederick Trude, administrator on the estate of John Trude, deceased, plaintiff, and against John Meyer, defendant, counting on an instrument in writing as a promissory note for six hundred dollars, alleged to have been made and delivered by the defendant to the intestate, in his lifetime. The plea was *non assumpsit*, and a trial by a jury, resulting in a verdict for the defendant, on which judgment was rendered, to reverse which the plaintiff appeals.

It appears, the intestate and the defendant were Germans, intimately acquainted. To sustain the issue, the plaintiff introduced in evidence a paper in the German language, which, being translated, reads as follows:

"$600 DUNTON, *the 4th November*, 1872.

I acknowledge that I, from Johann Trude, six hundred dollars received have, at ten per cent interest the year.

JOHANN MEYER."

This instrument is not described in the declaration as being in the German language, but is counted on as a promissory note in our language. Considering the writing, as held by the court below, a promissory note, the defense was, it had been paid,

and, as evidence thereof, it was found in the possession of the defendant, and he testified he had paid it the day before the death of the payee, Trude, in money, except one hundred and sixty dollars, for which he had given a like note in writing, which was found in the pocket book of the deceased after his death, and which was also in the possession of the defendant, it having been delivered to him by the sister of deceased, an aged woman, to whom the defendant, as he claimed, paid the amount.

On the question of payment of this six hundred dollar note, or receipt, or whatever it may be denominated, there was much testimony heard, plaintiff's theory being that it had been furtively taken out of the possession of the payee when he was very sick, and unable to attend to business. The jury, on the whole evidence, found this note had been paid.

It is now claimed by appellant that he should have had a verdict for one hundred and sixty dollars, the amount of the last receipt. We do not think this claim can be sustained. The plaintiff, in his pleading, gave no notice of any such claim; he declared for none such; he gave no notice, by a bill of particulars or in any other form, of such a claim. It was in evidence, against the objection of appellant, interposed by appellee to sustain his case, he claiming he had paid all of the six hundred dollar note except one hundred and sixty dollars, and then, in corroboration, produced this note. On the trial, it does not appear plaintiff made any claim to recover this one hundred and sixty dollars. The only question litigated was, whether or not this six hundred dollar receipt or note had been paid.

We can not disturb the finding of the jury on the question so fully submitted to them under the evidence, and by the instructions, with which we find no fault.

It is complained by appellant, that the court would not allow him to prove, by one Brossing, how much money the deceased had two weeks before his death. This was wholly unimportant, and such testimony was properly refused as having no tendency to prove appellee had not paid him money.

On the whole record, we find no error sufficient to reverse the judgment, and it must be affirmed.

Judgment affirmed.

R. P. ROBERTS *et al.*

v.

DARIUS CLELLAND.

1. JUDICIAL SALE—*notice to assignee not necessary on motion to set aside.* It is indispensable a purchaser of lands at a judicial sale should have notice of any motion to set aside such sale, but it seems it is not essential that an assignee of the purchaser should have notice; but such assignee should be permitted to come in by petition, within any reasonable time, and obtain leave to contest the motion to set aside the sale.

2. ASSIGNEE—*of certificate of sale not an innocent purchaser.* The assignee of the purchaser at a judicial sale acquires no greater equities under the certificate, and before the execution of a deed, than the purchaser himself has, but takes it charged with all defenses which could be interposed against such purchaser, and is chargeable with notice of all irregularities with which the purchaser is chargeable.

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

Such proceedings were had in the original case of Darius Clelland against the Frear Stone Manufacturing Company and Lewis Cornell, under the Mechanic's Lien Law, that a lien was established in favor of petitioner, and the property described was ordered to be sold, should default be made in payment of amount found due. At a sale under that decree, the property was first offered in separate parcels, and their being no bidders it was sold *en masse* to Carter, solicitor for petitioner, for the amount of decree and costs. The usual certificate was issued to the purchaser. Afterwards, Carter, who was acting on behalf of his client, and by his consent, assigned the certificate of purchase that had been issued to him to R. P. Roberts, G. C. Griffith and Daniel L. Sibley. On motion of Cornell, made

at a term subsequent to the one at which the sale had been reported to the court and confirmed, the sale was set aside. Carter, it seems, was notified, and appeared and defended the motion for himself and his client, the original petitioner, but no notice was given to the assignees of the certificate of purchase, notwithstanding it is alleged it was known by Cornell, before he made his motion to set aside the sale of his property, they were the owners and the real parties in interest. Afterwards, the holders of the certificate of purchase filed a petition, in which they asked to be made parties, and to have the order setting aside the sale reversed, so far as it affected them. The court permitted them to become parties to the record, but refused to cancel or revoke its former order setting aside the sale in the mechanic's lien case. It is from this last order the holders of the certificate of purchase prayed an appeal, and bring the case to this court.

Mr. A. D. CARTER, for the appellants.

Mr. P. L. SHERMAN, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

According to the practice that has always prevailed, it is indispensable a purchaser of lands at a judicial sale should have notice of any motion to set aside such sale on account of any irregularity or for any cause. His rights, and whatever interest he has in the property, are to be affected by the judgment to be pronounced, and it is in accordance with the analogies of the law he should have his day in court. *Dunning* v. *Dunning*, 37 Ill. 306; *Comstock* v. *Purple*, 49 Ill. 158.

But whether that principle can be extended so as to hold that assignees of the certificate must have notice of such motion before any action can be had, admits of some discussion. The purchaser at such sale is always known, because his certificate is a matter of record, but it can not be readily known who is assignee. No record is required by law to be made of such assignment, and it would not be practicable, in many in-

stances, to ascertain the name of such assignee, so as to serve notice upon him, should that be held to be necessary to give the court jurisdiction to hear and determine the matter. Such difficulties in discovering such assignees might arise as would defeat all summary remedy by motion. The better practice would be that which was observed in this case, to permit the assignees, when notice comes to them from their assignor or any other source, to come in by petition within any reasonable time, and obtain leave to contest the motion to set aside the sale. That mode secures to such assignees all benefits of previous notice, and avoids the difficulties as to giving notice to unknown parties. This practice was indicated in *Comstock* v. *Purple*, *supra*, and the rule is a reasonable one.

The property sold under the decree in the mechanic's lien case was purchased by the solicitor of petitioner, and it is conceded it was for the benefit of his client. Both petitioner and his solicitor are chargeable with notice of all irregularities in the sale, and as to them it can not be doubted there was good cause for setting aside the sale of defendant's property. Offering the property in separate parcels, as was done, was not a compliance with the law. The property had been subdivided before decree. It was not offered according to that subdivision, but by a former division that did not then represent the property as it was.

But the protection due innocent purchasers is invoked for the assignees, who are shown to have bought the certificate of purchase for value, without any actual notice of the irregularities that vitiate the sale as to the original purchaser, and that is the principal question in the case.

Certificates given by any officer to a purchaser of lands at a judicial sale, are, by provisions of our statute, made assignable by indorsement thereon; and every person to whom the same shall be so assigned, shall be entitled to the benefits therefrom, in every respect that the person therein named would have had if the same had not been assigned. Such assignee stands in the shoes of the original purchaser. He is entitled to the same benefits therefrom as the original holder,

and must be understood to take such certificate subject to all defenses that could have been made against it in the hands of his assignor. Until a deed is made he can not be said to have superior equities under the statute making such instruments assignable. He is given the same benefits his assignor had, and none others. We have no decision in this State directly upon the point, and we are, therefore, free to give a construction to this statute as on first impression. Counsel cites all the cases in this court that have any bearing on this subject, but it will be perceived they are not analogous, and do not sustain his view of the law.

Fergus v. *Woodworth*, 44 Ill. 374, holds a sale of property by a judicial officer ought not to be set aside except when the irregularities complained of do great injustice, and states an exception to the common law rule, where the judgment or decree is reversed defendant shall have restitution of the purchase money and the purchaser shall hold the property sold, to be, where plaintiff is himself the purchaser and still holds under that title, equity will interfere to prevent any such sacrifice of the property as amounts to wrong and oppression.

Guiteau v. *Wisely*, 47 Ill. 433, does not declare an innocent purchaser of a certificate of sale will not be affected by a reversal of the judgment or decree in favor of his assignor. The extent of that decision is, that where the assignee bought before reversal of the judgment, and obtained a sheriff's deed, his rights, like those of a third party purchasing at a judicial sale, will not be invalidated by a subsequent reversal of the judgment.

We are unable to perceive the case of *Conover* v. *Musgrove*, 68 Ill. 58, has any bearing on the question we are considering.

The construction we have indicated the statute should receive, stands to reason. An innocent purchaser is one that has the legal title to property, and has paid therefor a valuable consideration, without notice of defects or vices in the title. That can not be predicated of a mere assignee of a certificate of sale, issued to a purchaser under judicial sentence, who is chargeable with notice of all irregularities that may

invalidate such sale. As was said in *Bowman* v. *The People*, *ante*, p. 246, such purchaser does not take the land itself by his bid, but only an incipient interest, that may or may not ripen into an absolute estate. It is simply stating a truism, to say a party can not assign that which he hath not. Such purchaser has not the legal title to the property bought, and of course can not assign it.

On principle, therefore, it would seem such assignee can not be regarded as an innocent purchaser, and entitled to protection as such, until he is clothed with the legal title by a sheriff's deed. The case of *Reynolds* v. *Harris*, 14 Cal. 667, is in harmony with this view of the law.

The order of the circuit court was correct, and must be affirmed.

Order affirmed.

FRANCIS L. DAVIS *et al.*

v.

ORLANDO BRACE *et al.*

1. TAXES—*a law requiring the county clerk to extend a certain per cent on certain contingencies, is a standing levy of such per cent.* Where the law under which municipal bonds are issued requires the corporate authorities to levy and collect a sufficient tax, not exceeding a certain per cent, to pay the interest annually, and to liquidate the principal within the time specified for their payment, and provides that, in case the corporate authorities fail to certify to the county clerk the rate per cent to be levied for any year, before the time required by law for such clerk to extend the State and county tax, then he shall extend such tax for such year at one per centum, such provision is a standing levy, by law, so long as the bonds remain unpaid, subject to be modified or changed by the action of the corporate authorities.

2. SAME—*if there is a law authorizing an extension, such extension is valid, though intended to be done under a different law.* Where a town owes a debt which can only be paid out of funds raised by taxation, and a tax for that purpose is extended by the proper officer, who is authorized to extend the same by the act under which the indebtedness is created, it is wholly unimportant, in a court of equity, under what law the officer intended to

act in making the extension. It is sufficient that there is a law conferring authority on him to do what he has done, and the collection of the tax will not be restrained.

APPEAL from the Circuit Court of Stark county; the Hon. JOSEPH W. COCHRAN, Judge, presiding.

Mr. J. J. HERRON, and Mr. W. W. WRIGHT, for the appellants.

Mr. H. BIGELOW, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The tax, collection of which is sought to be enjoined by the bill, is for the payment of interest on the bonds of the town, issued in conformity with its subscription for capital stock in the Peoria, Dixon and Hannibal Railroad Company. The validity of the bonds is not questioned, nor is it claimed that the tax exceeds the constitutional limitation, nor that the amount proposed to be collected is not *bona fide* due from the town to the holders of the bonds, but it is simply asserted that the tax was not legally levied. The reasons alleged are: 1st. The bonds were not properly registered by the Auditor of Public Accounts, and hence his certificate conferred no authority upon the county clerk to extend the tax. 2d. The corporate authorities of the town did not certify to the county clerk the rate per cent to be extended upon the collector's books, and, therefore, he derived no authority to extend the tax from this source.

If these were the only sources from which the authority of the clerk to extend the tax could be derived, it would be necessary to inquire whether the allegations are sustained, but they are not. The seventh section of the charter of the Peoria, Dixon and Hannibal Railroad Company, under the authority of which the bonds were issued, requires the corporate authority of the town to levy and collect a sufficient tax, on the taxable property of the town, not exceeding three per centum, to pay the interest annually accruing on the bonds, and to liqui-

date the principal within the time specified for their payment; and concludes by providing that, in case the corporate authority shall fail to certify to the county clerk the rate per cent to be levied for any year, before the time required by law for such clerk to extend State and county tax, then he "shall extend such tax, for such year, at the rate of one per centum." This, in our opinion, is a standing levy, by law, so long as the bonds shall remain unpaid, of one per centum, subject, however, to be modified or changed by the action of the corporate authority. In the absence of the action of the corporate authority, it was the duty of the clerk to extend the tax at one per centum, and, on failing, he might have been compelled by *mandamus* to do so at the instance of any one interested in the bonds.

The case, then, stands thus: The town owes a debt which can only be paid out of funds raised by taxation. This tax is for the payment of that debt. It was extended by the proper officer, and his action is authorized by the law under which the debt was created. It would seem, therefore, especially in a court of equity, wholly unimportant under what law the clerk intended to make the extension. It is sufficient that there is law which confers authority to do what he has done. That he might have extended, or, indeed, should have extended the tax at a higher rate per cent, under the law, than he has, in nowise prejudices the tax-payer, and he can not complain on that account.

We are unable to perceive any equitable grounds for restraining the collection of the tax.

We are of opinion the decree of the court below in dissolving the injunction and dismissing the bill is right, and must, therefore, be affirmed.

Decree affirmed.

JOHN NELSON

v.

SIGVART O. DANIELSON.

1. MALICIOUS PROSECUTION—*for suing out an attachment without probable cause.** Where a plaintiff sued out a writ of attachment and caused it to be levied upon the goods and chattels of the defendant exempt from levy and sale, upon an affidavit that defendant was indebted to him in a certain sum then due, and that he was about to leave the State with the intention of having his effects removed from the State, when, in fact, a part of the indebtedness was evidenced by a promissory note not then due, and the defendant was, at that time, seeking employment, and was making no preparation to leave the State, which facts were known to the plaintiff when he sued out the writ, and the defendant had offered to give a mortgage to secure the indebtedness, which the plaintiff had agreed to accept, but sued out the attachment before the time agreed upon for the giving of the mortgage, it was *held*, in an action for malicious prosecution at the suit of the debtor, that a jury would be authorized to find that the creditor sued out the writ without probable cause, and was actuated by malice.

2. EXCESSIVE DAMAGES. In such case it was held that a verdict in favor of the plaintiff in the suit, for malicious prosecution, for $750, was not excessive.

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

Messrs. E. & A. VANBUREN, for the appellant.

Messrs. MAGEE, OLESON & ADKINSON, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action on the case, brought by Sigvart O. Danielson, in the Superior Court of Cook county, against John Nelson, to recover damages for the seizure of certain goods and chattels under a writ of attachment, which, as is alleged, was maliciously and without probable cause sued out by Nelson, and levied in a wanton and reckless manner upon personal property exempt from levy and sale.

*See *Barrett et al.* v. *Spaids*, 70 Ill. 408.

A trial of the cause before a jury resulted in a verdict in favor of the plaintiff for $750. A motion for a new trial was denied by the court, and judgment rendered upon the verdict, to reverse which the defendant appealed.

The attachment suit was commenced before a justice of the peace on the 13th day of November, 1874, upon an affidavit, filed by Nelson, that the defendant in the action was indebted to him in the sum of $200, which was then due; that he had good reason to believe and did believe Danielson was about to depart from the State with the intention of having his effects removed from the State. The jury, by their verdict, found that the attachment was sued out and the goods seized without probable cause, and in this we are of opinion they were correct. According to the testimony of Nelson, himself, he sued out the attachment on what he was told by one Johnson and the defendant and his wife. The substance of the information thus obtained, as we learn from the evidence, was this: Johnson, on November 12, told Nelson he understood Danielson was going to leave the State and go to California. On the same evening Nelson called upon Danielson, and, in conversation, was told by him that he was out of employment, and was thinking about going to California. Nelson then inquired, if he should go, if he was willing to give him a second mortgage on his property, to which Danielson replied he was willing to do that, whether he went or not. A contract containing the description of his property was then handed Nelson, and a mortgage was to be prepared, and the parties were to meet on the next day at noon, and the mortgage was then to be executed. Nelson did not, however, wait for the arrival of the appointed time to obtain his security, but early the next morning he sued out the attachment, and, while Danielson was absent from his home in search for work, where he had informed Nelson he would be on the day previous, he levied upon and removed the goods from the residence of Danielson. From this evidence, can it be said that Nelson had a reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in the belief that Danielson was about to depart from the

State with the intention of having his effects removed from the State? We apprehend not.

Johnson did not profess to have any information that was reliable; he only told Nelson what he had understood. The source of the information was not called for or given, but, even if this information could be regarded sufficient for Nelson to act upon, when, on the same day, he called on the defendant, and, from his own lips and his acts, found that there was no present intent of leaving the State, the commencement of the attachment proceedings under such circumstances betrayed a reckless disregard of that honesty of purpose which should govern every person before resort should be had to the extraordinary remedy of attachment.

It is urged that the instruction given for plaintiff was wrong, because it does not leave to the jury the question whether any property was seized by virtue of the attachment, but authorizes the jury to find for the plaintiff if they find that defendant directed a levy, whether he actually levied or not. Had the evidence failed to show that the property was actually taken under the writ of attachment, the question presented might be regarded as a serious one, but no such question arose on the trial. The evidence is undisputed that the property was taken and removed, and retained a number of days; if, therefore, the instruction was not strictly accurate in the respect complained of, it could not mislead the jury.

But it is contended the damages are excessive. Courts have always manifested a reluctance to disturb verdicts on account of excessive damages in cases of this nature, and never disturb them unless it is probable, from the amount of damages assessed, that the jury have acted under the influence of prejudice or passion. *Schlencker* v. *Risley*, 3 Scam. 483. While the damages in this case are large, yet we can not say they are so excessive as to justify the inference that the jury were actuated by passion or prejudice. The testimony introduced in regard to the conduct of the defendant in the commencement of the action and the execution of the writ, established such a clear and reckless disregard of the rights of the plaintiff, that the jury

could do no less than conclude that the defendant was actuated by malice.

One of the notes upon which the action was based was not due, and an action could not be commenced upon it, and yet the defendant filed an affidavit that the notes were both due. At the time the attachment was issued, Danielson was hunting for employment in the city of Chicago and making no preparations to leave the State, which fact, as appears, was known to the defendant. It also appears that a mortgage was offered upon real estate which was ample security for the debt, and which the defendant had agreed to accept, but, in utter disregard of his agreement in this respect, he sued out the attachment, and levied upon and carried away all the household goods of appellee save only a hot stove, which could not, at the time, be removed. Of the goods taken were a sewing machine, marble top stand, center table, pictures, chairs, watch, baby-cradle, bible, and even the clothing of a half-dressed babe was not spared, but, in reply to an appeal on behalf of the mother, the defendant replied, "he would listen to no more talk."

The jury, from the evidence, no doubt concluded, and rightfully too, that the conduct of the defendant was actuated by malice, rather than an honest purpose to collect a *bona fide* debt. Under such circumstances, while juries have the power to award vindictive damages, in actions of this character, we perceive no substantial ground upon which we can disturb the finding.

The judgment will be affirmed.

Judgment affirmed.

JOLIET IRON AND STEEL COMPANY

v.

SCIOTO FIRE BRICK COMPANY.

1. PLEDGE *of commercial paper, or bonds payable upon condition—rights and duty of pledgee.* The pledge of commercial paper, as collateral security for the payment of a debt, does not, in the absence of a special power for that

purpose, authorize the pledgee to sell the security so pledged, upon default of payment, either at public or private sale.

2. The pledgee of commercial paper, bonds, mortgages and promissory notes held as collateral security for the payment of a debt, is bound to hold and collect the same as they become due, and apply the net proceeds to the payment of the debt so secured.

3. The same rule will apply in the case of bonds payable on condition, which are pledged as collateral security.

Appeal from the Superior Court of Cook county; the Hon. Joseph E. Gary, Judge, presiding.

This was an action of assumpsit, upon a promissory note for $3953. The defendant set up, in its plea, that the plaintiff, after the commencement of the suit, had sold a number of railroad bonds belonging to the defendant, and by it placed in the hands of the plaintiff, as collateral security to secure the payment of the note sued on, which bonds were of great value, to-wit: of the value of all the damages sustained by the plaintiff by reason of the non-payment of the note sued on. To this plea the plaintiff replied that it had given public notice, by advertisement in a public newspaper, of the fact that it would sell the bonds referred to in the plea, at public auction; and that, in pursuance of such notice, it did sell said bonds at public auction to the highest bidder, and that the highest and best bid made for said bonds at such sale was $1800, and that the bonds were sold for that sum, which is the same sale in said plea mentioned, etc. To this replication defendant interposed a demurrer, which was overruled by the court and judgment rendered for the plaintiff, and the defendant appealed to this court.

