REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

NORMAN L. FREEMAN,
REPORTER.

VOLUME 91.

CONTAINING THE REMAINING CASES SUBMITTED AT THE SEPTEMBER TERM, 1878, AND A PORTION OF THE CASES SUBMITTED AT THE JANUARY TERM, 1879.

PRINTED FOR THE REPORTER.

SPRINGFIELD:
1880.

JNO. C. HUGHES,
PRINTER AND STEREOTYPER,
Springfield, Ill.

JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

ALFRED M. CRAIG, CHIEF JUSTICE.

PINKNEY H. WALKER,
JOHN M. SCOTT,
BENJAMIN R. SHELDON,
JOHN SCHOLFIELD,
T. LYLE DICKEY,
DAVID J. BAKER,*

} JUSTICES.

ATTORNEY GENERAL,
JAMES K. EDSALL.

REPORTER,
NORMAN L. FREEMAN.

CLERK IN THE SOUTHERN GRAND DIVISION,
R. A. D. WILBANKS, Mt. Vernon.
J. O. CHANCE,† Do.

CLERK IN THE CENTRAL GRAND DIVISION,
E. C. HAMBURGHER, Springfield.
ETHAN A. SNIVELY,† Do.

CLERK IN THE NORTHERN GRAND DIVISION,
CAIRO D. TRIMBLE, Ottawa.
E. F. DUTTON,† Do.

---

*Hon. JOHN H. MULKEY was elected as the successor of Mr. JUSTICE BAKER in June, 1879, but his name appears in this volume on page 343, as dissenting in the case of *Comstock et al.* v. *Gage*, that case having been considered upon rehearing after Mr. JUSTICE MULKEY came upon the Bench.

†Mr. J. O. CHANCE, Mr. ETHAN A. SNIVELY, and Mr. E. F. DUTTON, were elected Clerks in their respective Grand Divisions, on the 5th day of November, 1878.

TABLE OF CASES

REPORTED IN THIS VOLUME.

RULES OF PRACTICE IN THE SUPREME COURT.

Adopted at Springfield on the 11th day of February, 1879, being of the January Term of that year.

License to Attorneys.

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 will hereafter be issued by judges of this court in term time, on certificates from such court, 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 certificate 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. But no applicant who shall be rejected shall be permitted to be again examined within less than six months from the time of such rejection.

Adopted at Mt. Vernon, at the June Term, 1875.

Ordered:—That rule 43 be so modified that a diploma regularly issued by any law school, regularly organized under the laws of this State, whose regular course of law studies is two years, and requiring an actual attendance by the student of at least thirty-six weeks in each of such years, may be received and acted upon in the place and stead of the examination in open court, required by said rule; but every application for admission to the Bar, made on behalf of any person to whom any diploma, as aforesaid, has been awarded, must be made in term time, by motion of some attorney of this court, supported by the usual proofs of good moral character, and the production in court of such diploma, or satisfactorily accounting by affidavit for its non-production; and in all cases when the diploma on which the application is based does not recite all the facts requisite to its reception, all such omitted facts must be shown by the affidavit of the applicant, or some officer of the law school, or both.

Adopted at Ottawa, March 9, 1880.

NOTICE OF APPLICATION FOR REHEARING.

Ordered:—That rule 38 of this court be so amended that any party desiring a rehearing, in addition to the notice now required to be given to the opposite party or his counsel, of his intention to apply for a rehearing, shall also file with the clerk of this court, in the grand division in which the cause may be pending, a copy of such notice within fifteen days after the filing of the opinion in respect to which the rehearing is sought, and the right to file a petition for a rehearing shall depend upon compliance with this rule.

Adopted at Ottawa, March 22, 1880.

TIME OF COMMENCING CALL OF DOCKET, AND FOR FILING BRIEFS AND ABSTRACTS.

Ordered:—That hereafter the call of the docket will commence on the third day of the term, and twenty cases per day will be subject to call. Abstracts and briefs of plaintiff in error or appellant must be filed in the clerk's office on or before the time required for filing the transcript of the record, and in case either the abstract or brief is not filed within the time prescribed the judgment of the court below will, on the call of the docket, be affirmed. The defendant in error or appellee, in case he shall not argue orally, if the case is brought to this court from either of the Appellate Courts, shall file a brief within five days after the second day of the term, or if the case shall be brought directly from the circuit court, the Superior Court of Cook county, or from the county court or a city court to this court, he shall file his brief within ten days after the second day of the term, and the plaintiff in error or appellant can have five days in all cases to reply, at the expiration of which time the cause will stand for decision and no further arguments will be received. And rules 32 and 33 are hereby rescinded.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, 1878.

FRANCIS YOTT

v.

THE PEOPLE *ex rel.* Adolph Goldschmidt.

1. REPLEVIN—*power of court to compel defendant to surrender property.* The court from which a writ of replevin issues has no power, in case the officer fails to find the property therein described, to compel the defendant to surrender the property.

2. If the property is taken by the officer on the writ, and the defendant afterwards interferes with its possession or control or forcibly takes the same from the officer or the plaintiff, the court may doubtless enter a rule requiring the restoration of the property, and enforce obedience to such rule by fine and imprisonment, as the property in such case is in the custody of the law.

3. SAME—*defendant obstructing officer.* If a defendant in replevin should impede or obstruct in any manner the process of the court, issued to secure property, or prevent the officer from executing the same, this might afford ground for the imposition of a fine upon him.

4. OFFICER—*duty in respect to writ of replevin.* It is the imperative duty of an officer holding a writ of replevin to execute the same by seizing the property therein named, whenever he can find the same, whether the defendant is disposed to give it up or not.

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

Mr. CHESTER KINNEY, and Mr. EDWARD H. BRACKETT, for the appellant.

Mr. ADOLPH MOSES, for the appellee.

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

This is an appeal from an order or judgment, rendered in the circuit court of Cook county, wherein appellant, Francis Yott, was fined in the sum of $25, and ordered to be imprisoned in the common jail of Cook county for and during the period of twenty days, for contempt of court, for a failure to obey a certain order made by the court in an action of replevin, wherein Adolph Goldschmidt was plaintiff and Francis Yott defendant.

The writ of replevin was issued on the 2d day of May, 1878, returnable on the 3d Monday of May of the same year, for the recovery of a certain dapple-gray horse. The sheriff made return on the writ in the following words: "Served this writ by reading the same to the within named Francis Yott, and by demanding of him the within described property, which he refused to deliver up to me, on this 2d day of May, 1878."

On the 6th day of May, 1878, the court entered an order in the case, as follows: "On motion of said plaintiff, by his attorney, the said defendant is hereby ruled to deliver to the sheriff of Cook county the property described in the replevin writ issued in said cause, by 10 o'clock in the forenoon of the second day after the date of service of notice of this rule on him."

A copy of the order having been served, the defendant appeared and filed an answer under oath, which, not having been regarded as sufficient, the court rendered the judgment, to reverse which this appeal was taken.

Section 7 of chapter 119, entitled Replevin, (Rev. Stat. 1874, p. 852,) provides that the writ of replevin shall require the sheriff, constable, or other officer to whom it is directed, to take the property (describing it as in the affidavit) from the possession of the defendant, and deliver the same to the plaintiff, and to summon the defendant to answer the plaintiff in the action, or, in case the property or any part thereof is not found and delivered to the sheriff, constable or other officer, to answer the plaintiff for the value of the same.

Section 14 declares, that the sheriff, upon the plaintiff giving bond, shall forthwith execute such writ by seizing and delivering the property to the plaintiff, and by reading the writ to the defendant if he be found.

Section 18 provides, when the property or any part thereof can not be found, and when the writ has been served on the defendant, the plaintiff may declare in trover.