Mr. Fredrick Ulman, for the appellant.

Messrs. Sawin, Jones & Hunting, for the appellee.

Mr. Justice Dickey delivered the opinion of the Court:

The pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special

power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged, upon default of payment, either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured. A person holding property or securities in pledge, occupies the relation of trustee for the owner, and as such, in the absence of special power to do otherwise, is bound to proceed as a prudent owner would with his own. From the very nature of the case, *property* can only be applied as security through the process of sale. Not so with bonds, mortgages or promissory notes. *Wheeler* v. *Newbould*, 16 N. Y. 392.

It is insisted, however, that the bonds mentioned in the plea are not shown to have been commercial paper. It is not perceived that this could in any way alter the case. All the reasoning in support of the doctrine laid down as to commercial paper applies with the same, if not with more, force to bonds payable upon condition. Put up to sale, no bidder can, by mere inspection of the paper, form any just judgment as to the value of such paper.

The statements of the plea, in some respects, are not so full as they should be, but such defects are fully supplied by the statements in the replication.

Upon the facts as stated and confessed in the record, the judgment, upon the demurrer, should have been for appellant.

The judgment must be reversed, and the cause remanded for further proceedings in accordance with the views in this opinion.

Judgment reversed.

E. H. WALDRON *et al.*

v.

AMA MARCIER.

1. CONTRACT—*to locate a depot within a given time, does not require the erection of a depot building within the time named.* A contract by a railroad

company to locate a depot at a certain place within six months from the date of the contract, is complied with by staking off the ground, building a platform and actually using the premises for depot purposes, within the time limited, although the depot building is not erected within the time named.

2. MEASURE OF DAMAGES — *in trespass.* An instruction, in an action of trespass, where there is no evidence of wantonness or willfulness, should not direct the jury, if they find for the plaintiff, to allow him such damages as they believe, from the evidence, he is entitled to. Such damages as they believe, from the evidence, he has sustained, is all they should be directed to allow.

3. INSTRUCTION *should be based on the evidence.* The jury should not be instructed, in an action of trespass, that they may give punitive damages if they believe, from the evidence, the trespass was committed wantonly or willfully, where there are no circumstances of wantonness or willfulness to warrant such an instruction.

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

Messrs. HOLLAND & AYERS, for the appellants.

Messrs. BLADES, KAY & EVANS, for the appellee.

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

This was an action of trespass, for breaking and entering a close of the plaintiff and taking down a building. The plaintiff recovered, and the defendants appealed.

It appears, from the evidence, that the close in question is a part of a certain tract of twenty-five acres of land; that, on the 13th of August, 1871, Charles Arcenaux, the then owner of the twenty-five acres, executed a warranty deed to one Adams Earl, conveying to him, in trust for himself and three other named persons, an undivided half of the twenty-five acres. At the same time, Arcenaux and Earl executed an agreement, in writing, whereby it was declared that said conveyance was made upon the express condition that the Cincinnati, Lafayette and Chicago Railroad Company (of which Earl was president) should construct the main line of their railroad across the said

tract of twenty-five acres and locate their passenger depot thereon, and that the road should be so constructed and the depot located within six months from that date; and it was thereby agreed between the parties that, so soon as the line of the road should be permanently located over the tract, the tract of land should be platted and laid off into town lots, and they should be equitably divided between the respective parties to the deed, by receiving and taking each alternate lot, or in such other manner as might be mutually agreed upon, and that the deed should be held by a third person named, to await the performance of the conditions. The road was constructed over the land named, in the latter part of September following, and the depot had been located upon it some time previous. The twenty-five acres was platted and laid off into town lots, the certificate of acknowledgment of the plat by Arcenaux and Earl, bearing date October 29, 1872. On the 5th day of April, 1873, Arcenaux executed to Earl a quitclaim deed of a large number of the lots, upon one of which, we understand, the building in question stood.

On the 1st day of October, 1872, Arcenaux executed to the plaintiff in the suit, Ama Marcier, a warranty deed of a portion of the twenty-five acres, describing the same by metes and bounds, upon which her husband, Moses Marcier, placed the building at some time before, as we gather, there having been a bargain for the lot some six months before the deed was executed. The building appears to have been twelve by fourteen feet, one story high, the eaves nine feet from the ground, boarded up and down—not weather-boarded. It was some nine or ten feet from the depot, and kept as a saloon, the family living in it for a time. On the 6th of April, 1874, the whole family left the house, locked it up and moved five miles away into the country on an improved farm of the plaintiff. Some few household articles of insignificant value were left in the building. It appears to have been the intention to return and occupy the building at a future time.

While the building was in this unoccupied condition, in the absence of the plaintiff, the trespass complained of was com-

mitted, by going upon the premises about mid-day, and first taking the ends of the building off, then pushing the sides down and carrying the same across the road. The building was taken down carefully, doing no unnecessary damage to the property. The few household articles were taken into the depot building, and kept for plaintiff.

It clearly appears, from the evidence, that the plaintiff took her deed from Arcenaux, and made whatever prior contract for the premises she might have done, with full knowledge of the prior rights of Earl and others. The only pretense of any non-compliance with the conditions of the deed to and contract with Earl, so as to justify the making of the deed, which was made to the plaintiff, is that the depot was not located upon the twenty-five acres within the six months, because the depot building was not erected within that time. It is true the depot building was not erected within that time, but the depot had been located there, the ground staked out, a platform built, and the premises actually occupied and used for depot purposes, so far as might be, without having a depot building erected. The condition was not that a depot building should be erected within six months, but only that the depot should be located there within that time. The evidence shows sufficiently that it was so located within the time.

As the evidence was clear and undisputed upon this point, the fourth instruction should not have been given to the jury, upon one hypothesis, among others, that the depot was not located within six months—thus leaving it for the jury to find whether the erection of a depot building was essential to the condition of the location of the depot within the time specified; and the instruction was further erroneous in directing the jury, if they found for the plaintiff, to allow such damages as they believed, from the evidence, she was entitled to. It should have been such damages as she had sustained, and not have given to the jury the wide latitude of allowing her such damages as they might deem that she was entitled to.

The last instruction for the plaintiff should not have been given, that if the jury found for the plaintiff, and that the

trespasses were committed wantonly or willfully, they might give punitive damages. There were no circumstances of wantonness or willfulness to warrant the giving of such an instruction. The plaintiff had no right of possession, but only actual possession of the premises, and was entitled, under the circumstances, to recover for no more than the actual damage to the building. See *Ill. and St. Louis Railroad and Coal Co.* v. *Cobb*, *ante*, p. 183.

The evidence showed the value of the building to be about $100; that the damage done to it was not to exceed from $25 to $30; that it would cost that to put it up as good as it was before. The verdict and judgment were for $283.33.

The judgment is reversed and the cause remanded.

Judgment reversed.

CARTER SMITH

v.

FRANCIS A. STEVENS *et al.*

1. EVIDENCE—*record of a court competent against a party, though no decree pass against him.* In an action of ejectment, it is competent for the plaintiff to read in evidence the proceedings in a partition suit in which the defendant was a party, although no decree passed against him, wherein it was ascertained the legal title was in one person, and the equitable title in the complainant, and the owner of the legal title required to convey to the owner of the equitable title.

2. REMEDIAL STATUTES—*must be liberally construed.* The act in force April 2, 1872, entitled "An act to remendy the evils consequent upon the destruction of any public records, by fire or otherwise," is emphatically a remedial act, and must receive a liberal construction, and be made to apply to all cases which, by a fair construction of its terms, it can be made to reach.

3. POSSESSION—*must be adverse, and for twenty years, to defeat true owner.* Possession of land, under claim of title, can not defeat the real owner of the title, unless such possession is adverse, and has so continued for twenty years, and a shorter possession can not prevail against a title the record of which has been destroyed by fire.

4. JUDICIAL NOTICE—*of what this court will take.* The Supreme Court will take judicial notice of the fact that the United States were the proprietors of land granted by them to the State of Illinois, and that such grant was made, and of the location of such land.

5. EVIDENCE—*to identify a lot described on a plat.* Where the title to a tract of land out of which a lot in controversy is carved, is established, the identity of the premises may be shown by other proof, without the introduction of a map or plat of the survey of which the lot forms a part.

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

Mr. ROBERT F. WINSLOW, for the appellant.

Messrs. GOOKINS & ROBERTS, for the appellees.

MR. JUSTICE BREESE delivered the opinion of the Court:

This was ejectment, in the Cook circuit court, by Francis A. and Frank L. Stevens, plaintiffs, and against Carter Smith and Emanuel Points, defendants, to recover the possession of lot 13, in block 2, in Duncan's addition to Chicago. There was a plea of not guilty, and a submission to the court for trial without a jury, when, it appearing the lot was held in severalty by the defendants, Points claiming the north half and Smith the south half, plaintiffs elected to proceed against Smith alone for the south half of the lot, and dismissed their suit as against Points. There was a finding and judgment for the plaintiffs, to reverse which the defendant Smith appeals and assigns various errors.

The first point made by appellant is, in permitting the proceedings in the partition case of *Fish* v. *Carter Smith et al.* to be read in evidence against defendants' objection, that objection being that no bill of complaint, as a foundation for the decree, was shown, and no title shown in any of the parties to the proceedings.

We do not see any force in this objection. The purpose was not, by these proceedings, to show an adjudication of title, but to show the defendant was a party to proceedings wherein it was ascertained the legal title was in one person, and the

equitable title in the complainant, and decreeing the legal title be conveyed to the complainant. It was a link, merely, in the plaintiff's chain of title, and appellant being a party to the suit, it is clear the record was competent, though no decree may have passed against him. It was competent evidence, being a record of a court.

The point most earnestly pressed by appellant is, admitting in evidence the abstract of title offered by plaintiffs. We do not think the objections taken to this abstract are well founded. The abstract was approved under the act of the General Assembly in force April 2, 1872, bearing this title: "An act to remedy the evils consequent upon the destruction of any public records, by fire or otherwise."

The condition of property owners in Chicago after the great fire of October, 1871, was appalling, demanding legislative interference. A great evil had befallen them, which this act was designed to remedy. It is emphatically a remedial act, and, in accordance with a well established canon, it must receive a liberal construction, and made to apply to all cases which, by a fair construction of its terms, it can be made to reach.

It is claimed by appellant his case comes within the exception of section 14 of the act in question, and the abstract, therefore, not admissible against him, he being in possession, claiming title otherwise than under a sale for taxes or special assessments.

If appellant's views were correct, the statute would, in very many cases, be ineffectual for relief and remedy. Possession of a tract of land, claiming title, can not defeat the real owner of the title, unless such possession is adverse, and has so continued for twenty years. It can not be claimed that possession short of that period can prevail against a title the record of which has been destroyed by fire. Independent of the statute, the plaintiffs, on general principles, would have a right to rely on secondary evidence to establish title, and nothing short of a legal defense could prevail against it.

Other objections are made to the abstract, as, that the lot

in question is not named in the caption of the same. This abstract, it is admitted, was made in the ordinary course of business, and prior to the loss of the deeds, so that there can be no imputation of fraudulent design or unfairness in preparing this abstract. Such a document would, to be complete, show the origin of the title to the tract of land out of which the lots contested were carved, their identity being to be proved by any competent evidence. It was, therefore, necessary to commence at the source of title, which, in this case, was the State of Illinois. We take judicial notice of the fact that the United States were the proprietors of section 17, township 39 north, range 14 east, and that they granted the same to this State. We further take judicial notice of the fact that the section so described is in the county of Cook, in this State, and can, by no possibility, be anywhere else.

The objection that no plat of Duncan's addition was put in evidence, amounts to nothing, as the identity of the premises was sufficiently established by competent testimony, and by the admission of the defendant.

There is no foundation for the objection made by appellant that the finding and judgment do not specify the estate. The finding is, that the plaintiff is entitled to recover the possession in fee simple.

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

Judgment affirmed.

W. W. CRAWFORD *et al.*

v.

THE PEOPLE *ex rel.* Julian S. Rumsey.

1. ASSESSMENT—*for public improvements, must not exceed benefits.* Property can only be assessed for public improvements on the principle of benefits received by the property from the construction of the work, and the assessment should never exceed the benefits conferred; and it is essential that it should appear, from the proceedings themselves, that such was the principle upon which the assessment was made.

2. SAME—*special benefits—by whom to be ascertained and assessed.* The charter of the town of Cicero, in the county of Cook, granted in 1867, required that the amount to be assessed for public improvements, as special benefits upon property, should be determined by the board of trustees, and provided the manner of appointment of commissioners to apportion the special benefits and make the assessment.

3. It was clearly within the power of the legislature to say who should ascertain and determine the extent of the special benefits, and who should assess them.

4. Where an ordinance of such town, appointing commissioners to assess a certain sum for a public improvement upon the property to be thereby benefited, recites that the trustees of the town have, upon proper examination made by them, ascertained and determined that there was real estate in the town benefited to the amount required to be assessed, this is a sufficient finding of the fact, and it is not necessary that the commissioners should ascertain the fact again in making the assessment.

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

Messrs. MCDAID & WILSON, for the appellants.

Mr. F. A. SMITH, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The board of trustees of the town of Cicero, in Cook county, adopted an ordinance for graveling a portion of Madison street in that town. The ordinance provided that $400 of the cost be paid by the town, and $39,600 be levied on the property of individuals benefited by the improvement; and the ordinance recites that the "board of trustees having, on proper examination made by the board, ascertained and determined that there is real estate within said town which will be benefited by the said improvement, to the amount hereby ordered to be specially assessed," the board of trustees appointed commissioners to make the assessment.

The oath signed and sworn to by the commissioners is this: "We, the undersigned, commissioners, etc., do solemnly swear that we will assess the said amount of $39,600 upon the real estate deemed benefited by said improvement, in propor-

tion to the special benefits resulting thereto, as nearly as may be, in conformity with said ordinance, and that we will faithfully and impartially make such assessment according to the best of our ability."

The commissioners reported to the trustees that they had made the assessment upon the real estate deemed specially benefited by the improvement, in proportion, as nearly as may be, to the special benefit to each separate lot, or parcel thereof. They also say, in the conclusion of their report: "And do hereby assess the amount to each separate lot, or parcel of real estate, in the foregoing assessment roll mentioned, in their approximate return, as the special benefits resulting thereto from said completed improvement." They also report that they gave notice, by posting the same in three of the most public places in the town, of the times and places of making the assessment, to all persons to appear, if they chose, and that they were present at the time and place named. There was notice given of the time fixed to consider whether the report would be affirmed.

It is urged that this proceeding is insufficient, in the fact that the trustees directed that $39,600 be assessed upon real estate deemed benefited by the improvement, in proportion, as nearly as may be, to the special benefits resulting to each separate lot, piece or parcel of such real estate, without regard to the extent or amount of the benefits received, and that the return is in accordance with the oath of the commissioners; that the ordinance and their oath did not require them to ascertain the amount that each piece or parcel of ground would be benefited, and assess no more than that amount of such benefit, or less, if such was its proportion; but that they required them to apportion the whole amount on property deemed benefited, at a proportionate rate, although the amount imposed on each tract might be more than the benefit conferred.

If these propositions are true, then the assessment is void, and can not be collected. It is the well established doctrine of this court that property can only be assessed for pub-

lic improvements, on the principle of benefits received by the property from the construction of the work, and that the assessment should never exceed the benefits conferred; and it is essential that it shall appear, from the proceedings themselves, that such was the principle upon which the assessment was made.

In this case the trustees proceeded to determine that the property of the town was benefited to the amount of $39,600, and the commissioners were required to assess that sum on the property benefited, in proportion to the benefits received. It would seem that the determination of whether the property in the town was benefited to that amount, was not in anywise left to the determination of the commissioners. That had been determined for them by the trustees, and the commissioners only had to assess it on the property benefited, in proportion to the benefit.

The question is, whether the statement in the ordinance, that the board of trustees having, upon proper examination made by them, ascertained and determined that there was real estate in the town specially benefited to the amount required to be assessed, was such a finding as the law requires. There can be no doubt that, in some mode, it shall be ascertained that the special benefits will be conferred equal to or greater than the amount to be levied, and that they must be imposed on the property proportionately (*Greeley* v. *The People*, 60 Ill. 19); that there must be an examination by the proper persons, and the amount found, is held in that case. The board of trustees had no power to arbitrarily order a certain amount to be levied and assessed on property, and that it should be apportioned according to the special benefits received, although those benefits might only amount to a fractional part of the sum to be assessed. It was also held in that case that, as the town had taken no measures to ascertain that the special benefits were equal to or greater than the amount required to be levied, the assessment violated the principle that such burthens should not be greater than the ascertained special benefits, and their enforcement was defeated.

In the case of *Bedard* v. *Hall*, 44 Ill. 91, an ordinance was held good which provided that commissioners should examine the property and estimate the special benefits, and assess the same on the property, although not to a greater extent than the cost of the improvement; and appellants claim this was the only proper mode of ascertaining and assessing the special benefits. That case does not so hold, but holds that to be a proper mode, but does not determine that to be the only legal mode.

The case of *Greeley* v. *The People*, *supra*, is similar to this, except here the board of trustees had found the amount of special benefits, and required the commissioners to apportion them amongst the property owners receiving the benefit. The charter of the town (Private Laws 1867, vol. 3, p. 372) confers the power to make such improvements, by assessments on real estate benefited by the improvement, in proportion, as nearly as may be, to the benefits resulting thereto, and the amount to be assessed for such improvement or purpose is required to be determined by the board of trustees. It provides the manner of appointing the commissioners to apportion the special benefits and make the assessment; and we are clearly of opinion this ordinance and the proceedings under it conform to the charter, and to the cases above referred to, prescribing the requirements in such proceedings.

This is in conformity to the power delegated by the General Assembly, and that body had the undoubted power to say who should ascertain and determine the extent of the special benefits, and who should assess them; and the power having been pursued, the proceeding must be held to be valid and binding. Had the charter been silent as to who should ascertain the amount of special benefits conferred, we are not prepared, unless they were prohibited from doing so, to hold that the board of trustees could not have performed the duty of fixing, on a full examination, the amount of benefits specially conferred.

Perceiving no error in this record, the judgment of the court below must be affirmed.

Judgment affirmed.

Syllabus.

TOWN OF MIDDLEPORT

v.

ÆTNA LIFE INSURANCE COMPANY *et al.*

1. MUNICIPAL BONDS—*void if issued without authority.* Whoever deals in municipal bonds must be presumed to know what powers the corporation have, under the enabling laws of the State, to issue the securities in which they are making investments. Such authority, if any exists, is to be found in public laws equally accessible to all, and if bonds are issued without any authority in the officer issuing them, they are void, even in the hands of purchasers who have paid full value for them.

2. Where a law authorizes the donation of money by a municipal corporation, to aid in the construction of a railroad, and provides for levying a tax to raise the amount to be donated, the officers of the corporation can not adopt any other mode of paying the same, and bonds issued by them for the purpose of paying such indebtedness are void.

3. MUNICIPAL INDEBTEDNESS—*by whom to be created.* Under an act of the legislature authorizing the "authorities of any township" to levy and collect a tax with which to meet and liquidate aids voted to a railroad, or to borrow money and issue bonds therefor, for the purpose of paying the amount so voted, the supervisor and clerk of a township have no power to borrow money and issue bonds therefor; that can only be done by a vote of the people of the township whose property is to be affected by the burden imposed.

4. MUNICIPAL SUBSCRIPTIONS—*voted prior to constitution of* 1870. Donations and subscriptions in aid of railroads, voted by municipal corporations under then existing laws prior to the adoption of the constitution of 1870, are within the saving clause of that article which inhibits all municipal subscriptions or donations to railroad or other private corporations, and may still be paid.

5. But the obligations assumed by municipal corporations under then existing laws, prior to the adoption of the constitution of 1870, can not, since its adoption, be enlarged or materially changed, either by the action of the people of the municipality or its corporate authorities.

6. PRIVATE LAWS—*title must express object, under constitution of* 1848. All provisions of a local or private law, passed whilst the constitution of 1848 was in force, which are not germane to the subject expressed in the title of the act, are void.