We find no provision of the statute which authorizes the court from which the writ issues, in case the officer fails to find the property described in the writ, to compel, by order, a defendant to surrender the property, nor are we aware of the existence of any law which confers upon the court such extraordinary power. The theory of the statute under which writs of replevin are issued would seem to require the officer who holds the writ, whenever the property can be found, to take it and deliver it over to the plaintiff. Whether the defendant who has possession of the property may feel disposed to give it up or not, is a matter of no consequence. The officer is authorized by the writ, and it is his imperative duty, to sieze the property if it can be found, and deliver it as commanded by the writ. In the event, however, that the property can not be found by the officer, then the writ can be read to the defendant, and the case can proceed as in an action of trover, and the plaintiff can recover the value of the property.

It was doubtless contemplated that in many cases the property might not be found, and hence the necessity for section 18, authorizing the case to proceed as in an action of trover. If,

however, the court in which the writ issued has the power to compel, by an order, the defendant to surrender the property, the enactment of section 18 of the statute was unnecessary, but we do not think the court has such authority. Had this property been taken on the writ of replevin, and had the defendant afterwards interfered with the possession or control of the property, a different question would have arisen. Doubtless the case then would have been within the rule declared in *Knott* v. *The People*, 83 Ill. 532, and *The People* v. *Neill*, 74 id. 68, in which it was held, that where property has been replevied, and afterwards forcibly re-taken by the defendant from the custody of the officer or plaintiff, the court has the right to enter a rule requiring the property to be restored, and punish by fine and imprisonment for a failure to obey the order.

When property has been replevied, and the case in which the writ issued is pending and undetermined, the property may be regarded as in the custody of the law, and the court has the right to see that it is not interfered with; but here, the court had no jurisdiction over the property. It had never come into the hands or possession of any officer of the court. Nor did it appear that the defendant impeded or obstructed in any manner the process of the court which had been issued to recover the property. Had this appeared, there might have been some ground for imposing the fine, but such was not the case.

We are, therefore, of opinion the court had no authority to render the judgment and it will be reversed.

Judgment reversed.

Syllabus.

JAMES WALLACE *et al.*

v.

CHARLES H. GOOLD.

1. PRACTICE IN THE SUPREME COURT—*review of facts on appeal from an appellate court.* The Supreme Court can not review the findings upon the facts on an appeal from an Appellate Court, except in the cases enumerated in the 88th section of the Practice act,—that is, in criminal cases, and cases in which a franchise or a freehold, or the validity of a statute is involved.

2. AGENCY—*declaration of agent as binding on his principal.* Declarations made by one after he has ceased to act as agent can not bind his principal, and are not admissible in evidence.

3. A principal will be bound by the statements of his agent whilst acting within the scope of his authority, when made in reference to the business of the agency, and if made immediately after the transaction, they may be admitted in evidence as a part of the *res gestæ*.

4. SAME—*and herein, when an agency terminates.* Where an agent is employed to secure a debt of his principal, which he does by taking the indorsement of notes by the debtor to his principal, his agency does not cease while he still holds the notes and his acts have not been approved by his principal. Until such notes are accepted by the principal, the agent's declarations are admissible in evidence against the principal.

5. BILL OF EXCEPTIONS—*when necessary.* Where the record fails to show the instructions given for a party, it can not be determined that there was error in refusing others. Error will not be presumed, but it must be shown by the record.

6. INDORSEMENT—*whether as indorser or as guarantor.* Where the payee indorses a note in blank, the legal presumption is, that he assumes only the liability of an assignor, and to rebut this presumption it must be clearly shown that he agreed to guaranty its payment at the time he indorsed the same. If one, not the payee, indorses the note at its execution, he will be presumed to do so as guarantor, and so of a person having no interest in the note as payee or indorsee. But such presumption may be rebutted.

APPEAL from the Appellate Court of the Second District; the Hon. JOSEPH SIBLEY, presiding Justice, and the Hon. EDWIN S. LELAND, and the Hon. NATHANIEL J. PILLSBURY, Justices.

Mr. EGBERT PHELPS, for the appellants.

Mr. E. F. BULL, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action in the circuit court, brought by appellants, on the guaranty indorsed on a note payable to appellee. Appellee pleaded, denying that he ever executed the guaranty, and verified the plea by affidavit. On a trial the jury found for defendant, and plaintiffs removed the case to the Appellate Court for the Second District, and on a trial that court affirmed the judgment, and the case is brought to this court on appeal, and a reversal is asked.

The Appellate Court having affirmed the judgment of the circuit court, we must hold, in the absence of a certificate of its findings, that they found the facts sufficient to sustain the verdict. We must treat their judgment as conclusive of the facts as found by the jury, and liken their judgment to the verdict of a jury at common law, and before the adoption of our statute authorizing this court to review the finding of the jury, and determine whether it is sustained by the evidence. By that practice the evidence was never passed on in the appellate court; but decisions, and the rulings of the court on the trial had *ore tenis*, were embodied in the bill of exceptions, and this was its office. If the party offered evidence, this, of course, did not appear in the record, nor did the judgment of the court on such an offer. So, where the court was asked to instruct the jury, the request and the allowance or refusal were all oral, and did not appear of record; but that such decisions might be reviewed, the offer of the evidence, stating what it was and the decision of the court thereon, was reduced to writing by the party objecting, stating that he objected and excepted to the decision of the court, and it was signed and sealed by the court, and was called a bill of exceptions, and thereby became a part of the record in the case, and the decision of the court could, in that manner, be brought before the

appellate court for review. The same was the practice on allowing or refusing motions and any other decision of the court in the progress of the case or on the trial. Until our statute allowing this court to review the evidence and findings of the jury, as well as the decisions of the judge trying the case, the evidence found no place in the bill of exceptions. Where an instruction was asked and refused, the bill of exceptions stated that evidence had been adduced tending to prove the issue in reference to which it was asked; or, if there was no such evidence on which to base the instruction, the bill of exceptions so stated, that the appellate tribunal might see it was a mere abstract proposition of law the party had moved the court to announce to the jury. In this mode a record was made, from which it could be determined whether the rulings of the court to which exceptions had been taken were erroneous.

The 87th section of the Practice act, (Pub. Laws 1877, p. 153,) provides: "If any final determination of any case, as specified in the preceding sections, shall be made by the Appellate Court as the result, wholly or in part, of the finding of the facts concerning the matter in controversy different from the finding of the court from which such cause was brought, by appeal or writ of error, it shall be the duty of such Appellate Court to recite, in its final order, judgment or decree, the facts as found, and the judgment of the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such cause."

The 89th section of the same act provides, that "the Supreme Court shall re-examine cases brought to it by appeal or writ of error as to questions of law only, and no assignment of error shall be allowed which shall call in question the determination of the inferior or appellate courts upon controverted questions of fact, in any case, excepting those enumerated in the preceding section." (The preceding, or 88th, section, enumerates criminal cases and cases in which a franchise or freehold, or the validity of a statute, is involved.)

Thus it is seen that we are precluded from examining the evidence, to determine whether it sustains the finding of the Appellate Court, in all cases except those enumerated in the 88th section of the act. It, therefore, follows, that when the Appellate Court affirms the judgment of the circuit court, it, by force of this statute, becomes conclusive upon us as to the facts, as was the verdict of a jury at common law.

Assuming, then, the finding of the Appellate Court to be final, did the circuit court err in its decision of the law on the trial of the case?

It is first insisted that the evidence clearly shows appellee did guaranty the payment of the note. To this we can only say, the jury found the other way, and the Appellate Court, by affirming the judgment, has found that their verdict is warranted by the evidence. We are thereby precluded from examining the evidence, as the statute has made that finding conclusive of the facts. We are positively prohibited from considering the evidence, and must assume he did not guaranty the payment of the note.