7. CONSTRUCTION OF STATUTE—*that holds the law constitutional will be adopted.* A construction of a statute which imputes to the General Assembly a purpose to pass a law directly in opposition to the constitution, will

not be adopted by the courts where a different and more reasonable construction will hold the law valid.

8. BURDEN OF PROOF—*as to validity of municipal bonds.* The burden rests upon the party alleging the validity of municipal bonds, issued since the adoption of the constitution of 1870, to show affirmatively they were authorized by a vote of the municipality under then existing laws, had prior to the adoption of the constitution.

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

Messrs. DOYLE & KING, for the appellant.

Messrs. WILSON & PERRY, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The act of March 7, 1867, authorized all incorporated towns and cities, and towns acting under township organization, within limited boundaries, to appropriate such sums of money as they might deem proper to the Chicago, Danville and Vincennes Railroad Company, to aid in the construction of its road, to be paid as soon as the track should be located and constructed through such city, town or township, subject, however, to the condition that the proposition to make such appropriation should first be submitted to a vote of the legal voters of such municipality, at a regular or special election, upon notice being given; and if the majority of the votes cast should be in favor of the appropriation, then it should be made, otherwise not. Provision was made that the authorities of such corporations might levy and collect a tax, as might be necessary and proper for the prompt payment of such appropriations. No authority was given by that act to issue bonds or borrow money with which to pay such donations.

An election was held on the 8th day of June, 1867, in the town of Middleport, under the provisions of that act, at which a majority of the votes cast were in favor of the proposition submitted, that the town would appropriate, as a donation to the Chicago, Danville and Vincennes Railroad Company, the sum of $15,000. No work was done by the railroad company

towards constructing its road until the spring of 1871. It was then prosecuted with such dispatch, the road was completed through the town of Middleport by about the middle of July, next thereafter.

On the 10th of February, 1871, at a meeting of a portion of the officers of the town, at which were present the supervisor, the clerk and one justice of the peace, a preamble and resolution were adopted, to the effect that as it appeared the township was unable to pay the amount voted as a donation to the railroad company, it was resolved to issue bonds in the sum of $15,000, together with a sufficient amount to cover the discount necessary to enable them to negotiate the bonds, that is to say $1500, in addition to the principal sum donated. Bonds were accordingly prepared for the sums indicated, bearing date the 13th day of February, 1871, signed by the supervisor and town clerk, and delivered to a trustee resident in New York, in escrow, to be delivered to the railroad company when certain conditions should be performed, to prevent, as is alleged, the enjoining the issuing of such bonds.

These bonds were afterwards, at the request of the company, surrendered up and destroyed, and other bonds issued in lieu thereof, bearing date March 24, 1871, each for the sum of $1000, numbered from one to fifteen, both numbers inclusive, signed by the supervisor and town clerk, payable at different periods, with interest at ten per cent per annum, payable semi-annually, as shown by coupons attached. At the same time the supervisor paid the agent of the company $1500 in money, instead of issuing an extra bond, as was proposed by what purports to have been an order of the board of auditors of the town.

All these bonds recite upon their face the several acts of the legislature under which they were issued, and that they were issued in accordance with a vote of the electors of the township, at an election on the 8th day of June, 1867. The present holders of the bonds are chargeable, therefore, with notice of the fact whether there was any authority of law for issuing such bonds. Under the decisions of this court, if there was a

total want of authority in the municipal officers to issue such bonds, they are void, no matter if they have come to the hands of the present holders for full value paid. Whoever deals in municipal bonds must be presumed to know what powers such corporations have, under the enabling laws of the State, to issue the securities in which they are making investments. Such authority, where any exists, is to be found in public laws, and is equally accessible to all.

This brings us to the important inquiry, what authority had the officers assuming to act on behalf of the town of Middleport, to issue the bonds which are the subject of this litigation? Clearly they derived no authority whatever from the act of March, 1867, under which the election as to the propriety of making the appropriation to the railroad company was held. That act did not purport to give either the township or its officers power to borrow money or to issue bonds in payment of any appropriations that might be voted by the legal voters of the town to the railroad company. Such appropriations or donations were to be paid by a tax, which it was made the duty of the corporate authorities to levy and collect. Where one mode of payment of municipal indebtedness is fixed by statute, by implication it excludes all others. The electors gave their consent to the statutory mode of paying the appropriation voted, viz: by taxation, and none other, and the corporate authorities of the town were not at liberty to adopt any other mode.

The act of February 26, 1869, to which reference is made as conferring power upon the officers of the town to issue bonds in payment of the appropriation or donation voted under the act of March, 1867, is "An act to legalize certain aids heretofore voted and granted to aid in the construction" of the proposed railroad. That is all it purports to be by its title. The constitution of 1848, under which these acts were passed, contained a restriction that "no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title." This is a private or local law, and it can hardly be maintained

the issuing of bonds in liquidation of appropriations voted under a prior act, is germane to the subject expressed in the title of the bill, viz: "to legalize certain aids heretofore voted and granted." No such object is expressed in the title, and hence it follows, all provisions of the bill not so expressed are void. *Lockport* v. *Gaylord*, 61 Ill. 276.

Reference is also made to the act of March 24, 1869, as conferring additional powers upon the town officers to issue the bonds in question. That is "An act to enable towns, townships, cities or counties" along the line of the proposed railroad, to contribute towards its construction. It will be observed the provisions of every section of this act, except the eighth, are all prospective in their operation. If this is not the true construction, then the great portion of the act is plainly unconstitutional, as being inhibited by that clause of the constitution of 1848 which forbids the passage of any private or local law embracing more than the one subject expressed in the title. Should the fourth section be construed to confer upon the officers of townships that had previously voted aids to this railroad company, power to borrow money and issue interest-bearing bonds, running for definite periods, with which to pay such donations, then it does not appear any such purpose is expressed in the title of the act, and it would be void, as being within the inhibition of the constitution. But construing the 4th section as we think it ought to be, simply as conferring power upon the corporate authorities of the town to borrow money and issue bonds to pay such donations as should thereafter be voted under that act to aid in the construction of the railroad, then its provisions would be germane to the subject expressed in the title of the bill, and it would be a valid law. Any broader construction would impute to the General Assembly a purpose to pass a law directly in opposition to the constitution. That we ought not to do, when a different and more reasonable construction will hold it a valid law.

But, waiving all constitutional objections to both subsequent statutes, and treating their provisions as valid enactments, having a retroactive operation, designed to aid in completing

donations previously voted under then existing laws, still, we do not think they, or either of them, when rightly understood, conferred any authority whatever upon the township officers to issue the bonds in litigation. The power conferred by the act of March 24, 1869, is to enable the proper town authorities to levy and collect a certain per cent, by taxation, with which to meet and liquidate aids voted, or borrow money and issue bonds therefor, for the purpose of paying such donations. What is meant by the "authorities of any township," is not entirely clear, but we understand it is that body of officers in a township that represent the township as to its financial and other matters, as a common council represents a city, or as a board of trustees represents an incorporated town. The supervisor and town clerk of a township constitute no such board, and no warrant can be found anywhere in this act, or elsewhere, that would justify them in borrowing money, for any purpose, and issuing bonds therefor. That, we understand, can only be done by a vote of the people of the township whose property would be affected by the burden imposed. Constructing railroads, or aiding such construction by donations, are not among the general powers of municipal corporations, and it has never been understood the General Assembly had any power to impose such burdens, or authorize others to do so, upon the citizens of any municipality, without their consent. Our opinion is, if these acts referred to were intended by the framers to have any such effect, or to impose any such burdens, without the consent of the citizens whose property would be affected, then they are in violation of the constitution. *Marshall* v. *Silliman*, 61 Ill. 218.

The electors of the township, under the act of March 7, 1867, had voted a sum of money as an appropriation or donation to the railroad company, to be paid by taxation, and in no other way. They never gave their consent to any other mode of payment, and if the object of the later statute was to compel the township to issue interest-bearing bonds in liquidation of such aids, it was beyond legislative powers. Payment of interest for a series of years, upon donations voted, or discount

to make the donation equal to ready money in the market, was a burden the people of the township had never assumed, and no power existed anywhere to impose it upon them without their consent.

Since the adoption of our present constitution, it is plain any donation attempted to be made by any municipality in aid of a railroad or private corporation is forbidden absolutely. All that is contended is, that donations, as well as subscriptions voted under existing laws, prior to the adoption of the constitution, are within the saving clause of that article of the constitution which inhibits all municipal subscriptions or donations to railroad or other private corporations, and may still be paid. This is the extent of the decision in *The Chicago and Iowa Railroad Co.* v. *Pinckney et al.* 74 Ill. 277, so confidently cited as controlling this case. The case at bar, in our opinion, does not fall within the letter or spirit of that decision, and we see no reason for extending the principle declared, so as to make it embrace other cases not analogous.

It is apprehended the obligations assumed under existing laws can not, since the adoption of the constitution, be enlarged or materially changed, either by the action of the people of the township or its corporate authorities. All power is taken away, and the utmost that can be done is to make and complete the subscription or donation previously voted under then existing laws, upon the same terms and conditions as voted. Subscriptions or donations upon other terms would obviously require new consent on the part of the people of the municipality, which can not be had for want of power. No donation of interest-bearing bonds, running through a series of years as these bonds do, was ever voted by the people of the township under existing laws, prior to the adoption of the constitution, and hence they are absolutely void, even in the hands of a holder who may have paid value for them. The burden rests upon the party alleging the validity of bonds issued since the adoption of the constitution, to show affirmatively they were authorized by a vote of the municipality under existing laws, prior to the adoption of the constitution. *Jackson Co.* v.

Brush et al. 77 Ill. 59. That has not been done, and the admitted facts show it can not be proven.

What action the board of auditors may have taken since the adoption of the present constitution, in the matter of issuing these bonds, is of no consequence, as they had no authority to act in the premises. As we have seen, no such aid as interest-bearing bonds was ever voted to the railroad company. That which was voted was a definite sum of money, payable by taxation, without interest, and was of much less value. Issuing bonds bearing interest through a series of years was an additional burden, which neither the people nor the corporate authorities of the town could impose. The constitution, as we have seen, forbids the exercise of such powers.

The case of *The Chicago, Danville and Vincennes Railroad Co.* v. *Smith*, 62 Ill. 268, involved a donation to the railroad company under this same law, and is cited as controlling this decision. The point most elaborated in the opinion, is the constitutionality of laws permitting municipal subscriptions and donations to railroad corporations. Such laws were declared to be valid. The questions made in this case do not seem to have been made in that case—at least no discussion was had upon them in the opinion of the court. So far as anything is decided in that case, we are at liberty to decide the case before us as on first impression.

Our conclusion is, the bonds in question having been issued by the supervisor and town clerk on behalf of the township, without authority of law, are void, in whosesoever hands they may be.

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

Decree reversed.

Syllabus.

OTIS J. DIMICK

v.

ELIZABETH DOWNS.

1. EVIDENCE—*of experts, not necessary to prove drunkenness.* Whether a person is nervous and excited, or calm, or whether drunk or sober, are facts patent to the observation of all, and their comprehension requires no particular scientific knowledge, and may be testified to by any one who knows the fact.

2. SAME—*rebutting, may be admitted in advance, in the discretion of the court.* Where the materiality of evidence, though properly rebutting, is foreshadowed by the line of defense, it is within the discretion of the court to admit it in advance of the evidence which it is to rebut.

3. SAME—*of want of chastity of plaintiff not competent in suit for assault and battery.* It is not competent for the defendant, in an action for assault and battery, to prove that the plaintiff, who is a woman, has been guilty of adultery, either for the purpose of mitigating his act or for the purpose of impeaching the credibility of the plaintiff as a witness.

4. IMPEACHING WITNESS—*of the manner thereof.* It is only the general reputation of a witness that can be inquired into for the purpose of impeaching his testimony, and the inquiry should be confined to his general character for truth and veracity, in all cases except in prosecutions for rape, assault with intent to commit rape and indecent assault, where the character of the prosecutrix for chastity may be inquired into.

5. MEASURE OF DAMAGES *for assault and battery—evidence in respect thereto.* In trespass for an assault and battery, evidence in regard to the plaintiff's nervousness and excitement soon after receiving the beating, will tend, in some degree, though it may be slight, to show the extent of the injury he was suffering under, and thus would be competent in ascertaining the amount of damages to be assessed.

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

Messrs. KENWORTHY & BEARDSLEY, for the appellant.

Messrs. SWEENEY & JACKSON, and Messrs. OSBORN & CURTIS, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Plaintiff in the court below declared against the defendant in trespass, for assaulting, beating and wounding her. Defendant pleaded not guilty, and *son assault demesne*. By consent of the parties, the cause was submitted to the jury without instructions as to the law applicable to the case, and they returned a verdict finding the defendant guilty, and assessing plaintiff's damages at $800. Motion for new trial was made by the defendant and overruled by the court, to which defendant excepted, and the case is brought here by his appeal.

That defendant assaulted plaintiff, and seriously beat and injured her, is not controverted by the defendant. He claims, however, that what he did was in his necessary self-defense.

The evidence shows that defendant was the owner of certain grounds near the city of Rock Island, used for agricultural fairs. On the 21st and 22d days of October, A. D. 1874, the Rock Island County Agricultural Association, having previously obtained the grounds of the defendant for that purpose, held a fair there for the exhibition, etc., of horses. The plaintiff and her two daughters, both of whom had reached the age of womanhood, occupied a booth on the fair grounds during this fair, in which they furnished meals and sold drinks to customers. On the day after the conclusion of the fair, as the plaintiff and the elder of her daughters were walking through the gate leading from the grounds, a short distance in front of the wagon conveying away their goods, they encountered defendant. Words of an unfriendly character were exchanged between them, when, as the witnesses for the plaintiff testify, the defendant assaulted and beat her with a poker and a buggy whip, which resulted in breaking the metacarpal bone of the left hand, and bruising her considerably about the head, shoulders and side. They deny that plaintiff was in any way armed, or that she made any hostile demonstration toward the defendant. The witnesses for the defendant prove threats made by the plaintiff before she and her daughter left the booth; that, as they advanced toward the gate where the

defendant was, plaintiff had a rock in her hand, and her daughter was armed with a piece of pine board, split for kindling wood; that they were both violent, profane and obscene in their language, as they approached the defendant, and that they not only threatened the defendant with violence, but, in fact, violently assaulted him. It is impossible to reconcile the evidence of the witnesses for the respective parties, and, in point of numbers of witnesses, and apparent fairness and intelligence in their evidence, we are unable to say that there is a decided preponderance in favor of the defendant. It was the province of the jury to determine the question of fact thus presented, and we are unable to assign any reason conclusive to our minds why their finding should be disturbed.

Plaintiff's counsel, during the progress of the trial, introduced, as a witness, one Westerby, who testified that he visited plaintiff on the same day, and shortly after, she received the injury complained of. He was then asked whether she seemed nervous or excited, and whether she was under the influence of liquor; and, also, whether, if she had been under the influence of liquor, he would have noticed it. The court, over the defendant's objection, permitted the witness to answer the questions. This ruling was excepted to upon the ground that the witness was not an expert, and, also, upon the further ground that the evidence was immaterial. We think the exception was not well taken. Whether a person is nervous and excited, or calm, or whether drunk or sober, are facts patent to the observation of all, and their comprehension requires no peculiar scientific knowledge. The evidence in regard to whether plaintiff was drunk or sober was rendered material by the evidence of the defendant tending to show that she was drunk, with a view, probably, of weakening the effect of her evidence as to her conduct at and preceding the occurrence in which she was injured. Although this, strictly, should have been rebutting, yet, when its materiality was foreshadowed by the line of the defense, it was within the discretion of the court to admit it in advance of the evidence which it was to rebut. The evidence in regard to plaintiff's nervous-

ness and excitement tended, in some degree, though it may have been slight, to show the extent of the injury she was suffering under, and was thus competent in ascertaining the amount of damages to be assessed.

The evidence offered by the defendant, and rejected by the court, to prove that plaintiff and her daughters had, at various times and places, committed adultery, and that they had also been guilty of selling spirituous liquors in violation of law, was properly rejected. If these charges were true, they did not even tend to mitigate the conduct of the defendant in assaulting and beating the plaintiff. His act in so doing was not induced by reason of their guilt in these respects; nor did their guilt withdraw them from the protection of the law against physical violence. It is said in Waterman on Trespass, vol. 2, sec. 272, p. 244: "The fact that a man bears a bad character, or keeps company with persons of evil repute, furnishes no just provocation or palliation for doing violence to his person. He may forfeit the good opinion of his fellow men, and become an object of pity or contempt, by reason of his evil habits and associations, and want of moral worth; but there is no principle of law or ethics on which, for such a cause, immunity is to be granted to those who inflict injuries upon another, or full indemnity to be denied to a party for a violation of the sanctity of his person."

But counsel for plaintiff insist the evidence was admissible for the purpose of impeaching these persons as witnesses. This, also, is untenable. In *Frye* v. *Bank of Illinois*, 11 Ill. 373, this court said: "The authorities are uniform that it is only the general reputation of a witness that can be inquired into for the purpose of impeaching his testimony; and, although there is some conflict in the decisions as to whether the inquiry should be confined to the general character of the witness for truth and veracity, we think the better rule is, that it should be so confined." This doctrine has been frequently referred to with approval in subsequent cases, and in no instance questioned.

It is true, in prosecutions for rape, assault with intent to

commit rape, and indecent assault, the character of the prosecutrix for chastity may be inquired into; but evidence of sexual prostitution is not admissible to impeach a witness, or to affect his or her credit, in any other class of cases. *Bakerman* v. *Rose*, 18 Wendell, 148; *Spears* v. *Forest*, 15 Vermont, 435; *Com.* v. *Churchill*, 11 Metc. 538; *Evans* v. *Smith*, 6 Monroe, 363.

We are of opinion there is no error in the record, and the judgment must therefore be affirmed.

Judgment affirmed.

JOHN P. LEWIS *et al.*

v.

ALONZO ROSE.

1. MECHANIC'S LIEN—*decree presumed to be correct where the evidence is not preserved.* It devolves upon the party complaining of the judgment or decree in proceedings to enforce a mechanic's lien, to preserve the evidence, and if the evidence is not preserved, the findings of the court will be presumed to be correct.

2. SAME—*purchaser under a special execution against land acquires the title as against parties before the court.* Where a petition to enforce a mechanic's lien, states that the labor was performed for one who was the equitable owner of the lot, though the legal title was in another, and both are made defendants, and the court, after hearing evidence as to the title, renders judgment against the party for whom the labor was performed, and orders that, in default of payment thereof by him or the owner of the legal title, a special execution issue against the land, and that the same be sold, the purchaser at the sale under such execution will acquire the legal title.

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

Mr. M. Y. JOHNSON, for the appellants.

Messrs. D. & T. J. SHEEAN, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of ejectment, brought by the plaintiffs, to recover possession of lot 8, block 2, in the city of Dunleith. The court, before whom a trial was had by agreement, without a jury, found the issues in favor of the defendant, and the plaintiffs appealed. Both parties claim title from a common source, the plaintiffs under *mesne* conveyances from Simon E. Lewis, while the defendant claims title under a judgment in the circuit court of Jo Daviess county, in the case of Wm. G. Melville against Taylor S. Graham and Simeon E. Lewis, petition to enforce a mechanic's lien, rendered at the May term, 1858. If the judgment and sale were sufficient to divest the title of Lewis in the premises, then it is clear plaintiffs failed to establish title, and the judgment of the court was correct. It will therefore only be necessary to inquire into the legality of the proceedings in so far as they related to the title of Lewis in the premises, as the decision of that question will necessarily settle the controversy in the case.

In the petition to enforce a mechanic's lien, it was averred that Graham, for whom the building was erected, assumed to be the owner of the lot, and acted as such, and in fact was, in right and equity, owner thereof, but that the legal title to the lot was vested in Simeon E. Lewis. Graham and Lewis were made parties defendant to the petition, and required to answer the same. They appeared and filed separate answers.

Lewis, in his answer, set up that Graham had no title, either legal or equitable, to the lot, and that, in equity, he was the owner thereof.

Graham, in his answer, stated that he was neither legal nor equitable owner of the title, but merely had possession of the premises from Lewis.