It is next urged that Prescott's evidence as to what Wilder said when he returned to the store, immediately after seeing appellee and procuring his indorsement of the note, was erroneously admitted. It is admitted that Wilder was the agent of appellants to procure security for their debt at and during the time he procured appellee's indorsement, but it is urged his agency ceased as soon as that was done, and that when his agency ceased his declarations could not bind his principals. If this is true, then appellants' proposition is correct, as declarations made by a person who has ceased to act as an agent can not bind his former principal. But had his agency ceased? We think clearly not, as he still held the note and his acts had not been approved by his principals. He still held the note as their agent, and he had it under his control as fully as was the note he had taken from the maker to appellants, which he surrendered to him when he took this note from Hopkins payable to appellee. This note was fully under

his control, and had not been delivered to appellants nor accepted by them, as the jury seem to have found. No reason is perceived why he could not have made some other arrangement and surrendered this as he had done with the other note. Had he done so, will it be contended that appellants could have sued and recovered of appellee, notwithstanding it might have been thus surrendered and canceled by Wilder after he made the statements admitted in evidence, and to which exceptions were taken? We not only think his agency had not ceased, but the declarations were made so near the time appellee indorsed the note that they formed a part of the *res gestæ*, and were admissible as such. The principal will be bound by the statements of his agent, whilst acting in the scope of his authority, when made in reference to the business he is transacting, as agent, for his principal. This is such familiar law, that it requires the citation of no authority for its support.

It is next urged, that the court erred in refusing to give to the jury the 12th, 13th, 14th and 15th instructions, asked by appellants. It is a sufficient answer to say, the record fails to show that all the instructions that were given for appellants are embodied in the bill of exceptions. From anything appearing in the record, the court may have given others embodying all the legal principles, if any, these contain. We can not presume error, but it must be shown before we can reverse. On turning to the bill of exceptions, we find that only appellants' refused instructions are set out as a part of the record; but, aside from all this, the instructions are not correct, and were properly refused.

Where the payee indorses a note in blank, the legal presumption is that he only intends to assume the liability of an assignor, under the statute, and to rebut that presumption it must be clearly shown he agreed to guaranty the payment at the time he indorsed it. Some courts hold, that the guaranty must be written before the payee signs the indorsement to become liable as guarantor. Where, however, a person not a payee indorses the note at the time it is executed, then the

presumption is that he indorses as guarantor; and so of a person having no interest in the note as payee or indorsee indorsing it in blank, after its delivery,—he is presumed to do so as guarantor. But this presumption may be rebutted. In this consists the distinction. The law never presumes that the payee or indorsee of a promissory note intends to guaranty its payment simply because he indorses it in blank, but a stranger, having no interest in the note, is presumed to intend to become a guarantor by so indorsing it. These instructions were, therefore, properly refused.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

JAMES MIX

v.

THE NATIONAL BANK OF BLOOMINGTON.

1. EVIDENCE—*to show existence of a National Bank—certificate of the comptroller of the currency.* In a suit by a National Bank, as indorsee, upon a promissory note, under the issue upon a plea of *nul tiel corporation* the plaintiff, against the objection of the defendant, was permitted to give in evidence the certificate of the comptroller of the currency issued under section 22 of the National Bank act, that the association had complied with the law and was authorized to do business. There was, besides, evidence that the bank had been acting as a national bank for several years, and the existence of the bank was acknowledged in the note signed by the defendant, it being made payable at the bank: *Held*, the certificate was properly enough received in evidence, and the proof was sufficient to establish, at least *prima facie*, the existence of the corporation.

2. ASSIGNMENT—*before maturity, as payment or security for pre-existing debt—how far protected.* It has been held that the indorsee of a promissory note before its maturity, taking it as payment or security for a pre-existing debt, shall be deemed a holder for a valuable consideration, in the ordinary course of trade, and shall hold it free from latent defences on the part of the maker.

3. In this case the payee of a note left the same with a bank for collection, the note not then being due, and at the same time the payee indorsed it. The party so leaving the note for collection was surety upon another note to the

same bank, and it was the understanding between the surety and the bank, at the time the former left his note for collection, that the proceeds thereof when collected, should be applied on the note upon which he was surety. Subsequently, and after the maturity of the note left for collection, the note to the bank was renewed, the other note being then turned over to the bank as collateral security for the renewed note. It was *held*, in a suit by the bank, as indorsee of the note so left for collection, the position was not tenable that the bank did not hold this note as collateral security until after the renewal of the other note and after the maturity of the note sued on,—but it was held the bank, as a *bona fide* indorsee of the note sued on, *before* maturity, as collateral security for a pre-existing debt, took and held it free from any latent defences in behalf of the maker.

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

Mr. STEPHEN R. MOORE, for the appellant.

Mr. O. W. ALDRICH, and Mr. T. C. KERRICK, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit brought by the National Bank of Bloomington, as indorsee, upon a promissory note made by the defendant to one C. M. Nichols, and indorsed by the latter to the plaintiff, as follows:

$2745.25. *Bloomington, Ill. April* 28, 1875.

Six months after date I promise to pay C. M. Nichols $2745.25, at National Bank of Bloomington, Illinois. Value received, with interest at ten per cent per annum from date if not paid at maturity.

JAMES MIX.

Indorsed, C. M. NICHOLS.

Besides the general issue, there were the pleas of *nul tiel corporation, non est factum* verified by affidavit, and partial failure of consideration, upon which issues were joined, and found by the jury in favor of the plaintiff, and damages assessed to the amount of the note and interest, upon which judgment was rendered, and the defendant appealed.

It is objected, that, under the issue upon the plea of *nul tiel corporation*, the court below admitted in evidence the certificate of the comptroller of the currency issued under section 22 of the National Bank Act, (U. S. Stat. sec. 5169,) providing (after the association of individuals desiring to organize a national bank has done certain things as required by sec. 13) that "the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence business." There was, besides, evidence that the bank had been acting as a national bank for eleven years; and the existence of the bank is acknowledged in the note signed by the defendant, it being made payable at the bank. We think the certificate was properly enough received in evidence, and that the evidence was amply sufficient to establish, at least *prima facie*, the existence of the corporation.

It was set up by the defendant that the note had been altered since its execution by adding to it the words "with interest at ten per cent per annum from date if not paid at maturity," and the refusal of the following instruction asked by him is assigned as error, viz:

'You are instructed that if you believe, from the evidence, that the note sued on was changed, in a part material to it, without the consent of defendant, after the defendant had signed it, then the note is void and can not be recovered upon, and in this case you will find for the defendant."

We do not see why this instruction should not have been given had there been evidence tending in any material degree to show the alteration.

The only evidence in respect of any alteration was that of the defendant himself. He expressly refused to say that the note had been altered, and the strongest testimony which he could give was "I think these words (those above) have been

inserted since writing the note. That is my recollection." On the other hand the clerk at the sale of the cattle (the note having been given for the purchase price of cattle bought at a public sale) testified that he drew the notes, and wrote the note sued on; that all the written part, except the signature, was his handwriting, and that the note had not been in any manner changed or altered since the same was given.

The evidence tending to prove any alteration was so slight, that we do not think the defendant has any substantial cause of complaint for the refusal of the instruction. If error, strictly speaking, we do not, under the evidence, regard it as a material error, which should be held sufficient to reverse the judgment.

The ground of defence mainly relied upon was, partial failure of consideration in that the note was given for the payment of the purchase price of a number of short-horn cattle bought at a public sale, and that there was a warranty claimed as being contained in a printed catalogue and breeding list which had been published and circulated, that the cattle were breeders, etc., and that there had been a breach of the warranty. All the questions which have been raised upon this head may be disposed of, we think, upon the ground simply that this is a defence which is not available to the defendant as against the plaintiff in this suit, the indorsee of the note.