To these answers replications were filed, and at the March term of the circuit court, 1858, a trial of the cause was had before a jury, which resulted in a verdict in favor of the plaintiff in the action, for $1120.25. The court did not, on the return of the verdict, render judgment thereon, but continued

the cause for the purpose of hearing proof as to the interest of the defendants in the premises, and at the following May term a final judgment was rendered, which was as follows:

"WILLIAM G. MELVILLE
v.
TAYLOR S. GRAHAM and SIMEON E. LEWIS. } *Petition for mechanic's lien.*

This cause having been tried at the last term of this court by a jury, who found a verdict for the plaintiff, against the said defendant Graham, for the sum of $1120.25, and the said cause having been continued to this term, and the court having heard further testimony as to the interest of said parties in said lot in said petition described, it is ordered by the court that judgment be entered upon the verdict of the jury herein, and that said plaintiff have and recover of and from the said defendant Taylor S. Graham the said sum of $1120.25 so as aforesaid assessed by the jury, together with his costs in that behalf expended. It is further ordered by the court that, in case said defendant Graham or Lewis fails to pay the said judgment and costs within thirty days from this date, a special writ of execution shall issue against the lot of land described in the said petition, to-wit: lot eight (8) in block number two (2) in the town of Dunleith, in the county of Jo Daviess, in the State of Illinois, and that the said lot and house thereon be sold by the sheriff, and that the sheriff have the moneys received from said sale in this court at the next term thereof, to await the further order of this court as to the distribution thereof, and that this cause be continued to the next term of this court."

Upon this judgment a special execution was issued directing the sheriff to sell the lot named in the judgment, and a sale of the lot was made, reported to the court, and confirmed. But it is said the judgment was against Graham, and the sale could pass no title except what he had, and as the court failed to find Graham was possessed of the title, the sale did not transfer the title of the premises to the purchaser. It is true the judgment was against Graham, and could be against none other, as he alone incurred the indebtedness, but Lewis was

party to the proceeding, and whatever interest he had in the premises might, upon a proper showing, be subjected to the lien of the mechanic, and pass by the sale. The lien provided for by the statute was against the land upon which the labor was expended, and the materials furnished in the erection of the building.

As was held in *Steigleman* v. *McBride*, 17 Ill. 300, the lien created by the law is not against the specific thing furnished, nor necessarily against the interest alone, in the land of the party for whom they are furnished, but against the land, and should be satisfied out of the same in any manner consistent with the statute and the principles of equity.

What evidence the court heard which produced conviction upon the mind of the court that the title, whatever it was, resting in Lewis, was held subordinate to the lien of the mechanic, we have no means of knowing. The judgment does not recite that evidence, nor was it essential that it should, as has often been held by this court in cases of this character. *Kelly* v. *Chapman*, 13 Ill. 530; *Ross* v. *Derr*, 18 Ill. 245; *Kidder* v. *Aholtz*, 36 Ill. 478.

In proceedings under the Lien Law, it devolves upon the party complaining of the judgment or decree in the court below to preserve the evidence, and, as was said in the last case cited, the evidence not being preserved in the record, we must presume its findings to be correct. It is, however, manifest, from the language of the judgment, that the court heard evidence as to the title, and not only intended, but actually did order the sale of the entire interest of each of the defendants in the lien proceedings. It declares that, if defendant Graham or Lewis fails to pay the judgment and costs within a specified time, then the lot shall be sold. This language leaves no ground for the position that the interest of Graham alone was to be sold. It directs a sale of the lot, and is conclusive upon Lewis and those claiming under him. If Lewis was not satisfied with the decree, we are aware of no manner in which he could avoid its effect upon him, except by appeal or writ of error. It is, however, contended that importance should

be given to the return of the sheriff, that he sold the interest of Graham in the lot. The return of the sheriff can not overcome the fact that the judgment of the court directed the lot to be sold, and the lot was actually sold. But conceding that the sheriff sold only the interest of Graham in the premises, it by no means follows that the title to the property was left in Lewis.

As has been said, the proof upon which the court ordered the lot sold is not before us, and we will presume it was sufficient to fully justify the judgment. It may be that the court found, from the evidence, that Lewis had no title in the premises, and, as is alleged in the petition, that Graham was in fact the owner thereof. If the court so found, from the evidence, then a sale of Graham's interest would be sufficient to pass the title to the property.

The facts in this case do not justify us to indulge in nice distinctions, for the purpose of defeating a title to property honestly and fairly acquired by virtue of a sale under judicial process; nor do we perceive any ground for the position that this sale was impaired by the sale of the property upon two other executions, which were not against Lewis.

After a careful consideration of the whole record, we are satisfied the decision of the circuit court was correct, and it will be affirmed.

Judgment affirmed.

Mr. JUSTICE DICKEY: Both parties claim title under Lewis; the plaintiff, by deed from Lewis, the defendant, by sheriff's deed, founded upon an order of sale in mechanic's lien proceedings. The order of sale is, no doubt, adequate to authorize the sale of the interest of Lewis, but the return of the sheriff and the sheriff's deed both show that the interest of Graham alone was in fact sold. This, of course, shows no conveyance of the interest of Lewis. It is suggested that, as the evidence in the proceedings for a mechanic's lien is not preserved, the court, in that case, may have found that Graham had the legal title, in some way, from Lewis. This pre-

sumption can not properly be indulged, when there is no allegation in the petition, or elsewhere in the record, that Lewis ever parted with his title, save by this sheriff's deed. The defendant fails to show legal title in Graham, and therefore takes nothing save an equity by sheriff's deed, conveying his interest in the land. In ejectment, the legal, not the equitable, title prevails.

FLETCHER G. WELCH

v.

B. C. TAYLOR MANUFACTURING COMPANY.

1. BILL OF EXCHANGE—*drawer entitled to notice of non-acceptance or non-payment.* To charge the drawer of a bill of exchange by the payee, upon the ground of non-acceptance or non-payment, it is usually essential that proof be made of prompt notice to the drawer of such non-payment or non-acceptance, as the case may be.

2. Notice to the drawer of a bill of exchange of its non-acceptance or non-payment by the drawee is not essential, when the drawer is so situated that he can not be prejudiced by the want of notice.

3. SAME—*want of notice of non-payment excuses drawer when such want of notice may have injured him.* When a drawer of a bill of exchange, in good faith, believes that he has funds in the hands of the drawee to meet the bill, though, in fact, he may not have such funds, he is entitled to prompt notice of the non-acceptance or non-payment, and if such notice is not given he will not be liable to the payee. In such case the law does not require the drawer to show that he has been actually injured by the want of notice, but only that he *may* have been so injured.

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

Mr. F. W. S. BRAWLEY, for the appellant.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This was an action upon a bill of exchange, drawn in Chicago by appellant and his partner, payable to appellee,

addressed to one Taylor, of Cincinnati, Ohio, dated March 18, 1872.

On the trial, after proof of the execution of the draft or order, the drawee was introduced as a witness, and testified that, at the time the bill was drawn, the drawers had no funds in his hands, and that he did not, at that time, owe to them anything, and has not had any funds of the drawers in his hands since the date of this draft. He also stated that the draft was presented to him for payment soon after its date, and that he refused payment. He further testified that the drawers were notified that he had no funds in his hands, but failed to state when or how such notice was given. The witness was the president of the corporation to whom the bill was made payable.

Appellant testified, that the drawers formerly dealt with the drawee, and afterwards with the corporation (plaintiff below), which succeeded the drawee in business at Cincinnati; that the drawee was, at the time of the draft, indebted to the drawers to the amount of the draft, and that a statement of the accounts, showing that result, had been sent to the drawee in October, 1871. Witness further testified, that the drawers gave this draft to the payee in payment of so much of an account which the payee held against the drawers, and that the draft was accepted by the payee as such payment. And he further testified, that the drawers of the draft never had any notice of the presentment or protest of the bill of exchange, and that he did not know that the drawee denied the indebtedness against which the draft was drawn, until long after the draft was made.

This is the substance of all the material evidence.

To charge the drawer of a bill of exchange by the payee, upon the ground of non-acceptance or non-payment, it is usually essential that proof be made of prompt notice to the drawer of the failure of the drawee to accept or the failure to pay, as the case may be. This may be excused where the drawer is so situated that he can not be prejudiced by the want of notice. If, confessedly, the drawee had no funds of the drawer,

or was so situated that the drawer could have no reason to suppose that the draft would be honored, a want of notice could do the drawer no harm. No such case is made here. It is not material to this issue, whether, in absolute truth, the drawee had or had not funds in his hands, and so, in fact, was in duty to the drawer bound to honor this draft. It is sufficient that the drawers, in good faith, supposed the drawee was their debtor to that amount; that they had rendered a bill to that effect in October, 1871, which was not questioned, and therefore, by the neglect of the appellee, the drawers were left, for a long time after the default in payment, to suppose that their draft had been paid. If the drawers had been promptly notified of the drawee's refusal to honor the draft, they might have sued the drawee at once, and might have successfully shown what they now claim to be true. Want of such notice may have been injurious to the interests of the drawers. Their proofs against the drawee may have been weakened by time, or some statute of limitations may have intervened. The law does not require the drawers, in such cases, to show that they have, in fact, been injured thereby. It is sufficient that they *may* have been injured.

The judgment is reversed, and cause remanded for new trial.

Judgment reversed.

CYRUS ALDEN *et al.*

v.

ROSE GOLDIE *et al.*

TRUST DEED—*place of sale.* Where a trust deed provides for sale of premises, on default of payment, "at the north door of the court house in said city of Chicago," these words are not restrictive to the site of the court house in existence at the date of the instrument, but, in case of its destruction by fire, the sale may be advertised and made at the north door of the building in use for a court house.

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

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

Mr. A. T. GALT, for the appellees.

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

This was a bill for an injunction to restrain the advertised sale of a certain lot in the city of Chicago, under a trust deed given for the security of the payment of a promissory note, upon the ground that the trust deed did not authorize a sale at the place advertised.

The bill of complaint sets out that the trust deed was executed on the 11th day of October, 1869, authorizing a sale of the premises, in case of default in the payment of the note mentioned, at the north door of the court house, in the city of Chicago, county of Cook, and State of Illinois, which was then situated on the square bounded by Washington, LaSalle, Randolph and Clark streets in said city, and that the north door of the court house specified in the trust deed was the door of said court house fronting Randolph street, and between Clark and LaSalle streets, and that that place, and no other, was intended by the parties to the deed as the place where such sale might take place; that at the place where the sale was advertised to take place there was no court house in existence at the time the trust deed was executed, and no building there known as a court house at that time.

The bill called for the answer of the defendants under oath. They answered under oath, and the cause was heard on the bill and affidavit of one of the complainants and answers of the defendants, and a decree entered enjoining the sale, as prayed.

The answers set up that the building known as a court house, in Chicago, on the 11th day of October, 1869, the time of the execution of the trust deed, was destroyed by the great fire of

October, 1871; that, at the time of the filing of the bill of complaint, and for more than a year prior thereto, all the buildings on the square where said court house was situated had been wholly removed, even to the foundation stones thereof, and that the square itself was then, and had been for about six months prior thereto, surrounded by a board fence about ten feet high, and the public totally excluded therefrom; that about the 1st of April, 1872, the circuit court and the Superior Court of Cook county began to be held at the building on the corner of Adams and LaSalle streets in said city, the one specified in the notice of sale, and have ever since been held at said building, and processes issued from said courts have been made returnable to that place as the court house of said county; that said building on the south-east corner of Adams and LaSalle streets has, ever since said time, been well known as the court house of Cook county, and then had, and always since had, two north doors or principal entrances, within speaking distance of each other, about sixty feet apart, fronting on Adams street, and if there be any difference in publicity, the one nearest LaSalle street is the most public, and that a sale, if made at the place designated in the notice, will be at least as open, public and notorious a place as if the building was still standing on said "square," as it was in 1869, with its "north door" untouched, and the sale made there.

The sale was advertised to be made on the 11th day of May, 1876, at 11 o'clock A. M., "at the entrance door nearest to LaSalle street on the north side of the court house, namely, the building used as a court house, situated on the south-east corner of Adams and LaSalle streets, in the city of Chicago, in the State of Illinois."

The bill was filed on the 10th day of May, 1876.

It is insisted that the intention was, that the sale should be at the north door of the *then* court house, at the time of the execution of the trust deed. But the intention is to be derived from the language of the trust deed. There is nothing in that restrictive of the place of sale to the site of the then existing court house. But it is general, authorizing the sale

"at the north door of the court house in said city of Chicago." The advertisement of sale is, at a designated north door of the court house in the city of Chicago.

The place, as advertised, fulfills, in terms, the requirement of the trust deed. It abundantly satisfies its true spirit and intent.

The affidavit of one of the complainants, if it could be looked at for any purpose upon the final hearing, shows nothing material as bearing upon the question, more than that there is a court house on the north side, in the city of Chicago, where the criminal court and county court of Cook county are held, and which has a north door. This does not militate against the fact that the building on the corner of Adams and LaSalle streets is well known as the court house in the city of Chicago, and is properly to be designated as such.

We are of opinion that the place of the advertised sale comes within the terms of the trust deed; that a sale of the property may properly be had at that place, as being authorized by the trust deed, and that it was error to restrain the sale.

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

Decree reversed.

CLARISSA M. BAST

v.

EDWARD C. BAST.

1. DIVORCE—*desertion no excuse for adultery.* The fact that a husband has deserted his wife, or been guilty of drunkenness or cruelty, is not a sufficient recriminatory defense to a bill by him for a divorce for adultery on the part of the wife.

2. SAME—*direct proof of adultery not required.* Adultery may be shown, on a bill for divorce, by proof of circumstances that naturally lead the mind to its belief by a fair inference as a necessary conclusion. Direct proof of the fact is not indispensable.

Syllabus.

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

Messrs. BONFIELD, SWEZEY & SMITH, for the appellant.

Messrs. HAWES & LAWRENCE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The grounds alleged for reversing the decree in this case are, that the decree is not sustained by the evidence, and that appellee himself had deserted his wife, giving to her the right to claim a divorce from him. We do not think his desertion can exonerate the wife from the more serious charge of adultery. Neither that, nor drunkenness, nor cruelty, will, under our statute, constitute a sufficient recriminatory defense to a charge of adultery. Had appellee been guilty of a like offense, he could not claim a divorce.

As to the testimony in all such cases it must generally be circumstantial. The fact of adultery is to be inferred from circumstances that naturally lead to it by a fair inference as a necessary conclusion. The direct fact of adultery can seldom, or ever, be proved. We think sufficient facts were proved in this case "to lead the minds of reasonable and just men" to the conclusion established by the verdict, and we have no disposition to disturb it.

The decree must be affirmed.

Decree affirmed.

NATHAN CORWITH

v.

CHARLES COLTER.

1. NEW TRIAL—*when the evidence is conflicting.* Where the testimony is conflicting the finding of the jury will not be disturbed, unless it is made to appear that it is clearly against the weight of the evidence.

2. FAILURE OF CONSIDERATION—*what is.* Where a note is given in consideration of the sale and delivery of flour on the day of its date, if the flour is not delivered as agreed upon, this will constitute a failure of consideration.

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

Mr. R. H. MCCLELLAN, for the appellant.

Messrs. D. & T. J. SHEEAN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellee executed the note upon which suit was brought in the court below, on the 6th day of November, 1857. It was for $675, due in ninety days, and payable to the order of S. Alderson. It was indorsed, without date, to appellant by the payee. It appears that the note was given for one hundred and fifty barrels of flour, which were to be shipped on board of the steamboat Galena, then at the wharf in the city of Galena. The flour was to be placed on board so as to be transported to St. Paul, for which place the boat was then destined. Only fifty barrels were so put on the boat, and some bran and feed seemed to have been afterwards put on the boat, for which appellee paid Alderson.

Appellee claims that he refused to take the flour for which the note was given unless it should be shipped by that boat and on that trip, and demanded the note, but Alderson refused to surrender it to him. Alderson testified that he shipped the flour on other boats, but appellee denies, positively, that he ever received any but the fifty barrels, and is supported by the evidence of his brother, who was his clerk at the time. Alderson is also supported by the evidence of his son-in-law, who says the flour was delivered on the wharf at Galena. This witness, at the time of the transaction, as appears from his evidence, was clerking at the mill ten or twelve miles in the country.

Appellee testified that he found a portion of the flour he purchased on board another boat, with the marks he directed

to be placed on the flour scratched out and marked to another person, to whom Alderson had sold it; but Alderson positively denies that it was so changed or sold, and his clerks swore they knew of no such change or sale.

Alderson testified that he sold appellee two hundred barrels of flour, one hundred and fifty for which the note was given, and fifty for which cash was paid; and in this he is, to some extent, corroborated by his son-in-law and Newsom, his clerk, but the latter says he did not hear the contract made, and Kyle does not say he was in Galena, or heard the agreement, or even that he was not at the mill, ten miles distant. This is positively and unequivocally denied by appellee.

Again, appellee swears, that on the 9th of November, 1857, he went to appellant's bank, where the note, by its terms, was payable, and notified N. Corwith, the president of the bank, that the note was given for one hundred and fifty barrels of flour, and that Alderson had sold it to another person, and notified him not to buy it; that James Miller and James Scott went with him to witness the fact that he gave the notice, and that they had both died before the suit was brought. This is denied by N. Corwith, and he also denies all knowledge of any defect in the note, or of any defense thereto, or of any want or failure of consideration, before or at the time he took the note.

Appellee testified that he gave notice, in a newspaper published in Galena; but N. Corwith, whilst he says he was a subscriber to the "Galena Gazette," denies ever having seen or heard of the notice.

Newsom, appellant's witness, corroborates appellee in his statement that he was in Galena the next spring looking for Alderson, but did not find him. He also says, he thinks something was said about the marks on the flour being changed.

On this evidence, under the plea of an entire failure of consideration, the jury found for defendant, and plaintiff has appealed to this court and asks a reversal.

There are no exceptions taken to the instructions given by the court, but it is earnestly urged that the verdict is contrary

to the evidence. There is an irreconcilable conflict in the material portions of the evidence, and it was for the jury to determine the preponderance, and we can not interfere. In cases of such conflict, what, on paper, may appear to be slight circumstances, when seen and heard, may, and frequently do, have a controling influence in determining the weight to be given to the evidence. Many things in a trial in the court below can never be brought to this court, and they frequently properly control the finding of a jury. They have the witnesses before them, and their manner of testifying can not be transferred to paper, and hence all aids to the jury, derived from that source, can not be considered by the appellate court. The rule, therefore, has always prevailed in this court, that the finding of the jury will not be disturbed, unless we can see that the finding is clearly against the evidence. In this case it is manifest, that had appellee's evidence alone been before the jury, they could not have done otherwise than find for him. But being contradicted by appellant's evidence, it was the province of the jury to weigh all of the evidence in the case, determine its weight, and find accordingly. After its careful examination we are unable to say they erred in finding as they did.

It is said, in argument, that the facts set out in the plea do not show a failure of consideration. We presume this ground is not earnestly relied on, or a demurrer would have been interposed, instead of joining issue on the plea. Again, the plea is not set out in the abstract, and we, therefore, suppose the point was not, at that time, relied upon for a reversal. We have, however, turned to the record and examined the plea. We are referred to the cases of *Willets* v. *Burgess*, 34 Ill. 494, and *Gage* v. *Lewis*, 68 Ill. 604, to establish the proposition. In the former of these cases, it appears that the consideration of the note was a deed of conveyance and covenants for title, and not the performance of an act, or the delivery of property. In the latter case, the defense was interposed to a penal bond, and the plea averred that the obligee had made representations and promises to him as the consideration upon

which he executed the bond, and which the obligee failed to perform. In the one case, the party held the covenants, and in the other the promises upon which, in case of a breach, suit might he brought. But in this case the averment is, that the consideration of the note was the sale and delivery of the flour on the day the note was given, and that the flour was not delivered. In this there is a palpable distinction. We, therefore, see no force in this objection.

Perceiving no error in this record, the judgment of the court below must be affirmed.

Judgment affirmed.

THOMAS H. O'NEAL

v.

LEVI D. BOONE *et al.*

1. PLEADING AND EVIDENCE—*variance—when not fatal.* Where a bill in chancery charged that the vendor of land agreed with another to whom he conveyed to send notices of forfeiture to the vendee, in violation of a contract to extend the time of payment, and to have an outstanding mortgage of the vendor assigned for the benefit of such grantee; and the bill also charged that such grantee and those claiming under him had notice of the vendee's equities, it was *held*, that the former charge might be disregarded if not sustained by the proof.

2. Where a bill in chancery, to set aside conveyances as a cloud upon an equitable title of the complainant, is framed upon the theory that the land was purchased by A, alone, from a voluntary grantee, and the evidence shows that the purchase was by A, B, C and E, but the conveyance made to A, alone, for convenience, to hold and convey as directed by the purchasers, the variance will be fatal.

3. SPECIFIC PERFORMANCE—*when time is essential.* Where the purchaser of land, under a contract making the times of payment essential, makes all his payments promptly, except the last, and tenders that within the time agreed upon for an extension, he will be entitled to a specific performance of the contract as against the vendor and his voluntary grantee, and those claiming under them with notice of his equities.

4. MORTGAGE—*when satisfied, though assigned.* Where a mortgagee furnishes another the money with which to procure an assignment to the

latter of the mortgage, under which a sale is had to cut off the rights of an intervening purchaser, this will be a satisfaction of the mortgage, except as to subsequent *bona fide* purchasers without notice.

5. TRUSTEE—*whether a conveyance is made to one as such.* Where the facts and circumstances relied on, to show that a conveyance of land is made to one in trust for the original owner, are reasonably consistent with the *bona fides* of the transaction, the latter will be adopted, especially to protect rights subsequently acquired.

6. CONVEYANCE—*burden of proof to impeach.* The legal presumption is, that all conveyances are made in good faith, and not fraudulently, and the burden of proof rests upon one who seeks to impeach the same for fraud.

7. NOTICE—*what is, of third person's equity.* The fact that a party, taking a conveyance of land from a party holding the legal title, knew the grantee held the same in trust for another, is neither actual nor constructive notice of the equities of a third person claiming to have purchased the land from the real owner.

8. WITNESS — *credibility.* In this case, facts and circumstances are given as affecting the credibility of a witness, so as to render it of but little weight.

9. LACHES—*as affecting notice of claim.* Where a purchaser of land, after having paid all the installments except the last, and obtained an extension of time for its payment, was, before the expiration of the extended time, notified that his contract was forfeited, and the vendor conveyed to another, who paid nothing, and the purchaser, within the extension, tendered the balance due, and demanded a deed, the vendor promising to procure the same in a few days, but, instead of doing so, caused his grantee to convey to another, which deed was recorded, and the original purchaser, with notice of the facts, made no further claim for nearly twenty years, and paid no taxes, and then filed his bill to set aside the several subsequent conveyances, and to be invested with the title then in a *bona fide* purchaser, it was *held*, that his *laches* and delay in asserting his equities until others had acquired rights, was such as to bar his claim to relief.

10. FORFEITURE — *right to question after other rights are acquired.* Although a declaration of forfeiture of a contract is not justifiable, yet, if the purchaser lies by for an unreasonable length of time without asserting his equities, until others have acquired the legal title in good faith, upon the honest belief that the forfeiture was rightful, and that he acquiesced in the same, his equities will not be superior to those thus acquiring the legal title, and they will be protected against his claims.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. S. M. MOORE, Judge, presiding.

Statement of the case.

On the 18th of June, 1852, Fredrick H. O'Neal made a contract with Stephen Bronson, Jr., to purchase of him one part of the property in controversy, and on the 1st day of July, 1852, he made another contract with him to purchase the remainder of the property. Both contracts were in writing, and placed on record shortly after they were executed. A small sum was paid on each contract at the time it was made, and the residue of the payments were to be made by O'Neal, in annual instalments, in 1853, 1854 and 1855. O'Neal paid the taxes on the property for two or three years, and all the instalments of the purchase money except those due in 1855. Before these matured, he wrote to Bronson, requesting an extension of time within which to make the payments until October of that year, and Bronson replied, agreeing to the desired extension.

It was provided in the contracts that, in case O'Neal should make default, or fail to make any of the payments when due (the times of payment being declared to be an essential part of the contract), or should fail to punctually perform any of the covenants by him to be performed, the contracts and all the covenants and agreements on the part of Bronson should, at his option, or that of his representatives and assigns, be, and they were thereby, declared to be null and void, and no longer binding, and all the rights or interest of O'Neal therein, either in law or equity, should cease and determine, and all payments which might have been made thereon were to be forfeited.

Shortly after Bronson replied to O'Neal consenting to the extension of the payments, he sent O'Neal formal notices, declaring the contracts forfeited in consequence of his failure to make payments at the times specified in the contracts, and thereafter, on the 29th of August, 1855, Bronson conveyed the property by deed with covenants of warranty, excepting, however, back taxes, to Sherman P. Tracy, which deed was placed on record August 31, 1855. O'Neal, who resided at Fredrick, Maryland, received the notices of forfeiture by due course of mail, and, about the 18th of September, 1855, visited Bronson

at Chicago, and had an interview with him at the office of J. W. Waughop, O'Neal's agent and solicitor. At that interview, O'Neal reminded Bronson of his consent to the extension of time for the payments, which Bronson acknowledged, and he then attempted to palliate his conduct in declaring the forfeiture, by saying that he had become financially involved, and had conveyed the property to Tracy, as his confidential friend, in order that it might be disembarrassed of other liens, and, at the same time, under his control. O'Neal tendered him, then, in American gold, the amount due on the contracts. Bronson declined to accept the money, but acknowledged that the amount tendered was correct, and directed him to leave it with Waughop, promising to get a deed from Tracy to O'Neal when he should see Tracy. O'Neal then returned to his home, in Maryland, and did not again visit Chicago, with reference to the property, until in 1865. He seems, indeed, to have been in Chicago in 1856, but it does not appear that he then did anything with reference to the property.

On the 28th of September, 1855, Tracy conveyed the property to Berry, and the deed was recorded the next day (the 29th).

In 1851, Bronson, while the owner of an undivided interest in this and other property, as a tenant in common with certain other parties, had executed a mortgage to one Sayre, to secure a large sum of money, and the mortgage was duly recorded at or near the date of its execution. Subsequently, this property was set off to Bronson by decree for partition between him and his co-tenants, so that the mortgage, if still subsisting, attached to this property, and was a prior lien to the claim of title by virtue of the O'Neal contracts. Sayre, by deed dated September 10, 1852, and recorded October 22, 1852, transferred his interest in the mortgage to Magie, covenanting therein, among other things, that he was the lawful holder of the notes secured by the mortgage, and that there was then due and unpaid thereon $7500. Magie, by deed dated October 31, 1855, and recorded November 6, 1855, transferred his interest in the mortgage to Sherman P. Tracy, covenanting

therein that he was the lawful holder of certain unpaid notes secured by the mortgage, upon which there was then due the sum of $2500, with certain additional interest.

On the 18th day of December, 1855, Tracy executed a deed, which was recorded on the 19th of January, 1856, purporting to convey the property, by virtue of a sale under the mortgage, and pursuant to the power therein and the several assignments thereof, to A. Judson Higgins, and Higgins, by deed dated December 22, 1855, and recorded March 21, 1857, conveyed the property to Berry.

On the 10th day of October, 1856, Berry conveyed the property to Daniel L. Boone. Daniel L. Boone afterwards conveyed an undivided half of the property to Waller, and on the 16th day of June, 1860, he conveyed the residue to Levi D. Boone, and the deed was recorded immediately afterwards.

Loomis obtained a judgment in the circuit court of Cook county, against Bronson and another, on the 14th of June, 1855. Execution issued thereon within time to preserve the lien of the judgment, and levy of execution was made on the property in controversy. One part was sold to Miller, who received a sheriff's deed therefor on the 21st of May, 1857, which was recorded on the 25th of September, 1857, and the other part was sold to Loomis, who received a sheriff's deed therefor on the 28th of November, 1860, and which was recorded on the 3d of December, 1860. Miller conveyed the interest he held to Loomis, by deed dated May 23, 1857, and recorded September 25, 1857, and Loomis conveyed to Levi D. Boone, by deed dated November 28, 1860, and recorded December 3, 1860.

On the 28th of November, 1855, Tracy executed a deed to O'Neal for the property, but which was not delivered until in 1865; and Bronson also conveyed to O'Neal the property described in the first contract, February 22, 1865, and that described in the second contract, on 27th of February, 1865, and on the 1st of January, 1866, he executed another deed to him to correct an error in that of February 27, 1865.

Bill was filed by O'Neal on the 13th of March, 1872, for the purpose of procuring the removal of alleged clouds upon his title, and having Boone declared to hold in trust for him, and to convey to him the title he holds. Boone, Waller and others were made defendants. Answers were filed by Boone and Waller, putting in issue all the material allegations of the bill. Boone claims therein to have been a purchaser, in good faith, without notice of any equities in favor of O'Neal, and sets up the statutes of limitations, and *laches* on the part of O'Neal, to bar his rights, if any he has.

On hearing, the court decreed that O'Neal had no equity, and that the bill be dismissed.

Mr. Lyman Trumbull, and Mr. J. W. Waughop, for the plaintiff in error.

Messrs. Sleeper & Whiton, for the defendants in error.

Mr. Justice Scholfield delivered the opinion of the Court:

It is very clear that the evidence fails to sustain the entire theory of the bill. The charge that Levi D. Boone and Bronson agreed, before Bronson sent the notices of forfeiture to O'Neal, and conveyed to Tracy, that Bronson should send the notices of forfeiture, convey to Tracy, have Magie assign the Sayre mortgage to Tracy, and him to go through with the form of a sale and conveyance thereunder to Higgins, and procure the execution of the several other conveyances by which the legal title to the property in controversy was ultimately vested in Boone, is not only unsupported by the evidence, but is positively disproved. Even Bronson, the most unfavorable, and evidently an unfriendly witness to Boone, does not pretend that his acts were, in any degree, prompted by Boone, or that it was anticipated that Boone would acquire the title before the negotiations in 1856, which resulted in the conveyance to Daniel L. Boone.

We are, however, of opinion that, disregarding this charge, the allegations in the bill charging that Boone and those under

and through whom he derived title, were purchasers with notice of O'Neal's equity, would have been sufficient of themselves to have called for an answer, and that we are therefore not at liberty to affirm the decree of the court below simply because of the failure of the proof in respect to the other charge.

That O'Neal, as against Bronson, or any one simply occupying his place, is entitled to the property, can admit of no controversy. He purchased, originally, in good faith, paid all that was due, at the times stipulated in his contracts, with the exception of the last payments, and, as to these, Bronson consented to an extension of time, and before its expiration O'Neal tendered him the full amount due, which Bronson has since accepted. But if O'Neal, by his failure to exercise ordinary prudence, suffered Bronson to place a title of record inconsistent with the continuance of his rights as purchaser, and others, without actual knowledge of his rights, and upon the faith of the title as disclosed by the record, in good faith, purchased the property and obtained the legal title thereto, they do not occupy the place of Bronson, but of *bona fide* purchasers without notice, and their legal title must prevail over O'Neal's equity.

It is claimed the conveyances by Bronson to Tracy, by Tracy to Berry, the assignment of the mortgage by Magie to Tracy, the pretended sale and conveyance thereunder by Tracy to Higgins, and the conveyance by Higgins to Berry, were all voluntary, and that Tracy, Higgins and Berry held the title simply for the convenience of Bronson, and to enable him to perpetrate a fraud upon O'Neal; and that when Levi D. Boone became a purchaser, and had the property conveyed by Berry to Daniel L. Boone, he had actual knowledge of these facts, and that he also knew that Bronson had consented to extend the time of the last payments on the contracts; that O'Neal had tendered him the amount due within that time, and that Bronson had agreed to have the property conveyed to him.

The evidence fully shows that Bronson's conveyance to

Tracy was voluntary; that Bronson furnished Tracy the money to buy the mortgage from Magie, and that the pretended sale and conveyance under the mortgage were without consideration; and that Tracy and Higgins, in all things, acted for and under the direction of Bronson.

The position that Berry occupied with reference to the property is not so clear. Bronson says the conveyance to Berry was wholly for his benefit, and for the purpose of having it appear upon the record that he had conveyed away the title, and, at the same time, to keep it under his control. Berry, while showing that he acted in the matter entirely under the direction of E. S. Smith, says he acted in good faith; and, evidently, if he held the title for Bronson, he did so without knowing it.

It is possible Smith may have agreed to have the title held for Bronson, and had Berry hold it under his own direction and control for that purpose; but this is not charged in the bill nor supported by direct proof. It is, at most, but a matter of inference from circumstances which are reasonably susceptible of a construction consistent with the *bona fides* of the conveyance to Berry.

Bronson says the reason that the conveyance was made to Berry was, that Tracy had gone East to live, and it was not certain that he could readily confer with him. But from other evidence, it is very clear Tracy had not then gone East—Bronson himself shows this, and Berry says Tracy was present at the negotiations. Moreover, Berry, although then in Chicago, and probably occasionally temporarily there at other times, was a resident of Lagrange, Ky., where he would be almost, if not quite, as difficult of access as would Tracy be, in the State of New York.

In addition to this, in answer to the 17th cross-interrogatory, Berry says: "There was an agreement by which Bronson or Tracy was to perfect the title to the property, and they deposited collaterals to make good the agreement, (with another person, name now forgotten,) but some time thereafter, he, Bronson, obtained, by fraud, the consent of deponent to with-

draw the valuable ones and substitute worthless ones in their stead, which he represented as more valuable than the ones withdrawn."

It is impossible to reconcile this with the idea that Berry was a mere trustee or agent of Bronson, through a secret understanding between Bronson and Smith, or otherwise. The agreement to perfect the title imposed an obligation to make good an absolute, and not merely a colorable title; and Bronson could only have obtained the collaterals from Berry by fraud, on the hypothesis that Berry was, in good faith, the holder of the collaterals.

Again, Berry, through Smith, contracted, at one time, to sell the property to one Flournoy, of Paducah. The contract was reduced to writing, and failed only, as Berry says, because Flournoy became dissatisfied with the title, when, as he learned from Smith, it was rescinded. He speaks of this as a contract made in good faith, for his and Smith's benefit, and Bronson makes no claim to have been in any way interested in it. The circumstance that, after Boone, Smith, Waller and Boyle purchased, Boone obtained the notes given by Berry for the property, from Smith, as evidence that they had been paid, and the mortgage to secure them satisfied, we do not regard as necessarily inconsistent with the good faith of Berry in the transaction; nor do we regard the fact that the conveyance by Higgins to Berry subsequent to Berry's purchase, was made without the actual knowledge of Berry, in that light. What the precise relations existing between Berry and Smith were, in this, and other transactions in Chicago in which Berry's name was used, is not clear, further than it was one in which Berry gave entire and unlimited confidence to Smith. Berry says, in all such transactions, Smith did the negotiating. He signed deeds when Smith requested. He made notes, which Smith indorsed, upon which money was obtained in bank, etc.

If the charge in the bill and the evidence showed that Smith was in the employ of Bronson, then we should have no hesitancy in saying that Berry was used for Bronson; but in the absence of such charge and proof, we think it is of but

slight moment what were the precise relations between Berry and Smith. Smith, we may assume, without changing results, was the real party, and Berry's name was used by him as a mere cover to hide himself from the public—but, manifestly, until it is shown that Smith was acting for some one besides himself or Berry, it concerns no one else to know why they so acted.

Under the peculiar relations existing between Berry and Smith, it was Smith, and not Berry, that was looking after the title and attending to the payment of the notes; and the reasonable presumption is, the conveyance by Higgins was pursuant to the understanding between Smith, Tracy and Bronson, and that the notes were taken up by Smith before being presented to Boone. Whether Bronson received the money paid by Boone, or other money, in payment for the land, can make no difference, if the sale was actually made to Berry or Smith. It is very clear that Bronson knows nothing about the source from which the money he received came, except on information he had from his attorney, Charles H. King.

Bronson and Berry are O'Neal's witnesses. On their evidence alone he seeks to establish that Berry was a mere trustee for Bronson. The legal presumption is, that all conveyances are made in good faith, and not fraudulently, and the burden was on O'Neal to make proof of the charge of fraud. This we can not say, as respects Berry, has been successfully done.

Assuming Berry to have been a *bona fide* purchaser, either for himself or Smith, as the understanding between them may have been, we have no difficulty in coming to the conclusion that he purchased without actual knowledge of O'Neal's equity.

The fact testified to by Berry, that it was understood, at the time of the negotiations in his behalf, that the title was imperfect, may be explained by reference to what was then disclosed by the record with reference to the property. This negotiation occurred on the 28th of September, 1855. The Sayre mortgage was then outstanding, apparently, at least, in Magie, and the record of Sayre's assignment disclosed that

there was still due upon it $7500. Loomis' judgment had been obtained on the 14th of June preceding, and being prior to the conveyance to Tracy, even if that conveyance had not been known, as it was, to have been voluntary, must have been understood to have been a lien upon it; and, in addition to this, it is in proof that the Merchants and Mechanics' Bank recovered a judgment against Bronson, during the year 1855, for $25,000, which, upon the issuing of execution within a year, would become a lien upon all his property. Here, then, surely, was enough to make the title be regarded as "imperfect," as that term would be ordinarily used and understood by persons other than lawyers. Berry denies that he knew anything about what occurred affecting the sale of the property or its title, between Bronson and O'Neal. Bronson does not claim to have communicated anything to Smith in that regard, and there is no pretense that any one else did.

Berry knew that Bronson was the real owner, and Tracy but the trustee, when the property was conveyed to him; but we are aware of no authority for holding that was either actual or constructive notice of O'Neal's equity.

The doctrine is too familiar to need the citation of authorities, that, if the title which Berry held was acquired in good faith, for a valuable consideration, and without notice of O'Neal's equity, a purchaser of that title will hold as against O'Neal, notwithstanding he knew, at the time of his purchase, of O'Neal's equity.

Bronson testifies that the purchase was by Levi D. Boone, alone, of the title held by Berry, and the bill is framed on that theory.

A careful examination of Bronson's evidence shows that, in point of fact, he knows nothing about it. He was not present when the purchase was made, and only knows as he was informed by his attorney, Charles H. King. The evidence is conclusive that the purchase was by Smith, Waller and Boyle, and Levi D. Boone,—Boone to have only an undivided half, and the others the other undivided half of the property. The conveyance was made to Daniel L. Boone, for convenience, to

hold and convey as directed by the purchasers. He has conveyed one undivided half of the property, since then, to Waller, and the other undivided half to Levi D. Boone. In this respect, there is a material and fatal variance between the allegations and the proofs.

But, (although it is not necessary to an affirmance of the decree, in view of what has been already said,) we do not think the evidence satisfactorily shows that the purchasers of the title, as conveyed by Berry, had actual notice of O'Neal's equity at the time of the purchase. There is not a particle of evidence that Smith, Waller and Boyle had such notice. On the contrary, Waller shows that, when O'Neal's contracts were mentioned, the notices of forfeiture were referred to, and Smith asserted there could be no trouble on that account, and they purchased in that belief.

Bronson swears, in general terms, that Boone knew, before he purchased, of O'Neal's claim. Boone positively denies it, and asserts that he purchased in good faith, without knowing that O'Neal was then claiming to have any interest in the property.

As between Bronson and Boone, we can not hesitate in preferring Boone, interested though he is in the result. By Bronson's own testimony it is shown that he is a reckless, unscrupulous and dishonest man. He says, that after agreeing to extend the time for O'Neal to make the last payments on his contracts, he sent him notices of forfeiture, and conveyed to Tracy. When O'Neal reminded him of his promise he agreed to not enforce the forfeiture and to obtain the title for him. A few days after this, however, instead of having Tracy convey to O'Neal, as he had agreed, he negotiates with Smith to convey to Berry, and has Tracy make that conveyance. Then, a few days after this, he has Tracy make a deed to O'Neal, which he keeps in his possession until in 1865, without letting any one know of its existence. He receives from his attorney, King, $2500 for the property after it was conveyed to Daniel L. Boone, for Smith, Waller and Boyle, and Boone. In 1865, he receives from O'Neal the balance due on

his contracts from him, makes individual deeds to him, and delivers to him the deed which he had from Tracy to him and had secretly held for ten years. In 1855, in order to strengthen the appearance of title, adverse to any claim in favor of O'Neal, he has a pretended sale and conveyance under a mortgage that he had paid off; and, subsequently, and evidently to cloud and disparage that same title, he has the record of the mortgage entered satisfied. He has, as he shows, no very friendly feeling towards Boone. For a while, and up to some time in the year 1855, Boone was, nominally, president of the Merchants and Mechanics' Bank, (an institution existing under the old Banking law of this State,) of which Bronson was cashier. He says that he had trouble with the directors, and Boone sided with the directors. Here, then, is a motive for revenge, and we can scarcely doubt that, in gratifying it, he would not be very scrupulous as to the method. Apart from his bad conduct, referred to above, there are several other circumstances that forcibly tend, in our opinion, to corroborate Boone. In the first place, Bronson nowhere says that he informed Boone that, after he had given O'Neal notices of forfeiture, he consented to extend the time, and that O'Neal had, within that time, tendered him the amount due and he had promised to have Tracy convey to him. On the contrary, so late as in 1857, when the suit of *Loomis* v. *Riley*, 24 Ill. 307, was pending or anticipated, and Boone, who was Riley's landlord, was, evidently, looking about for evidence in support of his title, Bronson made and sent him this affidavit:

"I, Stephen Bronson, Jr., being duly sworn, doth depose and say, that the payments on two certain contracts or agreements," (describing those with O'Neal,) "have not all been made as the agreements specified, and that a portion of them are still unpaid, and that the contracts or agreements have been declared null and void on account of the said O'Neal's not having made the payments as required by said contracts or agreements." Which he subscribed and swore to.