The evidence shows that John Nichols, the father of C. M. Nichols, and C. M. Nichols were indebted to the National Bank of Bloomington upon a note for $5000, money borrowed by John Nichols, C. M. Nichols having signed the note as surety; that on October 18, 1875, C. M. Nichols, the payee of the note in suit, left it with the bank as security for the $5000 note, at the same time, and before its maturity, indorsing the note. This is the testimony of C. M. Nichols, and it shows the transfer of the note by indorsement to the bank before maturity as collateral security for a pre-existing debt owing by the payee and his father to the bank.

The case of *Manning* v. *McClure et al.* 36 Ill. 490, settles

the law in this State, that the indorsee of a promissory note before its maturity, taking it as payment or security for a pre-existing debt, shall be deemed a holder for a valuable consideration, in the ordinary course of trade, and shall hold it free from latent defences on the part of the maker. The only attempt at the withdrawal of this case from the reach of that decision is, the claim that the transfer was not made to the bank until after the maturity of the note. This claim is made upon the testimony of the president of the bank that the note was left with the bank on October 18, 1875, for collection, Nichols then indorsing it; that John Nichols owed the bank, and C. M. Nichols was his surety; that he owed the bank $5000; that on February 23, 1876, the John Nichols note, on which C. M. Nichols was surety, was renewed, and the Mix note now in suit was turned over to the bank as collateral security. It is claimed from this that the note, before its maturity, was but left with the bank for collection, and that it was not turned over to the bank as collateral security until at the time of the renewal of the John Nichols note, which was after the maturity of the note in suit. But this witness stated further, in his testimony, that when C. M. Nichols left the note, October 18, 1875, with the bank for collection, it was with the understanding that the proceeds when collected were to apply on his note to the bank. Taking this entire testimony in connection with that of C. M. Nichols, the payee of the note, it shows satisfactorily that at the time the note was first left with the bank in October, before its maturity, it was left as collateral security. It must be held, then, that the bank, as a *bona fide* indorsee of the note before maturity, as collateral security for a pre-existing debt, took and held it free from the defence of failure of consideration in whole or in part.

The judgment must be affirmed.

Judgment affirmed.

C. W. KNOTT *et al.*

v.

WILLIAM G. SWANNELL.

1. BILL OF EXCEPTIONS—*when necessary.* Where there is no bill of exceptions, the Supreme Court can not inquire into the sufficiency of the evidence to sustain the finding, nor to the correctness of the ruling in refusing a new trial.

2. AFFIDAVIT OF CLAIM—*not open to contest after default.* Where a defendant makes default, he waives all objection that might have been urged to the affidavit of claim filed with the declaration. It matters not how deficient it may be, after default.

3. VARIANCE—*joint and several note described as jointly made.* In a suit upon a promissory note which read, "I promise to pay," etc., and signed by two persons, the note was described in the declaration as having been made jointly by the defendants: *Held*, the note was joint and several, and hence there was no material variance between the count and the note.

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

Messrs. LAKE, MOORE & KNOTT, for the appellants.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was assumpsit, by appellee against appellants, on a promissory note, of which this is a copy:

"*Kankakee, April* 1, 1873.

Thirty days after date I promise to pay to the order of Wm. G. Swannell one thousand dollars, with ten per cent per annum after date, value received.

(Signed) C. W. KNOTT,
DANIEL T. VAN METER."

Judgment by default was rendered against appellants for $1347.50.

The clerk's transcript of the record shows that a motion for a new trial was made and overruled, but this is not embodied in a bill of exceptions, and can not, therefore, be considered.

The only objections urged against the judgment are:

1st, There is a variance between the note described in the declaration and that a copy of which is annexed to the declaration. 2d, The affidavit filed with the declaration does not disclose who was the rightful owner of the note at the time of the bringing of the suit, nor does the affidavit show the amount of plaintiff's claim.

We can not believe either of these objections is urged in good faith.

There being no bill of exceptions the court can not inquire into the sufficiency of the evidence to sustain the finding, nor the correctness of the ruling in refusing a new trial. *Miller* v. *Dobson*, 1 Gilm. 572; *Wilson* v. *McDowell*, 65 Ill. 522; *St. Louis, Alton and Terre Haute Railroad Company* v. *Dorsey*, 68 id. 326; *Seibel* v. *Vaughan*, 69 id. 257; *Nason* v. *Letz*, 73 id. 371.

Even if the affidavit filed with the declaration were conceded to be insufficient, this could not help appellants. Had they appeared and objected to filing an affidavit of merits with their pleas, it would then have been important to have inquired whether the plaintiff's affidavit was sufficient. But having made default, they have waived all objection that might otherwise have been urged on account of the affidavit filed with the declaration. *Kern* v. *Strasberger*, 71 Ill. 303.

But even if these objections had been urged in apt time, they are totally destitute of merit, and are frivolous.

The note is joint and several, and hence there is no material variance between the count describing it as jointly made by the defendants and the copy annexed to the declaration. 1 Parsons on Bills and Notes, 251, and cases cited in note "K."

The affidavit is in substantial conformity with the requirements of the 37th section of the Practice act. Rev. Stat. 1874, p. 779.

The judgment is affirmed.

Judgment affirmed.

Syllabus.

SALOME WEIS *et al.*

v.

HUGH TIERNAN.

1. CREDITOR'S BILL—*judgment must be a lien, to avoid fraudulent conveyance.* The issuing of an execution upon a judgment within one year after its rendition, is indispensable to the right of the creditor to maintain a bill to set aside a fraudulent conveyance of land, and subject the same to sale in payment of the judgment. Without this the judgment is no lien on real estate,—and a lien is essential to the right to maintain the bill.

2. EVIDENCE—*to prove judgment.* The record of the court, if in existence, is the only competent evidence to establish the fact of the recovery of a judgment, and secondary evidence is not admissible until the destruction of the record is shown.

3. SECONDARY EVIDENCE—*proof of destruction of original evidence.* The loose statement of a party that he had heard the records of a court were destroyed, or, had read it in a newspaper, is not sufficient to admit secondary evidence of a judgment. If the records have been destroyed, the fact may be proved by any person who knows the fact.

4. EXECUTION—*after seven years.* An execution issued on a judgment after seven years from its rendition and levied on land, where no execution has been issued within a year, is unauthorized, unless the judgment has been revived by *scire facias*, and such execution may be avoided, and the certificate of levy under it will form no basis for a lien under such judgment.*

5. SAME—*levy when no lien.* The lien of a levy where an execution issues to a foreign county and is levied on land, will not continue beyond seven years from the last day of the term of the court at which the judgment was recovered.

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

Mr. JAMES B. WELCH, and Messrs. HAINES & TRIPP, for the appellants.

Mr. W. S. SEARLS, for the appellee.

*See *James* v. *Wortham et al.* 88 Ill. 70, and note referring to the recent statute.