Now, although the implication from this affidavit was, in fact, false, and the making of it is another evidence of the

utter recklessness and depravity of the man, it shows, beyond cavil, that he was then endeavoring to induce Boone to believe that O'Neal's rights under the contracts had been terminated by the declaration of forfeiture. We can not believe that he would have had the audacity to send the affidavit to a man to whom he had communicated that he had waived the forfeiture under the contracts.

Boone was a man of some experience in real estate matters, occupying an honorable position among his neighbors—having at one time, shortly prior to this purchase, been mayor of the city of Chicago, and it is not reasonable to suppose Bronson would have assumed him to have been either so ignorant of the law or so reckless in the use of his money as to have invested a considerable sum of money (equal to the full value of the property) in purchasing property which he was informed equitably belonged to another. It did not subserve the end Bronson had in view, of twice selling and getting pay for the property, to tell Boone all; and the price paid by Boone ($2500 for the undivided half of it, which is not claimed to have been less than it was worth,) tends to show that Boone was conscious of no outstanding equity that imperiled his title.

One Cline, however, swears that he informed Boone that Bronson had extended the time of payment on the contracts; that O'Neal had left the money in the hands of Waughop to make payment, and that Bronson had agreed to have Tracy make a deed to him. This is denied, *in toto*, by Boone.

It does not appear that Cline had any control over or interest in the property, at the time, and he says that after he made the communication Boone did not say much. In his direct examination, he says this occurred in the early part of the fall of 1856; but, on cross-examination, on being required to fix the time with particularity, he says it was in September, 1855, about a week or ten days after O'Neal had returned East. Even if it be true, that he made the communication he says he did, we think, coming from an uninterested party, at a period so remote from the time of the actual purchase, it can

not, of itself, be held actual notice of O'Neal's equity. Boone's purchase was not made until the 10th of October, 1856. A communication made in September, 1855, by an uninterested party, might well have passed out of mind by October, 1856.

But, even if in September, 1855, Boone had known of the understanding between Bronson and O'Neal, would not the fact that O'Neal had failed to procure the title, and that, meanwhile, Tracy had conveyed to Berry, authorize the inference that O'Neal had ceased to claim a deed under the contracts?

O'Neal, we think, was guilty of inexcusable negligence, under the circumstances, in not taking prompt steps, after his tender, to insure the execution of his deed. He already had abundant evidence of Bronson's treachery and faithlessness. The pretext for conveying to Tracy, he should have seen, was false, for no judgment against Bronson, subsequent to the recording of his contracts, could affect his interest in the property or interfere with Bronson conveying to him, and prior liens could not be removed or avoided by conveying to Tracy. Why did he not then obtain his deed? Tracy was in the city, the money was ready, and there appears no reason why there ought to have been a delay, or why a prudent man, under the circumstances, would have consented to a delay. He says he was again in Chicago in the fall of 1856, but he does not pretend to have done anything then towards getting his deed. The record, of which he is charged with notice, then disclosed that, within a few days after Bronson had agreed to obtain a deed from Tracy to him, Tracy had conveyed to Berry, thus passing the title into other hands, over which he had no reason to believe Bronson had any control. He brought no suit to set aside that conveyance and have specific performance of his contracts; paid no taxes on the property; made no effort to obtain possession of the property, and did not even call upon Tracy or Berry to make known his rights and have them protected. It is true, the records gave notice of the terms of his contracts, and that all persons subsequently dealing with the property are bound to know what those terms

were; yet, those terms authorized a declaration of forfeiture for non-performance of any of the covenants, and, although it could not be assumed there had been a declaration of forfeiture, from the lapse of time only, the record of the conveyances by Bronson to Tracy, and by Tracy to Berry, was conclusive evidence, to those who had no notice that they were made for the benefit of O'Neal, that Bronson had declared the contracts forfeited; and the non-assertion of rights, under the contracts, by O'Neal, was sufficient evidence of his acquiescence in the forfeiture. It is not to be assumed that conveyances are made in bad faith; and those who, without actual notice, or what is equivalent thereto, of bad faith, purchase property, are authorized to rely upon the state of the title as disclosed by the records.

We think, even if Boone had heard and understood what Cline says he told him, early in the fall of 1855, he had a right to believe, in October, 1856, and act upon the assumption, since O'Neal had not taken possession or paid the taxes on the property, or instituted proceedings on his contracts to enforce specific performance, and the title had, meanwhile, been conveyed to Berry, that the contracts had been forfeited. At all events, as between Boone and O'Neal, under the circumstances, the negligence of O'Neal is the more culpable, and he can not, therefore, be said to have the superior equity.

In the absence of clear and satisfactory proof that Boone, Smith, Waller and Boyle actually purchased in bad faith, being fully cognizant of all the facts going to show O'Neal's equity, there are other circumstances which render it extremely inequitable that O'Neal should have the relief he asks. The evidence does not even tend to impeach the good faith of the judgment in favor of Loomis against Bronson. So far as the title obtained by Boone and Waller is concerned, that judgment was a prior lien, and the title derived under it was superior.

There is no evidence that the ejectment suit of *Loomis* v. *Riley*, *supra*, was prosecuted in the interest of Boone and Waller, or in bad faith. Their title being junior, the only

defense their tenant, Riley, could interpose, was the claim of title under the Sayre mortgage. They could not rely upon the contracts of O'Neal, because the record showed conveyance by Bronson, subsequent to those contracts under which they derived title, which implied their forfeiture. *O'Neal* v. *W. Av. Bap. Church et al.* 48 Ill. 350. And when the court adjudged that the Sayre mortgage was extinguished, before the several assignments of it and sale thereunder, we do not perceive any other defense they could have interposed to the prosecution of the suit.

The judgment, in that suit, established that Loomis had the paramount title, and gave him the possession of the property. The only alternative apparently left to Boone and Waller, was either to surrender possession or purchase the title of Loomis. Boone chose the latter, and we can not doubt his good faith in so doing. The price paid for that title was $3600, and there is no evidence that it was, at the time, inadequate. This was not the mere strengthening or propping up of a defective title, but the acquisition of a new title—paramount to any title under which he could make claim. It would be contrary to all principles of justice and right, that O'Neal, whose silence and want of diligence had permitted this title to become paramount, should have it conveyed to him, and especially as sought, without even so much as offering to reimburse Boone in the expense he had incurred on its account.

The legal title in regard to this property was determined in *O'Neal* v. *Boone*, 53 Ill 35, and *O'Neal* v. *Wabash Avenue Baptist Church et al. supra*, and, although the facts are materially different as presented in the present case, in view of all the circumstances, and the great and unexplained delay of O'Neal in giving notice of his rights and attempting to assert them, we do not perceive that his claim to equitable relief is better founded than his claim was at law.

The decree must be affirmed.

Decree affirmed.

Syllabus.

JOEL D. HARVEY

v.

MARCUS D. DREW.

1. PLEADING—*plea to suit for contribution.* Where one joint debtor is sued and compelled to pay a debt, and sues his co-obligor for contribution, alleging the recovery of judgment against himself and its satisfaction, a plea by the defendant that the court had no jurisdiction of his person, by service or otherwise, presents no defense to the action. If the suit was upon the judgment, it would be otherwise.

2. JUDGMENT—*when no jurisdiction.* A party can not have execution of a judgment rendered in another State, where the court had no jurisdiction either of the subject matter or of the person of the defendant.

3. CONTRIBUTION—*right to recover.* The principle is well settled, that one obligor or surety who advances money for a co-obligor or co-surety, may be indemnified to the extent of his advances for such other party.

4. Where one of two joint obligors discharges the indebtedness, either with or without suit and legal compulsion, he may maintain his action against his co-obligor for contribution.

5. In a suit by one obligor against his co-obligor, for contribution for money advanced to discharge a joint indebtedness, it is competent for him to plead, or even prove under the common counts, that the money was not voluntarily advanced, but was paid under compulsion, by judicial process.

6. PAROL EVIDENCE—*to show for what judgment was recovered.* In a suit by one joint obligor against another, for contribution for money paid under a judgment rendered in another State, parol testimony is admissible to show for what the judgment was recovered, not to contradict the record, but to show the real cause of action involved in the litigation.

7. REMEDY—*whether at law or in equity.* If two parties contract a joint indebtedness, not as partners but as joint purchasers, and one is compelled to pay money for the other on such indebtedness, his remedy is at law and not in equity, notwithstanding equities may have arisen since the making of the contract.

8. INTEREST—*on money advanced by joint obligor.* Where one of two joint obligors advances money in payment of the joint indebtedness, he will be entitled to recover of his co-obligor interest, at the rate of six per cent, from the date of such advance.

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

Messrs. LAWRENCE, CAMPBELL & LAWRENCE, for the appellant.

Messrs. MILLER & FROST, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

On the 13th day of July, 1865, defendant and plaintiff, in connection with four other persons, contracted with the owners for a release and assignment of their interest in contracts for the purchase of certain property known as the "Rooker farm," for the sum of $107,500. The conveyance was to be made upon the full payment of the contract price, which was to be paid $27,500 cash in hand, and the balance in monthly installments of $16,000 each, with interest. All the purchase money was paid as it became due, except the last installment of $16,000, with the interest that had accrued thereon. On this last installment, suit was brought in the Supreme Court of New York, against plaintiff and others, and judgment obtained for the whole amount, with interest and costs. This judgment was subsequently compromised by plaintiff and Bates, one of the obligors, for an amount less than what was justly due. This action is brought to recover of defendant his aliquot share of the amount paid by plaintiff to discharge their joint obligation.

The declaration contains special and the common counts. In the special counts it is averred, in substance, plaintiff and defendant, in connection with the other persons named, had entered into a contract with the owners for the purchase of certain property for the sum of $107,500, of which $27,500 was paid in cash, and the balance to be paid in monthly installments of $16,000 each, which contract was a joint obligation, under seal; that a judgment was obtained by the owners of the indebtedness, in the Supreme Court of New York, for the amount of the last installment, and it is then averred plaintiff had discharged that judgment, by reason whereof defendant became liable to pay him his proper proportion by way of contribution.

The general issue was filed to all the counts, *nul tiel record* as to the judgment described in the first and second counts, and a third plea as to the first and second counts, in which it was averred the supposed judgment recovered in New York was rendered in a cause in which the court had no jurisdiction of the person of the defendant, by service of process or otherwise. The latter plea presented no defense to the action, and a demurrer was properly sustained to it. Had the declaration been upon the judgment to enforce it against defendant, the plea, under the decisions of this court, would have been good. A party can not have execution of a judgment rendered in another State, where the court that assumed to pronounce it had no jurisdiction either of the subject matter or the person of defendant. But that is not this case. It is not to enforce the judgment obtained in New York against defendant. The obligation upon which the declaration counts, springs out of the contract entered into by the parties for the purchase of the oil land. That, as we have seen, is a joint obligation, and the principle is not questioned, as we understand counsel, that one obligor or surety who advances money for a co-obligor or co-surety may be indemnified to the extent of his advances. *Klein* v. *Mather*, 2 Gilm. 417, and other cases in this court.

It is, therefore, wholly immaterial whether defendant was served with process in the suit in New York or not. It is not sought, in this action, to enforce that judgment, or any obligation arising under it, against defendant. It is not, in any sense, the foundation of the action. No doubt it was a valid judgment against plaintiff, and it is pleaded simply to show in what manner plaintiff paid the indebtedness for which he and his co-obligors were liable. But the same obligation would have rested upon defendant to pay his aliquot share, had plaintiff discharged their joint indebtedness without suit. It was, however, competent to plead, or even prove under the common counts, the money was not voluntarily advanced, but was paid under compulsion by judicial process.

There is not the shadow of a doubt the judgment in New

York was rendered upon the contract of plaintiff and defendant and their co-obligors, which they gave to secure the purchase money of the oil lands, in which enterprise they were engaged. It has never been doubted that parol testimony was admissible to show for what the judgment was recovered, not, of course, to contradict or vary the record, but to show the real cause of action involved in the litigation.

No importance need be attached to the judgment, in any view. The evidence offered, as we have seen, was admissible under the common counts, and we shall not consider the great number of mere technical objections urged to the transcript in evidence.

Treating the obligation of defendant as arising out of the contract for the purchase of the oil lands, the case presents no obstacles to a recovery. It was a speculation, upon which the parties embarked as joint purchasers, and not as partners. As originally made, the contract had no elements of a partnership. The relation of the parties to each other was that of joint obligors, and the duties arising out of that relation may be enforced at law. Indeed, that is the proper forum. Equities may have arisen subsequently to the making of the contract between the parties, that could be better adjusted in a court of chancery. But this litigation concerns nothing save the legal rights of the parties under the contract. The duty resting upon defendant to pay his just proportion of the indebtedness, by way of contribution, is a legal obligation, and arises by operation of law.

The point is made, defendant, by the judgment of the court below, is made to pay more than his just share of the joint indebtedness. We do not think so. Defendant is one of six joint obligors, and his undertaking was to pay one-sixth of the contract price of the lands bought. His obligation is not affected by the proportion of the land itself he may have subsequently owned. Bates had contributed more than his just share of the indebtedness in discharging the judgment, consequently plaintiff could recover nothing from him by way of contribution. The mode adopted for ascertaining the share

defendant was bound to pay was correct, and was the only one that would do complete justice.

The court allowed plaintiff interest on his claim, at the rate of six per cent per annum, from the date of payment, although no demand for contribution had been made previous to commencing the suit, and that is one of the errors assigned. Our present statute allows a creditor interest, at the rate of six per cent per annum, on money "advanced for the use of another." But that statute was not in force when this suit was brought or cause of action arose.

The case of *Snell* v. *Warner*, 58 Ill. 42, is exactly like the one at bar, and was decided when our former interest laws were in force. Although the point does not seem to have been made in that case, interest was allowed plaintiff on his claim, at the rate of six per cent per annum.

A majority of the court are of opinion, in this case interest was properly allowed from the date of payment, and the judgment will be affirmed.

Judgment affirmed.

JAMES H. ALLEN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. ASSAULT TO INFLICT BODILY INJURY—*sufficiency of indictment.* An indictment averring that the defendant, on, etc., at, etc., with a deadly weapon, to-wit: a certain pistol, upon the person of one C D, with force and arms, did then and there unlawfully make an assault, with the intent then and there unlawfully to inflict upon the person of the said C D a bodily injury, no considerable provocation then and there appearing, contrary, etc., is sufficient. It is not necessary to aver that the pistol was loaded, that being a matter of evidence.

2. SAME—*provocation.* Where the defendant was chasing sheep from his premises with a dog, and a boy seventeen years old shot the dog with a revolver, upon which a scuffle ensued between the defendant and the boy, in which the defendant got the revolver, and struck the boy several severe blows on the head, it not appearing to have been in self-defense, it was *held*,

that the jury could not do otherwise than find the defendant guilty of an assault with intent to inflict a bodily injury.

3. INDICTMENT—*sufficiency in general.* Every indictment, under the statute, shall be deemed sufficiently technical and correct which states the offense in the language of the act creating the same, or so plainly that the nature of the offense may be easily understood by the jury.

WRIT OF ERROR to the Circuit Court of Lake county; the Hon. THEO. D. MURPHY, Judge, presiding.

Mr. ALLAN C. STORY, for the plaintiff in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an indictment, in the circuit court of Lake county, against the plaintiff in error, under section 25, chapter 38, Revised Statutes of 1874, page 355, which provides that "an assault with a deadly weapon, instrument or other thing, with intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, shall subject the offender to a fine not exceeding $1000, nor less than $25, or imprisonment in the county jail for a period not exceeding one year, or both, in the discretion of the court."

The second count of the indictment under which the defendant was convicted avers that, on a certain day and year, the defendant, at and in the county aforesaid, with a deadly weapon, to-wit: a certain pistol, upon the person of one Charles Davidson, with force and arms, did then and there unlawfully make an assault with the intent then and there unlawfully to inflict upon the person of the said Charles Davidson a bodily injury, no considerable provocation then and there appearing, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the State of Illinois.

It is insisted by the defendant that the indictment is insufficient to sustain the judgment; that the pleader was bound not only to aver that the pistol was a deadly weapon, but he was

required to state facts which would of themselves show the instrument with which the assault was made to be a deadly weapon. The averment in the indictment is specific that the assault was made with a deadly weapon—a pistol; and we can not well understand that anything more could be required of the pleader. To aver that the pistol was loaded, or that it was an instrument of such size and weight as to be a deadly weapon, in the hands of a strong man, who might desire to use it for the purpose of striking a blow, would be, in effect, pleading the evidence which was necessary to be introduced on the trial in order to obtain a conviction. When the pleader averred that the assault was made with a certain instrument, and averred that instrument to be a deadly weapon, the demands of the law were fully answered.

The case of *The State* v. *Seaman*, 1 Green, 418, is in point, where the Supreme Court of Iowa held an indictment good where it alleges the assault to have been made with a deadly weapon, without any other description of the instrument.

But if there was any doubt in regard to the question, that provision of our criminal code which declares that every indictment shall be deemed sufficiently technical and correct which states the offense in the terms and language of the act creating the offense, or so plainly that the nature of the offense may be easily understood by the jury, would seem to relieve the subject from all controversy. The offense is not denied to have been charged in the language of the statute, and such has been held sufficient so long in this State, that it has become an established rule of criminal pleading. See *Lyons* v. *The People*, 68 Ill. 271, and cases there cited.

It is next urged by the plaintiff in error that the verdict is against the evidence and the law, and that the jury were improperly instructed. It appears, from the testimony contained in the record, that certain sheep belonging to one Davidson were trespassing upon land in the possession of the defendant; that the defendant was chasing the sheep with his dog, when Charles Davidson, a boy seventeen years old, shot the dog with a revolver. A scuffle then ensued between the

defendant and the boy, in which the defendant obtained the revolver, and with it inflicted a number of severe blows on the head of the boy. The evidence entirely fails to show that the blows inflicted were in necessary self-defense of the defendant. While the boy, Charles Davidson, had no right to shoot the defendant's dog, and might be held liable for his conduct, in an appropriate action, yet the defendant had no right to take the law in his own hands and redress any real or supposed grievances which he might have, by the infliction of severe punishment by striking or in any manner beating the prosecuting witness, Charles Davidson. The law affords ample protection to every citizen for a violation of every right, and under no circumstances can he take the law into his own hands, except in the necessary self-defense of his property or person, and then only sufficient force can be used for the protection of the former or safety of the latter.

The assault in this case, so far as we understand the evidence, was not warranted by the surrounding circumstances, and the jury, having due regard to their duty, could not have done otherwise than rendered a verdict of guilty.

Exceptions were taken to the giving and refusing instructions, but we perceive no substantial error in the ruling of the court in this regard. The instructions that were given on behalf of the defendant presented the law involved in the defense fairly to the jury; and if it be true that some of the refused instructions contained correct propositions of law, the defendant was not prejudiced by their refusal. The substance of defendant's second refused instruction was embraced in instruction No. 1, which was given. The other refused instructions were calculated to mislead the jury, and it was not error to refuse them.

After a careful consideration of the whole record, we are satisfied the law was fairly given to the jury by the court, and, as the evidence warranted the finding, we perceive no ground upon which we can disturb the judgment. It will therefore be affirmed.

Judgment affirmed.