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

This was a bill in equity, brought by Hugh Tiernan in the circuit court of Lake county, against Salome Weis and others, to remove an alleged fraudulent deed made to Salome Weis by one Wadsworth on the 25th day of October, 1860, in which certain lands were conveyed to her. It is alleged in the bill that at the September term, 1860, of the Superior Court of Chicago, the complainant in the bill, Hugh Tiernan, recovered a judgment in said court against Frederick Weis for the sum of $331.60 and costs of suit; that immediately after obtaining the judgment, an execution was issued and delivered to the sheriff of Cook county, which was returned *nulla bona.* It is also alleged in the bill, that at the time of the rendition of the judgment and the issuing and delivery of the execution and the return thereof, Frederick Weis was the equitable owner of a large interest in real estate in the city of Chicago, the description of which is unknown to complainant; that afterwards, and on the 25th day of October, 1860, Weis sold and exchanged his interest in the real estate in Chicago to one E. S. Wadsworth, for two hundred acres of land in Lake county, which is described in the bill; that at the time of said purchase Frederick Weis was the husband of Salome Weis, and that he caused the deed of the Lake county lands to be made to his wife; that at the time said deed was made Frederick Weis was largely indebted to sundry persons and to the complainant; that he caused the deed to be made to his wife for the purpose of cheating and defrauding his creditors and especially the complainant; that the wife at the time knew her husband was largely indebted, and that she took the conveyance for the purpose of assisting her husband in placing his property beyond the reach of his creditors; that from the time of the purchase to the filing of the bill, Frederick and Salome Weis have resided upon the premises as a homestead, and the property is of the value of $7000.

It is also alleged in the bill that complainant has caused *alias* execution to be issued on said judgment to the sheriff of Lake county, which was returned *nulla bona*; that on the 19th day of May, 1869, a *pluries* execution was issued to the sheriff of Lake county, which still remains in his hands; that the sheriff, on or about the 6th day of August, 1869, levied upon said lands. The bill concludes with a prayer that a decree be entered declaring the title to the lands in Frederick Weis, that the deed to Salome Weis be set aside, and that the land be subjected to sale in satisfaction of complainant's judgment.

On the 20th day of April, 1870, Frederick Weis died, and his heirs were made parties to the bill. They and Salome Weis put in their answers to the bill, in which all the material allegations were denied. A replication having been filed, the court, upon a hearing on the pleadings and the evidence, rendered a decree substantially as prayed for in the bill, to reverse which this appeal was taken.

The bill in this case was filed on the 12th day of August, 1869, about nine years after the judgment was alleged to have been rendered and the fraudulent conveyance alleged to have been made, and the main inquiry presented by the record is, whether the decree granting the relief prayed for in the bill is sustained by the testimony introduced on the trial. Under the issues made by the pleadings it devolved upon the complainant to prove a judgment, the issuing of an execution within a year from the rendition of the judgment, a return thereon of *nulla bona*, that an *alias* execution was issued to the sheriff of Lake county which was returned *nulla bona*, and that a *pluries* execution was issued and levied on the land, as alleged.

The record does not show that a judgment or the copy of a judgment of any court was offered in evidence, nor was it proven by any person who had ever seen the record of a judgment and knew the fact that one had been rendered in the case.

The complainant testified he obtained a judgment in some of the courts of Cook county against Weis, but the date or amount of it he can not give. About all he seems to know about it is, that he held a note against Weis, which he gave to Judge Blackwell to sue, and he paid him to get a judgment, and supposed one was rendered. As to the destruction of the record of the judgment, all he knows on that subject is, he "heard the records were burned,—he read it in the newspapers." In regard to an execution having been issued within a year from the rendition of the judgment, the only proof upon that point was the evidence of the complainant, and the substance of his evidence was as follows:

"Q. What is your best impression on the subject? A. My impression is that I got an execution there; I couldn't be quite certain, but the execution I got either there or here; the execution I got, any way.

"Q. I am asking you about the execution issued in Cook county to the sheriff of Cook county. A. I think I got one there, I am not certain; I wouldn't swear positive,—it is impossible from recollection; my impression is I got the execution there."

In regard to proof of judgment, the record of the court in which the judgment was rendered was the only competent evidence to establish the fact, if the record was in existence; if not in existence, then secondary evidence of the contents of the record might be resorted to, but secondary evidence was not admissible until the fact that the record of the judgment had been destroyed was proven. This fact was not established. The loose statement of the complainant that he had heard the records in Cook county were destroyed, or had read it in a newspaper, was not sufficient. If the record had been destroyed by fire or otherwise, that fact could have been easily proven by calling the officer who has the custody of the records, or any person who knew the fact.

In regard to an execution having been issued within a year, as alleged, that fact was not proven. The complainant thinks

he had an execution issued to the sheriff of Cook county, but of this he is not certain; but if one was issued at all to the sheriff of Cook county, it is mere conjecture that it issued within a year and a day from the rendition of the judgment. The proof upon this subject is entirely too vague and uncertain. It would be a dangerous precedent to hold that the title to real property rested on a tenure so slight that it could be resisted by such proof as was relied on upon this point in the case.

The proof that an execution issued within one year from the rendition of judgment was indispensable. The right to maintain the bill depended upon such proof, and we are aware of no authority upon which the bill could be maintained without such evidence. The bill could not be sustained if the judgment was not a lien upon the land, and no lien would exist unless an execution had been issued within a year. This is the doctrine of *Newman* v. *Willetts*, 52 Ill. 98, where a bill like the one under consideration was filed, in which it was said, "If a party has no lien on the land alleged to be fraudulently conveyed, such conveyance can do him no injury. The record in this case fails to show that complainant had a lien on this land, no execution having been issued within one year from its date. The presumption of law is, that the judgment was paid, and to enable the complainant to issue an execution the judgment would, necessarily, have to be revived by *scire facias*."

Under the decision cited, if it be conceded, which we do not, that the certificate of levy filed by the sheriff of Lake county on the 6th day of August, 1869, was competent proof of the contents of a judgment or execution, the execution therein referred to having been issued on the 19th day of May, 1869, more than seven years after the rendition of the judgment, and no execution having been issued within one year from the rendition of the judgment, the execution was unauthorized, unless the judgment had been revived by *scire facias*, as held in the case cited. The execution issued in 1869

was liable to be quashed on motion. It was unauthorized and voidable, and the certificate of levy filed by the sheriff of Lake county by virtue of the levy under the execution could form no basis for a lien under which the lands could be sold on complainant's judgment. The lien of a levy, where an execution has been issued to a foreign county and a levy made on lands, will not continue beyond seven years from the last day of the term of court at which judgment upon which execution issued was obtained. This question was expressly decided in *Ewing* v. *Ainsworth*, 53 Ill. 464. The levy in 1869 not having been made until after the expiration of the time in which the certificate of levy might have become a lien on the lands, no lien whatever was acquired by the complainant by virtue of the certificate filed. As the judgment set out in the bill, therefore, was no lien on the lands, independent of other questions the decree was not warranted by the evidence.

The decree must be reversed and the cause remanded.

Decree reversed.

FRANCIS W. BLAKE

v.

JEROME MCMULLEN.

NEW TRIAL—*on the evidence.* A verdict of a jury will not be lightly disturbed, and all allowances and presumptions will be made in its favor; but where it appears that the jury have wholly disregarded the evidence and found against its decided weight, a new trial will be granted.

APPEAL from the Circuit Court of Cook county; the Hon. W. K. MCALLISTER, Judge, presiding.

Mr. J. W. BENNETT, for the appellant.

Mr. M. L. KNIGHT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In this case it is claimed that the finding is so clearly against the weight of evidence that the judgment of the court below should be reversed.

It appears that appellee had in his hands some property of Jenkins to exchange for other property, for which, if he succeeded, he was to have a commission. He wrote appellant that he could exchange his property, which was worth something more than $4000, but it was incumbered by a mortgage of $2300, leaving it worth not more than $2000 over the incumbrance. Appellant saw appellee, and afterwards saw Jenkins, who showed him the property, and the exchange was made, appellant receiving unincumbered property, and Jenkins receiving his subject to the incumbrance.

When the trade was consummated, the question arose between appellee and appellant as to the commission the former should have, he claiming $129, or three per cent on $4300, the full value of appellant's property unincumbered. Appellant claimed that appellee had agreed to charge no more than two and a half per cent, and that he would collect one-half of Jenkins. Appellee claims it was to be three per cent from appellant, and that when he wrote him that he could exchange his for other property, he so informed him. Appellee says he told appellant, before the trade, that he had written him his commissions would be three per cent, and appellant replied he would pay what was right, from which he understood it was to be three per cent; that when the transaction was closed, and he informed him that $129 was his charge, appellant did not dispute its correctness; that he did not object to the amount of the charge on other occasions when the matter was spoken of between them. To this he swore on the trial.

Jenkins testified that he was to pay three per cent and understood appellant was to pay the same. But appellant thought it was too much. Keys says he heard, before the trade, some talk that both parties were to pay three per cent

commission, and thinks appellee was present. This is all the corroborating evidence introduced by appellee.

Appellant testified that appellee wanted three per cent, but he told him he would not pay that amount; that appellee then said, this was an exchange of property and he would do it for two and a half per cent and get half of that of Jenkins. He made the proposition and appellant accepted it, which made one and a quarter per cent for him to pay, and that agreement was never changed.

Long testified that appellee thought he ought to get three per cent, but Neff said he would not pay it, and appellee then said he would charge but two and a half per cent, and only charge Blake half of that and get the other half from Jenkins; that appellee told witness he would charge two and a half per cent, and Blake was to pay half of that.

Neff testified that he was appellant's agent, and he asked appellee what commission he should charge if the trade was made with Jenkins, and he replied, the commissions down town were from two to three per cent, but as this was an exchange of property he would not charge that amount; that he would charge one-half to appellee and get the other half out of Jenkins; that witness asked whether he could tell appellant that, and he said yes. The next day appellant asked appellee how about commissions, and he said he would call his commissions two and a half per cent, and charge one half of it and get the other half out of Jenkins.

Avery testified that appellee stated he would not charge appellant his usual commissions, as it was an exchange of property, and one half of what he should charge he would get out of Jenkins. These last three witnesses speak of the others being present.

There is no impeaching evidence in the record on either side. Standing unimpeached, as this evidence does, we are unable to concur with the jury in their conclusion on the facts. The evidence corroborating appellee is slight, loose and indefinite. Jenkins does not say that appellant told him he had

agreed to, or was to pay three per cent, but he understood he was to pay that per cent. He may have simply inferred that he was, and he may have been mistaken in his inference, and the remark of appellant, that three per cent was too much, would apply as well to what Jenkins said he was to pay as to what appellant expected to pay. The remark does not seem to be confined to what appellant expected to have to pay. Keys says he heard some talk, before the trade, that both parties were to pay three per cent commissions. He does not say who was talking about the matter and thinks only appellee was present. If the conversation was between third parties, when the parties were not present, all know it would not be evidence that should bind them.

We are reluctant to disturb the finding of a jury unless it appears to be clearly wrong, but when it does, we do not hesitate to send the case to another jury. We will not lightly disturb their finding, and make all allowances and presumptions in favor of the verdict, but when it appears to us that the jury have wholly disregarded the evidence, a verdict should not stand. Here, the witnesses are unimpeached, and it appears to us that the evidence is overwhelmingly against the verdict and that it ought not to be permitted to stand.

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

Judgment reversed.

JOHANNA AUSTIN, Admx.

v.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO.

1. CONTRIBUTORY NEGLIGENCE—*walking upon railway track without due caution.* The walking upon the track of a railroad without looking in both directions to discover approaching engines or trains, when the exercise of such precaution would discover the same, is such negligence as will preclude a recovery, unless the injury be willfully or wantonly inflicted by the railroad company.

2. Where a person got in close proximity to a side track of a railroad, and was walking along the same when he was struck by a yard engine and killed, and it appeared he was well acquainted with the locality, and placed himself in this dangerous position when the approaching engine was very near to him, without looking back to see if any engine was on the track, and that the engine was too close to him when he got near the track to be stopped, it was *held*, that his negligence was so great as to preclude any recovery against the company by his personal representative.

APPEAL from the Circuit Court of Cook county; the Hon. W. K. MCALLISTER, Judge, presiding.

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

Mr. THOMAS F. WITHROW, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On the 6th day of April, 1871, Lawrence Austin was struck by a yard engine of the Chicago, Rock Island and Pacific Railroad Company, on the west side of Clark street, and between Fourteenth and Fifteenth streets, in the city of Chicago. He died in a few hours, of the injuries there received. This action was brought by his widow, as administratrix of his estate, under the statute in that regard, against the company, to recover in respect of the death so caused. The jury returned a verdict for the defendant, upon which judgment was rendered. Plaintiff appealed.

It appears, from the evidence, that a very short time before the accident, Austin, the deceased, was walking northward in front of a freight train on the main track of the Lake Shore and Michigan Southern railroad, toward the point at which it intersected the side track of the Rock Island railroad, and near which he received his injury. This train was running very slowly. At the same time, east of this, the yard engine of the defendant was moving south upon its main track, in Clark street. It proceeded to a position just south of the switch and near to Fifteenth street, where it stopped. The switch was thrown to let it pass, and it moved on to the side

track of the Rock Island road. Both engines were then moving north toward the point of intersection, the one on the Lake Shore track moving slow, as was always the practice at that place, so that they could stop immediately should there be anything in the way at the crossing. Austin left the Lake Shore track and walked a short distance between it and the Rock Island side track. He was also moving north toward the intersection. He finally stepped to a position within a foot of the west rail of the side track of the Rock Island road, still looking and walking north. Almost immediately afterward, after proceeding not more than two or three steps, he was struck, the engine being but some ten or eleven feet from him when he placed himself in this dangerous proximity to the track. The engineer did not see Austin before the collision. The fireman on the yard engine, and the conductor on the Lake Shore freight train, called to Austin at the moment he placed himself in danger, but the engine was so near that he did not have time to act.

The deceased was well acquainted with the locality of the tracks and the method of operating trains thereon. He was, at the time, employed in an elevator near where the accident occurred, and lived in a south-westerly direction therefrom. In passing between his home and his place of labor, he was at least twice a day in the vicinity of the place where he was injured. This had continued for a number of years.

The negligence claimed in the defendant was, in not ringing the bell on its engine, and in running at a rate of speed higher than six miles an hour,—the rate fixed by the city ordinance.

One witness testified the bell was not rung,—four others that it was rung, one of them saying that he was ringing it himself. The evidence seems to be that the engine was running at the rate of about five or six miles an hour, or not much over five or six miles an hour.

Upon the facts of this case we do not see any right of recovery. It appears that the deceased was walking along the track of defendant's road, and placed himself in the position

of danger he did from an advancing engine, without using any precautions whatever to ascertain whether or not there was any engine or train approaching on the track. Seeing the engine go south on the Rock Island main track but so short a time before may have misled him to think it, or any other engine, would not come north on the side track so soon afterward. Watching, as he appears to have been, the engine on the Lake Shore track at the time he went so dangerously near the Rock Island side track, may have, in a degree, diverted his attention from approaching danger on the latter track, but neither or both of these things can be accepted as an excuse for omitting to look and see whether there was, in fact, danger in taking the position so near the Rock Island track. There was no reasonable necessity or cause for his going there. The distance between the two tracks, Lake Shore and Rock Island, was some eight or ten feet,—ample room of safety between them. Negligence and inattention in voluntarily and needlessly going into a place of danger, are not to be excused. The greater the danger, the higher the care and caution which should be exercised to avoid it.