BREESE, WALKER and DICKEY, JJ., dissenting: We think the second instruction asked by defendant, and refused, ought to have been given, and that proofs show considerable provocation.

THE MASSACHUSETTS MUTUAL LIFE INSURANCE CO.

v.

WALTER B. KELLOGG.

1. AMENDMENT—*when notice is required.* Where an amendment of the record or officer's return to process is sought at the return term or before the cause is disposed of, no notice thereof is required, but after the case has been finally disposed of, and the term ended, special notice is necessary.

2. PLEADING—*allegation of promise to pay.* In a declaration in assumpsit, where the instrument sued on does not contain an unconditional promise to pay money, the pleader, after stating the conditional undertaking, and the happening of the condition, should state that the defendant thereby became liable to pay, and thereupon undertook and promised, etc. But the want of such allegation can be reached only on special demurrer. It is sufficient, except on special demurrer, to state distinctly that which, if proved, will sustain the action.

3. SAME—*declaration on insurance policy.* A declaration upon a policy of insurance which shows the making of the policy, the conditions of the contract, the performance of the conditions, and the happening of the contingency upon which the defendant became liable, and his failure to pay, is good in substance, and entitles the plaintiff to recover on default.

4. SAME—*on life policy of insurance.* The interest of a party insuring, in his own life, need not be averred in a declaration upon the policy, and when the policy is set out in the declaration, and it shows the interest of the plaintiff, this is sufficient.

5. SAME—*variance—surplusage.* Where a declaration sets out a policy of insurance or contract *in hæc verba*, and then states its legal effect incorrectly, the latter will be treated as surplusage, and there will be no variance.

6. DEFAULT—*what admitted by.* A default admits every traversable allegation in the plaintiff's declaration, and every ground upon which a recovery is sought, and where the suit is upon an instrument for a definite sum of money, no evidence is necessary upon the assessment of damages.

Appeal from the Superior Court of Cook county; the Hon. Joseph E. Gary, Judge, presiding.

Mr. S. K. Dow, and Mr. Frank J. Smith, for the appellant.

Messrs. Norton, Hubbard & Hatch, for the appellee.

Mr. Justice Dickey delivered the opinion of the Court:

This is an action of assumpsit, by Walter B. Kellogg, upon a life insurance policy issued to Henry H. Kellogg on July 27, 1868, insuring the life of Henry for the term of 23 years, (beginning at noon of the day of the date of the policy,) in the amount of $1000, payable 90 days after proof and notice that he had attained the age of 45 years, or died prior to attaining that age; the sum insured in the latter contingency being for the benefit of Walter, the father of the assured. The policy is set out *in hæc verba* in the bill of exceptions.

The declaration was filed April 23d, 1875. To it was attached what purported to be a copy of the policy. The declaration alleges the making by appellant of their policy of insurance, a copy of which is hereto attached. The declaration then proceeds to set out the supposed legal effect of the policy, proceeding with the words "whereby the defendant, in consideration," etc., and there seems a variance, in some respects, between the supposed legal effect thus attributed to the instrument, and the true legal effect of the same. Then follow, in the declaration, allegations that the annual premiums mentioned in the policy were regularly paid, and duly, and that Henry died on October 13, 1874, and before he had attained the age of 45 years, and that of all this defendant had proof and notice before the suit was begun; that Henry, in life, fully complied with the terms of the policy on his part, and that, at his death, there was no sum due on the policy for unpaid premiums, yet defendant has not, though often requested, paid to plaintiff any part of the sum of $1000, etc.

Service of summons was had April 20th, 1875, upon Mortimer A. Frisbee and Nicholas B. Rappleye, agents of this cor-

poration, the president not being found in the county, but the sheriff, in making return, said the process was served on "*Frisbee and Rappleye*, agents," etc.

Judgment by default was entered at the return term. After the default was entered, the sheriff, by leave of the court, amended the return by inserting, instead of the words "Frisbee and Rappleye," the words "Mortimer A. Frisbee and Nicholas B. Rappleye."

After this, and before the assessment of damages, the defendant, by attorney, appeared and moved to set aside the default. The motion was overruled, and, on the assessment of damages, the policy of insurance, only, was given in evidence, and to this defendant objected, and excepted to the ruling of the court in receiving the same in evidence. The court assessed the damages at $1009. Defendant then moved in arrest of judgment. This motion was overruled and final judgment entered for damages and costs, and defendant appealed to this court.

Appellant contends it was error to permit an amendment of the sheriff's return without notice. The defendant had notice by the service of summons. The amendment was at the return term, and the whole proceedings were *in fieri* until the last day of that term. After an action has been disposed of, and the term has ended, special notice is necessary on a motion to amend the record in any respect, because the parties depart without day; but so long as an action is pending and undisposed of, the parties are presumed to be in court, and no special notice is, by law, required for the making of any proper order in the case, or for the amendment of any part of the record of the current term.

Appellant contends that the declaration is defective for want of an averment of an unconditional promise to pay money. In declarations in assumpsit, where the instrument sued upon does not contain an unconditional promise to pay money, the pleader, usually, after stating the conditional undertaking, the happening of the condition, proceeds to say that defendant thereby became liable to pay, and thereupon "undertook and

promised," etc., but this is a mere matter of form, and the failure to do so can not be questioned upon general demurrer or motion in arrest, or on error. It is sufficient, except on special demurrer, that the pleader has stated distinctly that which, if proven, will sustain the action. This is done in this case. The making of the policy, the conditions of the contract, the performance of all conditions he is bound to show were performed, and the happening of the contingencies upon which defendant becomes liable to pay, and the failure of defendant to so pay, are all set out in this declaration.

We can not commend this declaration as a model of artistic pleading, but its imperfections are not such as to require a reversal of this judgment. Some criticism is indulged in by appellant as to the use by the pleader of the phrase "substantially promised." This means simply that the pleader proposes to set forth merely the legal effect, or the substance of the promise, without giving the precise words, and is not faulty in substance, although it does not follow the language of the precedents.

It is also objected that the declaration "contains no statement of interest in the insured." The insurance was taken and paid for by Henry H. Kellogg, upon his own life. The interest of a man in *his own* life need not be averred. The interest of the plaintiff in the money to be paid is shown by the terms of the policy, which is set out verbatim in the copy attached to the declaration as a part thereof.

Lastly, it is insisted that there was error in receiving in evidence, at the assessment of damages, the policy of insurance, because, first, it varied from the instrument mentioned in the declaration. It is not alleged that it varied from the copy attached to the declaration as part thereof, but that it varied from the allegations contained in the same count as to the legal effect of the contract declared upon.

Such a variance can not avail. If the pleader's general description of the instrument declared on, contained in a count which sets out the instrument verbatim, varies from the true legal effect of the instrument itself, the general descrip-

tion must yield to the language of the instrument as set out, and, in so far as it varies, must be rejected as surplusage. It is merely the erroneous opinion of the pleader, which does not affect the true legal effect of the words of the instrument. If, rejecting this general description as surplusage, the declaration shows a cause of action, and the proof agrees with these paramount allegations, it is sufficient.

Again, in this case, there was no necessity for any proof whatever for the assessment of damages. The damages rested purely in computation. The default admitted every allegation of the declaration, in so far as it was traversable. It admitted the execution of the policy, the terms of the policy, the full performance of the conditions by Kellogg, the fact of the death under the age of 45, the time of the death, notice and proof of these facts 90 days before, and hence admitted that $1000 was due and unpaid at the time of the bringing of the suit, and all that remained was, to compute interest from the bringing suit to the assessment of damages. This needed no proof whatever, and so long as the damages do not exceed the amount of the policy and proper interest, the defendant can not be said to be harmed.

The judgment must be affirmed.

Judgment affirmed.

WESLEY MORRILL

v.

WILLIAM H. COLEHOUR *et al.*

1. SPECIFIC PERFORMANCE—*not when contract is abandoned.* Where the legal title to land purchased is taken in the name of one of the purchasers, and he gives his written agreement to the others that they shall share in the net profits, and they afterwards verbally agree with him to abandon all claims they have, in consideration of being released from liability for the purchase money, they can not have the contract of purchase specifically enforced in equity.

2. CONSIDERATION—*release from liability.* Where several parties are interested in a purchase and liable for the purchase money, an agreement on the part of one to pay the money yet due, is a sufficient consideration to support a contract, on the part of the others, to abandon and give up all their interest in the property purchased.

3. LAND *as personalty—statute of frauds.* Where land is purchased by several for the purpose of sale and the acquisition of profits only, and not for permanent use, it will be regarded in equity as personal property among the partners in the speculation, and one of the parties may release his interest in the same verbally, and the same will not be within the Statute of Frauds.

4. CONTRACT—*written one may be released verbally.* The rule seems to be well established, that the terms and conditions of a written contract, and even a covenant, may be dispensed with by a verbal agreement, founded upon a proper consideration, and the same may be set up as a bar to an action for its breach.

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

Mr. ARTHUR D. RICH, for the appellant.

Messrs. GOUDY, CHANDLER & SKINNER, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It is alleged in the bill, that about the 18th day of July, 1871, complainant, together with Francis M. Corby and Charles W. Colehour, after previously negotiating with the owners, Robert D., Harriet S., Sarah J. and Henry F. Clark, purchased the undivided half of a tract of land, for the sum of $100,000 as the purchase money; to be paid, a prior mortgage of $4000; cash in hand, $10,000; and the balance in five annual installments of $17,200 each, with annual interest at the rate of seven per cent per annum, to be secured by deed of trust; that the purchase was made, and the conveyance was made to Wm. H. Colehour, who gave his notes and a deed of trust on the property, to secure the deferred payments.

Before the purchase was made Hansbraugh called the attention of C. W. Colehour to the fact that this land was in the market. He proposed to take an interest in the purchase, and

asked Colehour to do likewise. Thereupon he called Corby's attention to the matter, who also brought it to Morrill's notice. It was necessary, to consummate the purchase, that $10,000 should be paid when the purchase was closed. Colehour did not have the money and hence applied to Corby to take an interest in the purchase and advance the money, but he was unable to do so, and he applied to Morrill to take an interest and furnish the money. Pending the negotiations, there were numerous conferences between C. W. Colehour, Corby and Morrill, but there was no final action in the matter until about the 1st of August, 1871. It is claimed, and there seems to be evidence to support it, that whilst these conferences were being held C. W. Colehour had contracted with the Clarks for the purchase of the land for his brother, Wm. H. Colehour, and they executed a deed to him for the land on the 18th day of July, 1871, and he gave a trust deed to Turner to secure the $86,000 of unpaid purchase money.

Afterwards, about the 1st of August, the Clarks demanded that the $10,000 be paid or the purchase abandoned. Hansbraugh had furnished half of that sum, and C. W. Colehour, Corby and Morrill agreed that Morrill should furnish the money, as the others did not have it, as he was expecting means from Vermont, and C. W. Colehour and Corby were to refund to him their equal proportions of the amount. Morrill procured the $5000 from a bank, on his and Corby's note, and on the 14th of August he paid $2500 on this note, and on the 25th of October, following, he paid the balance. In May, 1872, Corby gave his note for one-third of the amount, and C. W. Colehour a note for a similar amount. Corby paid his note, but Colehour did not pay his, but renewed it, and subsequently Morrill recovered a judgment thereon.

The $5000 thus borrowed from the bank was placed in the hands of C. W. Colehour, which, with the $5000 he had received from Hansbraugh, he paid to the Clarks, and the deeds, previously prepared, were exchanged. The negotiations for the sale and purchase seem to have been conducted, on the

part of the Clarks, by H. F. Clark, and for W. H. Colehour and the others, by C. W. Colehour.

After the payment of the $10,000, and the exchange of the papers, Wm. H. Colehour gave to Hansbraugh a paper stating that he had paid $5000, half of the cash payment, and as he, Colehour, should make sales, Hansbraugh was to have one-half of the profits. He, at the same time, executed and delivered this paper to the other parties:

"CHICAGO, ILL., *August* 1, 1871.

"Know all men by these presents, that F. M. Corby, Wesley Morrill and Chas. W. Colehour are, together, jointly and equally interested in one-half of the 406 acres of land situate in Hyde Park, Cook county, Illinois, this day, to-wit: July 18, 1871, bought of H. F. Clark and others, they having advanced one-half of the purchase money advanced, in cash, to-wit: $10,000, they paying $5000 for the purchase of the same; and it is hereby agreed, that out of the profits, if any, to be realized from the sale of said land, the said parties above jointly shall be entitled to and receive the one-half of the net profits from any sale of said land. Witness my hand and seal, this 1st day of August, A. D. 1871.

WILLIAM H. COLEHOUR." [SEAL.]

The fire of October, 1871, destroyed the deed of conveyance from the Clarks to Wm. H. Colehour, but it was subsequently restored. These facts seem to be established by the evidence, and have given rise to less dispute than others in the case. But the Colehours having denied that complainant has any interest in the property, or in the proceeds of the sale thereof, he filed his bill to establish his rights, and for an account of the proceeds of sales made by Wm. H. Colehour.

As a defense to the bill, defendants insist that complainant released and discharged W. H. Colehour from all liability under his agreement of August 1, 1871, to account for profits, or for any interest in the land thus purchased and held by him; and that, under the release by C. W. Colehour, Corby and appellant, Wm. H. Colehour acquired and became invested

with all interest in the land, and he had taken possession and improved it, thereby greatly enhancing its value.

Against this defense, it is urged that appellees have failed to prove that appellant ever agreed to release the trustee; that if such proof was made it is by verbal agreement, not in writing, without consideration, and it is void; that the possession was taken under the conveyance and for the use of the *cestuis que trust*, and not under any release from appellant, written or verbal; and that, under the fiduciary relation of Wm. H. Colehour, he could not be released or discharged from the trust by a mere verbal agreement.

On a hearing on bill, answer, replication, exhibits and proofs, the court below refused the relief sought and dismissed the bill, and complainant appeals, and assigns various errors.

It is insisted that the evidence fails to show that there was an agreement entered into by the two Colehours, Corby and appellant, about the first of May, 1872, or at any other time, to turn the purchase over to W. H. Colehour, and that the others would abandon all claim to the property or to any profits that might be realized from its sale, and that he would not look to them for purchase money. Both of the Colehours and Corby testify that the arrangement was made; but it is positively denied by appellant. We think the circumstances in evidence strongly tend to corroborate the evidence of appellees. Their evidence may not be as clear and precise in all of the circumstances and details as we might reasonably expect, yet they all agree and are positive that the arrangement was made. When it is remembered that the fire of October, 1871, was so disastrous to the property of the city; that it so greatly depressed property beyond but near the city; and when we see that appellant, according to his own statement, gave the matter but little attention; when he saw the property lie for such a length of time without being offered for sale; and then, when he must have seen the various improvements being constructed upon it, and be content himself with only calling a few times at Colehour's office, without seeing him, it has little of the appearances of ownership or claim of profits from sales.

The improvements were extensive, and could not but attract the attention of all persons claiming any interest in the property. It does not appear that appellant ever gave authority to improve the property, and if not, and he claimed any interest in the property, we may safely infer that it would have induced him to at once inquire why they were made, and that he would have been vigilant in making inquiry as to their object, and would not have contented himself simply by calling at Colehour's office, and not seeing him for such a length of time. It is almost incredible that he should have done so, if he considered himself as interested in the land. He does not say that he ever inquired at all about the improvements thus made. This is not the course usually pursued by persons so largely interested in property.

Again, it is manifest that all of these parties believed, or at least they feared, that they were liable for the payment of any portion of the purchase money that might not be realized by a sale of the property. The price was depressed and the prospect of loss was strong, if the deed of trust should be speedily foreclosed. This, then, formed a strong inducement to abandon the whole thing and sustain the loss of the $5000 in equal portions, if they could induce W. H. Colehour to assume the risk. Hence, so far from there being no motive to enter into the arrangement, we can see that there was a strong inducement.

Stress is laid upon the fact that written releases were not given or written indemnity taken if the arrangement was made. In the first place, the parties certainly feared they were liable for the unpaid purchase money, and they must have known that the liability, if it existed, was to the Clarks, the vendors, as well as to W. H. Colehour. They, of course, would not go to the Clarks to obtain releases when it seems, from the evidence, that they all desired that the vendors should not become acquainted with the fact that they had any connection with the transaction. They would, therefore, naturally avoid all effort to procure such a release from that source.

The record shows that Corby had the same interest as that of appellant, and he swears that he surrendered his claim at the same time and on the same agreement as did appellant; and, notwithstanding the vast rise in this property, he disclaimed all interest in it, and, against his interest, testifies that they both, at the same time and from the same motives, abandoned all claim to the property or the profits arising from its sale. These are circumstances strongly corroborating the testimony given by appellees.

It is urged, that as W. H. Colehour occupied the relation of trustee, he should have fully disclosed everything to appellant, affecting his interest in the trust property, when the agreement to abandon the arrangement was made. A careful examination of the evidence fails to show that Colehour had superior information to that of appellant, or that he wrongfully withheld anything. They were both of mature age and were business men. They were both on the ground and had been for a considerable time, and, so far as the record discloses, appellant had equal means of information, and may have had all that was possessed by Colehour. So far as we can see he was equally well informed and as capable of protecting his interest as was Colehour.

It is, however, urged that appellees have entered into a conspiracy to defraud appellant out of his interest in the property. There is no direct evidence to sustain such a supposition. Even the prospect of large gains is wanting on the part of Corby. Instead of his making a large sum, he, by his testimony, deprives himself of all possibility of ever participating in any profits arising from the transaction. Nor is it shown that he would otherwise derive any gains by uniting with the Colehours in defrauding appellant out of his interest, by perjury. No motive is shown which would render it in the slightest degree probable that he would enter into such a base and infamous scheme; and if he was so depraved as to do so without some powerful motive, his character would be so infamous that it would have been an easy matter to have shown that his evidence was wholly unworthy of belief. A man can not be-

come so depraved without the almost total loss of character. He is not shown to have been unfriendly with appellant, nor to have had any interest or other controlling motive to combine with the Colehours to perpetrate so base a wrong on appellant. We see nothing in the record to even raise such a suspicion. All of the facts considered, we think that it clearly appears the parties did make the arrangement.

It is urged that there was no consideration to support the contract to abandon the agreement, which had been manifested in writing; that it was but an unexecuted agreement for a voluntary gift, and that a court of equity will never execute and enforce such a gift.

The fact that the property had largely depreciated in value, to perhaps less than the sum still due on it, and the fear that W. H. Colehour could hold them liable, and also, that they might be liable to the Clarks for any loss that might be sustained from a sale of the lands, was the strong inducement to make the arrangement, and the agreement with W. H. Colehour that he would be responsible to the Clarks for the purchase money, and not look to them for any portion of it, was the consideration of the agreement. Nor does it matter that they did not procure an agreement from the Clarks of a similar character, as the promise they did receive was a sufficient consideration to support the agreement.

It is next contended that the agreement related to such an interest in the land as to be void under the Statute of Frauds, because there was no memorandum of it in writing signed by appellant.

The written agreement executed by W. H. Colehour only binds him to pay appellant and the others equal portions of the one half of the net profits arising from the sale of the lands. It in no event bound him to convey the land, nor can we imagine any state of facts that could arise under the agreement, that would require a court of equity to compel him to convey the land to them. Had he failed or refused to proceed to make sales as was contemplated by the parties, he could, no doubt, have been compelled to do so, or another would have

been appointed for the purpose, by a decree of court. By this agreement, this was not an interest in or title to the land, but it was an agreement to give appellant, and pay to him, profits that might be realized from the sale of the land.

W. H. Colehour held the legal title, the Clarks held the equitable title, or rather a lien on the land to secure the purchase money, and appellant and his associates held an agreement for one half of the net profits arising from the sale after discharging the $4000 mortgage, the purchase money, the expenses, taxes, and paying W. H. Colehour for his trouble.

It was not in the contemplation of any of the parties that W. H. Colehour should ever convey a foot of this land to them or either of them. The purchase was made for the purpose of sale and the acquisition of profits. It was not bought to hold as land, but simply as an article of commerce, and for speculation, and for that reason equity regards it as personal property among the partners. In such cases the intention of the parties stamps the character of the transaction. We are, for these reasons, of opinion that this was not a contract for such an interest in lands as to fall within the Statute of Frauds, and was not, therefore, void, because it was not in writing.