This court has repeatedly held, that to walk upon the track of a railroad, without looking in both directions to discover approaching engines or trains, when the exercise of such precaution would discover either the one or the other, is such negligence as will preclude a recovery, unless the injury be willfully or wantonly inflicted by the defendant. *Chicago and Alton R. R. Co.* v. *Gretzner*, 46 Ill. 82; *Chicago and Northwestern R. R. Co.* v. *Sweeney*, 52 id. 325; *Chicago, Burlington and Quincy R. R. Co.* v. *Van Patten*, 64 id. 510; *Chicago, Burlington and Quincy R. R. Co.* v. *Damerell*, 81 id. 450; *Chicago, Rock Island and Pacific R. R. Co.* v. *Bell*, 70 id. 106; *Lake Shore and Michigan Southern R. R. Co.* v. *Hart*, 87 id. 529; *Illinois Central R. R. Co.* v. *Hall*, 72 id. 222; *Illinois Central R. R. Co.* v. *Hetherington*, 83 id. 510.

We are of opinion that there was such negligence here, on the part of the deceased, that the plaintiff has no right, in law,

to recover; that the case is so clear for the defendant, upon the facts, that had the verdict been for the plaintiff, it would have been the duty of the court to have set it aside as unwarranted by the evidence.

Under such circumstances, we deem it unnecessary to consider the questions raised upon instructions, and as to allowing a certain interrogatory to a witness, as, upon the facts, there can be no just cause of complaint of injury therefrom.

The judgment will be affirmed.

Judgment affirmed.

THE CHICAGO WEST DIVISION RAILWAY COMPANY

v.

PHŒBE R. MILLS.

1. INSTRUCTION—*should not assume facts not proved.* An instruction should not assume an important fact in the case of which there is no evidence.

2. NEGLIGENCE—*in city railway while passengers are getting off.* When a city railway car stops at a place where the conductor makes his report and waits for the return of the car, and a passenger attempts to get off without notice of such intention, and it does not appear that such place is one where passengers usually get on and off, or that those in charge know that persons are actually getting off, and they start the car, whereby a passenger is thrown and injured, the railway company will not be chargeable with negligence in starting the car forward. The passenger, before attempting to get off, should know that the stoppage is for the purpose of letting persons get off, or make his intention to get off known.

3. SANITY—*presumed.* The legal presumption is, that all persons of mature age are of sane memory, but after inquest found the presumption is the reverse until it is rebutted.

4. MENTAL CAPACITY—*burden of proof.* If a party not insane seeks to avoid a release given by her while her mental faculties were temporarily impaired, the burden of proof is upon her to show the mental incapacity, and not upon the other party to show her mind was not impaired.

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

Mr. F. H. KALES, for the appellant.

Mr. S. K. DOW, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

On the 13th of May, 1875, the plaintiff, in company with a friend, (Mrs. Camp,) took passage on one of the defendant's open summer cars, at a point on the southern part of its line, intending to go to a point some short distance south of the northern terminus of its line; but this intention was abandoned upon the coming up of a slight shower of rain, and they remained in the car, (intending to return home by it,) until it had been run to its northern terminus and returned south again as far as the corner of State and Randolph streets, when, the car stopping, the plaintiff and her friend, (Mrs. Camp,) again changed their minds and concluded to leave the car at that point. Mrs. Camp left the car without difficulty, but the plaintiff, while attempting to leave it, was thrown, in consequence of the car being suddenly started forward, with great violence to the ground. The plaintiff received a severe and painful injury, in consequence of the fall, and was put to serious expense for attendance of physician and care in nursing, etc.

The defence interposed was, first, that of not guilty, and secondly, that the plaintiff had released the defendant of all claim for damages growing out of the injury.

The verdict was for the plaintiff, assessing her damages at $7000, upon which, after overruling a motion for a new trial, the court gave judgment, and the case comes here upon the appeal of the defendant.

Under the issue presented by the plea of not guilty, the court, at the instance of the plaintiff, gave, among others, the following instruction:

"The court instructs the jury as a matter of law, that it was the duty of the defendant as a carrier of passengers for hire,

to carry such passengers safely, and, upon notice, to stop a car, to give such passengers a reasonable opportunity to alight from their car, stopping a reasonable length of time for that purpose, and if the jury believe, from the evidence and circumstances proven in this case, that the plaintiff was a passenger upon one of the cars of defendant by the consent of defendant, or its agents, as conductor or driver, on or about the 13th day of May, A. D. 1875, and that the defendant stopped said car on State street near Randolph street for the purpose of permitting the plaintiff and other passengers to alight, and that when the plaintiff, if using due care and diligence on her part, was in the act of stepping down and off from said car while the car was standing still, the defendant, by its agents, as driver or conductor, started the said car before the plaintiff had had a reasonable time to alight from said car and while she was alighting from said car, which said starting of the car, without negligence or default of plaintiff, caused the plaintiff to be thrown down and injured by breaking her bones, and that the neck of the femur, commonly called the thigh bone, was broken or injured without any negligence or carelessness on the part of the plaintiff, then the railroad company was guilty of such negligence as would make the defendant company liable, and the verdict should be for the plaintiff, unless the jury believe, from the evidence, that the release read in evidence was executed by the plaintiff under an agreement which she was at the time capable of understanding and consenting to, or after being informed thereof, ratified it, or failed to return the consideration paid to her, and thereby avoid it."

This instruction, under the evidence preserved in the record, was calculated to mislead the jury, and it should not, therefore, have been given.

It assumes that the car was stopped upon notice, for the purpose of letting passengers off. There is no proof that warrants such an assumption. No one swears that the car was

stopped on notice, or that the place at which it was stopped was a usual place for passengers to get on and off. It is not shown how or why the car happened to be stopped at that place. It is shown that it was customary for the conductor, on reaching Randolph street, after aiding such as desired to get off there, to go into the office of the company and make his report, allowing the driver to go alone with the car from that point to the northern terminus—a distance of about half a block—and resume his place in the car on its returning to the south side of Randolph street. While this circumstance should not be held to exonerate the defendant from the exercise of the care with which it is properly chargeable as a common carrier, yet the facts are such as to show that the defendant should not be required to anticipate that persons would be desirous of getting off the cars at any and every stoppage they might make in this short circuit. And, therefore, unless it should appear that the driver stopped the car for the purpose of letting passengers get off, or he knew that persons were actually getting off, the company is not chargeable with negligence because of his starting the car forward. Passengers, as a matter of prudence, before attempting to get off, should know that the stoppage was for the purpose of letting them get off. These circumstances are entirely left out of view by the instruction. The fact that what purports to be a release was obtained by one Blodgett, as agent for the defendant, is admitted. But it is denied, in the first place, that plaintiff signed it; and in the second place, it is contended that if she did sign it, she did so while her mind was in a state of unconsciousness caused by opiates which she had taken to allay the intense pain from which she was suffering.

On this point, the court, at the instance of the plaintiff, gave, among others, this instruction:

"The court instructs the jury, that under the issues in this case, the burden of proof is upon the defendant to show that the alleged written release of plaintiff, offered in evidence by

defendant, was the conscious act and deed of said defendant, or executed in compliance with a previous agreement made when she was mentally capable of making and understanding it."

This was clearly erroneous.

In *Lilly* v. *Waggoner, conservator, etc.* 27 Ill. 397, the rule was thus laid down: "The legal presumption is, that all persons of mature age are of sane memory. But after inquest found, the presumption is reversed, until it is rebutted, by evidence that he has become sane. When the transaction complained of occurred before the inquest is had, the proof of insanity devolves upon the party alleging it, but it is otherwise if it took place afterwards." See also, *Fisher* v. *The People*, 23 Ill. 283 and *Menkins* v. *Lightner*, 18 id. 282. There is no pretense here that the plaintiff was actually insane—her mental faculties were simply temporarily impaired—and it devolved upon her to show that the release was obtained when her mind was thus impaired—not upon the defendant to show that her mind was not impaired when it was obtained.