The rule seems to be well established that the terms and conditions of a written contract, and even a covenant, may be dispensed with by a verbal agreement founded upon a proper consideration. A formal release must, of course, be in writing, and under seal, but a verbal agreement to dispense with the performance of a written agreement, may be set up as a bar to an action for its breach. See Brown on Frauds, sec. 429, *et seq.*, *Gross* v. *Lord Nugent*, 5 Barn. & Adolph. 64, *Bell* v. *Howard*, 9 Mod. 302, and *Stephens* v. *Cooper*, 1 Johns. Ch. R. 49. These cases hold that, where a party sues to have a contract specifically performed, the defendant may prove that the contract was abandoned by a verbal agreement, and this is upon the principle that the court will never decree that a contract be performed when, to do so, it would be inequitable or oppressive.

Now this bill is, in effect, for a specific performance of the

contract of W. H. Colehour of the date of August 1, 1871, and the defense is, that the agreement was waived and discharged, and we think the waiver may be shown, as it was done, by a verbal agreement. Whether such a waiver or discharge can be relied upon as a defense in all cases, both at law and in equity, it is unnecessary at present to inquire, but that it may, in all cases for the specific performance of contracts and bills of that nature, we have no doubt.

For the reasons here given, we are clearly of opinion the decree of the court below dismissing the bill must be affirmed. We have, on a rehearing of this case, carefully reconsidered the grounds of the former decision of the case, and are unable to arrive at a different conclusion, and we must adhere to what we then said and determined.

Decree affirmed.

Illinois and St. Louis Railroad and Coal Co.

v.

David Ogle.

Measure of damages—*in trespass for taking coal from the mine of another.* In an action of trespass for taking coal from the plaintiff's mine, he may recover the value of the coal at the mouth of the pit, less the cost of carrying it there from the place where it was dug, allowing the defendant nothing for digging.

Appeal from the Circuit Court of St. Clair county; the Hon. William H. Snyder, Judge, presiding.

Messrs. G. & G. A. Kœrner, for the appellant.

Messrs. C. W. & E. L. Thomas, for the appellee.

Mr. Justice Craig delivered the opinion of the Court:

This was an action of trespass, brought by David Ogle in the circuit court of St. Clair county, against The Illinois and

St. Louis Railroad and Coal Company, to recover damages for an unlawful entry upon the plaintiff's close, and digging out a certain vein of coal. A trial of the cause before a jury resulted in a verdict and judgment in favor of the plaintiff, to reverse which this appeal was taken by the defendant.

The only error assigned is, that the court erred in instructing the jury in regard to the measure of damages, as follows:

"If the jury believe, from the evidence, that the defendant trespassed upon plaintiff's land, and mined coal therefrom, and converted it to its own use, the jury are to be in nowise limited by the value of the land itself, but must regard the instructions of the court upon the question of what is the proper measure of damages.

"If the jury believe, from the evidence, that the defendant, by its servants and employees, mined coal from plaintiff's land without his consent, as alleged in the declaration, and did so by mistake or inadvertence, and without knowledge that the coal was being mined from plaintiff's land, then the jury are bound to allow plaintiff the value of the coal taken from his land within five years before this suit was commenced, estimated at the pit mouth, less the cost of carrying it where it was dug to the pit mouth, or, in other words, the plaintiff, under the above circumstances, is to be allowed the value of the coal at the pit mouth, less the cost of carrying it there from the place where it was dug, allowing defendant nothing for the digging, the verdict, however, not to exceed $65,000."

In *Robertson* v. *Jones*, 71 Ill. 405, the same question presented by the instructions of the court in this case arose, and we there held, in an action of trespass, the owner of the mine could recover the value of the coal as soon as it was severed and became a chattel, or he might recover the value of the coal at the mouth of the pit, less the cost of removing it from the mine, after it was dug, to the pit's mouth.

The instructions given are in harmony with the views expressed in *Robertson* v. *Jones*, but it is urged by appellant that a different rule has been established in other courts, and

our attention is called particularly to *Wood* v. *Morewood*, 43 E. C. L. 810; *Forsythe* v. *Wells*, 41 Pa. St. 291; and the late case, in Michigan, of *Winchester* v. *Craig*, decided at the January term, 1876.

The decision in *Robertson* v. *Jones*, *supra*, although in harmony with other authorities, is predicated mainly on the decision of *Martin* v. *Porter*, 5 M. & W. 353, which, like the case before us, was an action of trespass for breaking and entering the plaintiff's close and carrying away coal, by an owner of an adjoining estate. On motion to reduce the damages, before a full bench, it was held that the plaintiff was entitled to recover the value of the coal as soon as it existed as a chattel, which would be its value at the mouth of the pit, after deducting the expense of carrying the coals from the place in the mine where dug, to the pit's mouth.

This decision was rendered in 1839. In 1841, *Wood* v. *Morewood*, *supra*, was tried at Derby Summer Assizes, before Baron Park, and on the trial the Baron directed the jury: "That if there was fraud or negligence in the defendant, they might give as damages, under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin* v. *Porter;* but if they thought that the defendant was not guilty of fraud or negligence, but acted honestly and fairly, in the full belief he had a right to do what he did, they might give the fair value of the coals, as if the coal fields had been purchased from the plaintiff."

This decision is cited by appellant as authority that the rule announced in *Martin* v. *Porter* was not adhered to in the courts in England; but the fallacy of the position is fully established by the decision of *Morgan* v. *Powell*, 43 Eng. Com. L. 734, which was an action of trespass for entering the plaintiff's close, and mining and carrying away coal. On a rule before Lord Denman, Patterson, Williams and Colridge, J J., to show cause why the expense of mining and carrying the coals from the mine to the mouth of the pit should not be deducted from the verdict, Lord Denman said: "We are of opinion that the rule in *Martin* v. *Porter*, is correct, and

properly applicable to the present case. The jury must give compensation for the pecuniary loss sustained by the plaintiff from the trespass committed in taking his coal, compensation having been separately given for all the injury done to the soil by digging, and for the trespass committed in digging the coal along the plaintiff's adit; and the estimate of that loss depends on the value of the coal when severed—that is, the price at which the plaintiff could have sold it. This, plainly, was the value of the coal at that moment. The defendant had no right to be reimbursed for his own unlawful act in procuring the coal, nor can he, properly speaking, bring any charge against the plaintiff for labor expended upon it. But it could have no value as a salable article without being taken from the pit. Any one purchasing it there, would, as of course, have deducted from the price the cost of bringing it to the pit's mouth. Instances may easily be supposed where particular circumstances would vary this mode of calculating the damage, but none such appear."

In the argument, the case of *Wood* v. *Morewood*, decided at *Nisi Prius* by Park, B., was cited, and relied upon as establishing the correct rule of damages. Yet the court in no manner alluded to that decision, but, on the other hand, followed and affirmed *Martin* v. *Porter*.

The doctrine announced in *Martin* v. *Porter* was again followed and adhered to in the case of *Wild et al.* v. *Holt*, 9 Mees. & Wels. 672.

So far, therefore, as we understand the English authorities, in an action of trespass, like the case under consideration, the rule of damages is well settled that the plaintiff is entitled to recover the value of the coal at the mouth of the pit, after deducting the cost of removing it from the place where mined to the pit's mouth.

No necessity exists for one miner to trespass upon an adjoining owner. If proper maps and plans of the mine are kept, and measurements and surveys of the work made, as required by common prudence and the statute, each miner will have no difficulty in confining his operations to his own estate.

When, therefore, one miner, in disregard of his duty, invades the property of another, he should not be permitted to profit by his unlawful act, which would be the case if the trespasser was only required to pay the value of the coal as it existed in the mine before it was taken.

It is true, a different rule was established in *Forsythe* v. *Wells*, *supra*, cited by appellant; but that case seems to be predicated upon what was said in *Wood* v. *Morewood*, *supra*, which, as we have attempted to show, can not be regarded as the doctrine of the English courts. The doctrine announced in the Michigan case, cited by appellant, in so far as the question here involved is discussed, seems to follow the rule announced in the case cited from Pennsylvania, which we are not inclined to adopt.

The same question involved in this case, in 1873 came before the Supreme Court of Maryland, in *Berlin Coal Co.* v. *Cox*, 39 Md. 1. The action was trespass, to recover damages for mining and carrying away coal. The court, after a thorough and able review of the authorities bearing upon the question of the correct rule of damages, approved and followed the rule announced in *Martin* v. *Porter*, *supra*. In the concluding part of the opinion bearing upon the question, it is said: "The necessity and importance of this rule can scarcely be magnified in a community where the wealth of the country consists in its mineral deposits."

It is true the authorities in the States are not entirely harmonious, but we are satisfied the rule announced in *Robertson* v. *Jones* is correct in principle, that it is in harmony with the rule adopted in England and in most of the States, and we perceive no reason for departing from the doctrine announced.

Believing that the instructions of the circuit court are correct, the judgment will be affirmed.

Judgment affirmed.

The East St. Louis and Carondelet Railway Co.

v.

Ulrich Gerber.

1. Railroads—*liability of company upon failure to fence track.* A railroad company which fails to fence its track as required by the statute is liable for any damage resulting from such failure, whether caused by its own trains or those of another company using its track.

2. And a railroad company will be liable for any damage done by its trains, resulting from a failure to fence the track on which the damage is done, although the track may belong to another company; either company is liable in such case.

Appeal from the Circuit Court of St. Clair county; the Hon. William H. Snyder, Judge, presiding.

Mr. John B. Bowman, and Mr. R. A. Halbert, for the appellant.

Mr. James M. Dill, and Mr. W. C. Kneffner, for the appellee.

Mr. Justice Craig delivered the opinion of the Court:

This was an action, brought by Ulrich Gerber against the East St. Louis and Carondelet Railway Co., to recover the value of a mare killed upon the track of the railroad company. A trial of the cause before a jury resulted in a verdict and judgment in favor of the plaintiff for the value of the mare, to reverse which the railroad company has taken this appeal.

The evidence is undisputed that the road had been built and in operation for over four years, and it had not been fenced.

It was also proven that the mare was killed on the track, and not at a railroad crossing or within an incorporated town or village.

At the place where the animal was killed, appellant and the Cairo and St. Louis Railroad Company used a part of the track in common.

The appellant's road is of the ordinary guage (4 ft. 8½ in.,)

and the Cairo and St. Louis is a narrow-guage. The former was constructed about one year before the latter was built, but after the construction of the Cairo and St. Louis, the two companies used the west rail of the track in common. Under what arrangement, however, appellant permitted the Cairo and St. Louis company to use a portion of its track, does not appear from the evidence.

The defense interposed in the circuit court, and also relied upon here, to defeat a recovery is, that the animal of the plaintiff was killed by a train of cars belonging to and under the control of the Cairo and St. Louis Railroad Company. There is evidence tending to establish this view, and, at the same time, proof was introduced which tended to prove that the animal was killed on that part of the road used exclusively by appellant. Upon this question, the jury might properly have found either way, and the finding might have been justified by the proof.

But the circuit court, on the trial, refused an instruction requested by appellant, which in substance directed the jury that appellant would not be liable if the animal was killed by the trains of the Cairo and St. Louis company, and on the track used by it.

In *The Toledo, Peoria and Warsaw Railway Co.* v. *Rumbold*, 40 Ill. 143, where an animal was killed by trains operated by the Illinois Central Railroad Company, on the road of the Toledo, Peoria and Warsaw company, it was held, the latter company was liable for the damage. In the case cited it was said, it was the duty of appellants to have fenced the road, and public safety demands they should be held liable for all damages resulting from the neglect to fence it. And the same policy would require that the Illinois Central should be responsible for presuming to use the road of another company, fenceless and unprotected. Either company would be liable for the injury. The same principle that governed the case cited will apply here.

The appellant had its road in operation. The Cairo and St. Louis company was permitted to construct a rail on appellant's

track, and thus operate its trains over the road. If appellant would be liable, as held in the case cited, by permitting another company to run trains over its track, upon the same principle the liability would attach if it suffered a portion of its track to be used.

The statute required appellant to fence its road, and when it undertook to operate the road or allow others to do so, it must be held responsible to third parties for such damages as are incurred. The liability arises from the neglect of appellant to fence its road. The negligence in this regard is the gist of the action.

We are satisfied the law involved in the case was properly given to the jury. The judgment will, therefore, be affirmed.

Judgment affirmed.

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3. *Whether a delegation of legislative authority.* The fact that a law depends upon a future event or contingency for its taking effect, and that contingency may arise from the voluntary act of others, does not render it liable to the objection that it is a delegation of legislative authority to them upon whose acts the taking effect of the law depends. *Guild* v. *City of Chicago*, 472.

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4. *Act for the establishment of ferry at a particular place.* An act, the title of which is "An act to authorize the establishment of a ferry across the Illinois river," and which is limited in its application to one ferry, and that one located at a definite place, is a special act, and is, therefore, unconstitutional. *Frye* v. *Partridge*, 267.

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5. *And changing or amending their charters—effect of section* 22 *of article* 4. Section 22 of article 4 of the constitution, was not designed to repeal or change charters of cities, towns and villages in force at the adoption of the constitution, but merely to provide that no city, town or village should thereafter become incorporated or have its charter changed or amended, except by virtue of a general law; and all that is practicable or could have been intended, was, that the legislature should, by a general law, provide for the incorporation of cities, towns and villages, or the change or amendment of their charters, leaving it to those interested to bring themselves within its operation. *Guild* v. *City of Chicago*, 472.

6. *Amendment of charters must be under general law.* Amendments of the charters of cities, towns and villages must be by general law, which must apply alike to all cities, towns and villages desiring to amend their charters in that particular respect, so that one city, town or village may not amend its charter by adopting one provision, and another city, town or village amend its charter by adopting another and different law on the same subject. Whether the amendment to be adopted shall extend to a single or many subjects, is not within the regulation of the constitution. Its mandate is observed where the amendment, whether extensive or limited, is by general law. Ibid. 472.

7. *Cities adopting provisions of a general law in regard to, governed by any amendment made to such law.* Where a city, under the provisions of a general law for the incorporation of cities, adopts such general law, it does so subject to the power of the legislature to repeal or amend the same; and whenever the city takes any steps or institutes

EXCEPTIONS AND BILLS OF EXCEPTIONS.

Bills of exceptions.

1. *Whether necessary.* The ruling of the court upon motions to dismiss for want of a bond for costs, and to dismiss an appeal for want of a sufficient appeal bond, must be preserved in a bill of exceptions, if its propriety is sought to be questioned in this court. *Hyatt et al.* v. *Brown et al.* 28.

2. *What they should contain.* Where a defendant in replevin relied upon a chattel mortgage, and the court below, on motion of the plaintiff, excluded all the testimony relating to the mortgage, upon which the defendant assigned error, it was held that an objection to the mortgage of such character as ought to have been specifically made in the court below, would not be considered in the Supreme Court unless the bill of exceptions showed that the objection had been specifically made. *Wright et al.* v. *Smith*, 527.

EXECUTION.

Alias execution by justice of the peace.

1. *Before twenty days after judgment.* Where an affidavit is filed by a plaintiff, and an execution issued thereon by a justice of the peace inside of twenty days after the date of the judgment, and the execution is returned inside of the twenty days, the same affidavit will be sufficient to authorize the issuing of an *alias* execution. *Johnson* v. *Holloway*, 334.

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EXEMPTION.

From levy and sale on execution.

1. *Who is the head of the family—the husband or the wife—presumption.* In an action by a married woman residing with her husband on her land, against an officer, for levying upon her property under execution, on the ground that it is exempt, no presumption can be indulged that she is the head of the family, but that fact must be shown by proof that clearly rebuts the presumption that her husband is the head of the family, and it must be shown that the officer had notice of such anomalous relation. *Clinton* v. *Kidwell*, 427.

LICENSES.

To keep a dram shop.

1. *Subject to existing ordinances.* Although there may be no condition in a license to keep a dram shop granted by a town, nor any reference to any ordinances of the town, yet such license will be held to have been granted subject to such ordinances of the town as had a legal existence at the time it was granted, and such as were within the competency of the town authorities to enact. *Baldwin et al.* v. *Smith*, 162.

2. *Power to revoke does not authorize depriving licensee of use of his property by force.* Where an ordinance of a town provides, that in certain cases the town council may revoke license granted by them to keep dram shops, and it shall be the duty of the town constable to immediately close up the grocery of the licensee, the town authorities have no power to oust the keeper of the dram shop from his premises by force, take and hold possession of the same, and thus deprive him of the use of his property. Ibid. 162.

LIENS.

Mechanic's lien.

1. *Attaches to leasehold estate for work on machinery which lessee, under his lease, may remove.* Although, by the terms of a lease, the lessee has the privilege of removing all machinery and fixtures placed upon the leased premises, yet an engine and fixtures attached to the soil are a part of the estate itself until severed, and a mechanic or materialman, who, under a contract with the lessee, furnishes such engine and fixtures, and puts it up on the premises, is entitled to a mechanic's lien against the estate of the lessee on account thereof. *Dobschuetz et al.* v. *Holliday et al.* 371.

2. *Lien not affected by voluntary surrender to owner of the fee.* A voluntary surrender by a lessee of the leased premises to his landlord, before the expiration of his lease, can not affect a mechanic's lien upon the leasehold estate which attached whilst the lessee was the owner; and in such case, if the owner of the fee should neglect to discharge the lien, upon the consummation of a sale under the decree establishing it, he would be compelled to accept another tenant. Ibid. 371.

3. *Decree against owner of fee who accepts surrender of leasehold estate subject to mechanic's lien.* Where a lessee of land, whose estate only is sought to be subjected to a mechanic's lien, surrenders his estate to the owner of the fee, a decree establishing the lien may properly order that, in default of the payment of the amount of the lien by the lessee or the owner to whom he has surrendered, the interest of all the parties therein be sold; such a decree would be construed as applying to the interest of the parties in the leasehold estate, including the improvements for which the lien is established. Ibid. 371.

*See *Barrett et al.* v. *Spaids*, 70 Ill. 408.

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As a priority of equities.

3. *In respect to several mortgages given by successive purchasers.* A party, having a bond for a deed for a tract of land, upon the payment of the purchase money, sold the same, and took notes of the purchaser, and a mortgage on the land to secure their payment. The purchaser then sold to a third party, and took his notes, and a mortgage on the land to secure their payment. These mortgages were assigned to different parties. Whilst matters stood thus, the owner of the legal title gave notice to the holder of the bond that, unless the purchase money was paid by a given time, he would declare a forfeiture. When the day of forfeiture arrived, no one else having paid the purchase money, the assignee of the second mortgage paid it, and had the land conveyed to the holder of the bond, and took a deed of trust from him to secure the money thus advanced, as well as the notes secured by the second mortgage which he held. These notes not being paid, he sold the land under his deed of trust, and had it bid in by one who acted for him, and who reconveyed the land to him, no money passing between them in the transaction. Prior to this sale, the holder of the first mortgage had foreclosed it, making only the two assignees of the bond parties. Upon a bill filed by the party claiming title under the deed of trust, to set aside the title under the decree of foreclosure of the first mortgage, as a cloud upon his title, there being no evidence that the original owner had any power to declare the forfeiture of the contract, as he threatened, it was *held*, that there was nothing in the facts shown which cut off the lien of the first mortgage, or that would prevent the assignee of the second mortgage from redeeming from such first mortgage; that the lien for the money advanced to pay the bond was the first and highest lien, and that the holder of the first mortgage had no claim to the title, but simply to have the amount secured by his mortgage paid, and that the bill should be dismissed without prejudice. *Steinkemeyer* v. *Gillespie*, 253.

Payment of senior mortgage by junior mortgagee.

4. *And subsequent sale under senior mortgage.* If a junior mortgagee pays off a senior mortgage, but, instead of having it canceled, treats the transaction as a purchase, and has the mortgage assigned to himself, and makes an assignment of it in order that a sale may be made under it, and not only assents to a sale being made under it, by being present and making no objection, but participates therein by bidding on the property, a court of equity will not interfere in his behalf, and set aside the sale on the ground that the mortgage debt had been paid, although the result of such sale is to deprive him of the benefit of his junior mortgage. *Pursley* v. *Forth et al.* 327.

Foreclosure.

5. *Decree should only require payment of money by the debtor.* On a bill against a husband and wife to foreclose a mortgage executed by

*See *Richeson* v. *Ryan et al.* 15 Ill. 13, and cases there cited.

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ERRATUM.

The citation on page 450, of 3 Md. Eq., should be 3 Ired. Eq.