The question was one upon which there was a conflict of evidence, and it should have been fairly submitted to the jury.

The evidence is far from satisfactory to our minds that the negligence of the defendant was gross and that of the plaintiff slight, in comparison with each other, which is essential to authorize a recovery.

For the errors indicated, however, the judgment is reversed and the cause remanded.

Judgment reversed.

DAVID DOWS

v.

JOHN NAPER.

1. CORPORATION—*estoppel of stockholder from denying his liability under unconstitutional charter.* Although a provision in a charter of a corporation giving banking privileges may be unconstitutional, still, if a stockholder has acted under it, and thereby induced or contributed to the loss of a creditor of the corporation, such stockholder will be estopped from denying his individual liability under the charter.

2. SAME—*amendment of charter as affecting liability of stockholder.* Where a stockholder in a corporation with banking powers is conversant with its affairs, and makes no objection to an amendment to the charter, and changes in the business consequent thereon, and participates in the benefits derived therefrom, he can not avoid personal liability to creditors on account of such amendment, but will be held to have acquiesced in the same.

3. SAME—*evidence of amount and character of deposit.* Where the charter of a corporation with banking powers provided that its officers, when required by any person making a deposit in the savings department of the company, shall issue certificates of deposit for the same, and made the stockholders personally responsible to depositors in such department, it is not essential to the liability of the stockholders that a certificate of deposit be given, but the amount and character of a deposit may be shown by any other competent evidence. It may be shown by the pass book given the depositor.

4. EVIDENCE—*parol, to show one a stockholder.* In a suit by a creditor of a corporation seeking to enforce the personal liability of a stockholder, the plaintiff is not required to prove the ownership of stock by record evidence, but such fact may be shown by the defendant's admission and the testimony of the officers of the corporation.

5. SAME—*to show acceptance of amendment to charter.* The record or journal of the acts and proceedings of a corporation is admissible in evidence against a stockholder in a suit to enforce his personal liability to a creditor of the corporation. It is competent evidence to show an acceptance of an amendment of the charter, without first showing that the persons accepting the same were directors, when they are named as such in the journal.

6. SAME—*books of corporation, against stockholder.* In an action by a depositor in a bank against a stockholder, the ledger of the bank, though not a book of original entries, is competent testimony against the stockholder as an admission of the company, on its own books, of the amount due the depositor.

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

Mr. E. P. WEBER, and Mr. GEORGE C. INGHAM, for the appellant.

Mr. S. P. MCCONNELL, for the appellee.

Mr. JUSTICE BAKER delivered the opinion of the Court:

In this case John Naper, the appellee, sued David Dows, the appellant, in the Superior Court of Cook county, and recovered judgment for $1437.55. He claimed that amount to be due him as a depositor in the savings department of the Marine company of Chicago. The suit was prosecuted on the theory appellant was a stockholder in said Marine company to the amount of $5000, and, as such, was liable to appellee for the funds deposited, by virtue of section 10 of the act of February 21, 1861, amending the charter of said corporation.

It is urged by appellant, that said amendatory act, inasmuch as it conferred banking powers and was never voted upon by the people of the State, as well as for other reasons suggested, was not a valid enactment, but was unconstitutional, null and void. We do not deem it necessary to pass upon this question, for, even should we assume the act to be unconstitutional, the case would fall within the rule announced by us in *McCarthy* v. *Lavasche*, 89 Ill. 271. It was there held, that even though the provisions of a charter may be unconstitutional, yet if the stockholder has acted under it, and thereby induced or contributed to the loss of a creditor of the corporation, then the stockholder is estopped from denying his liability under its provisions.

In this case it was shown, by the admissions of appellant, that he was a stockholder in said Marine company, to the amount of $5000. Moreover, Mr. Scammon, the president of the corporation, testified Dows was a stockholder to the extent of one hundred shares, of $50 each, in 1860, and had been ever since, and that he was sure the company paid him re-

peated dividends. It was not objected on the trial that there was record evidence of the fact appellant was a stockholder, which would be the best evidence of such fact, nor do we know of any rule of law which would compel a creditor of a corporation seeking to fasten a personal liability on a stockholder, to prove the ownership of stock by record evidence. We think the admissions of appellant himself, and the statements of Mr. Scammon, in the absence of testimony to show the contrary, were amply sufficient to sustain the finding of the court in that behalf. Appellant never made objection to the amend ment to the charter, and changes in the business of the corporation consequent thereon, and he participated in the benefits derived therefrom. The evidence shows appellant was frequently in the old Marine Bank building, before the fire, and had been well acquainted with the president of the company for a great many years, and talked with him often on the subject of the institution. It must be presumed, from the facts shown, that appellant knew, and, also, (at least so far as the interests of an innocent third party, influenced, in part, by his conduct, are involved,) that he acquiesced in the amendment to the charter.

As appellant was a stockholder and member of the company, it was not error to admit in evidence the journal and record of the corporation to prove acceptance of the amendatory act, without first requiring other evidence that the persons accepting the same were directors. The journal itself names them as directors, and shows their action. Being a record of the company, it must be held binding upon the stockholder. *Culver* v. *Third National Bank of Chicago*, 64 Ill. 530.

It is true, the second section of the amendatory act provided: "The president, secretary or treasurer of said company shall, when required by any person making a deposit in the savings department of said company, issue certificates of deposit for the same." Yet it is also provided in said section: "All such sums of money as shall be deposited in the savings department of said company, shall be held in trust for said

depositors, and shall not be mingled with the general funds of said company." And section ten of said amendatory act read as follows: "The stockholders in this corporation shall, as to all funds deposited as savings and in trust with said corporation while they are stockholders, be individually liable to the extent of their stock, and shall so continue for six months after transfer of the same, notwithstanding such transfer."

It was the undoubted duty of the president or other designated officer to issue a certificate of deposit, if required or called upon so to do, to the person making a deposit in the savings department of the Marine company; yet, if money was, in fact, deposited in that department, and no certificate required or given, nevertheless, such money would be deposited in the savings department and in trust, and would be "funds deposited as savings and in trust with said corporation," and entitled to all the safeguards and protection furnished by the personal liability imposed by said section 10. The certificate would be an evidence of the amount and character of the deposit that the depositor might have required; but in the event he did not require it, the place, amount and character of the deposit would not be changed, and might be shown by other legal and competent testimony.

In this case, Mr. Long testified he had been connected with the Marine company from its first existence, and knew its course of business, and that a pass book was issued to depositors depositing money in the savings department, or else a certificate of deposit. He fully identified the pass book of appellee as one issued by the savings department of the Marine company, and the book itself stated, in its heading, that the funds therein entered were "deposited in the savings department of the Marine company of Chicago." The company furnished appellee with this pass book as evidence of the amount and character of his deposit, and we are unable to perceive upon what principle it can be claimed it is not evidence of such amount and character of deposit. The ledger of the corporation was, at most, but cumulative evidence of

that which was already sufficiently proven by the entries in the pass book. Although not a book of original entries, it showed an admission by the company, on its own books, of the amount due appellee, and it was competent testimony against the stockholder.

We find no error in the record, and the judgment must be affirmed.

Judgment affirmed.

THE CITY OF CHICAGO

v.

STEPHEN GOSSELIN.

SUPREME COURT—*jurisdiction of appeals.* This court has no jurisdiction of an appeal from the judgment of a circuit court in an action of debt to recover a penalty for the violation of an ordinance, which is allowed and taken since the law creating the Appellate courts went into effect, and if taken to this court it will be stricken from the docket, each party to pay his own costs.

APPEAL from the Criminal Court of Cook county.

Mr. R. S. TUTHILL, for the appellant.

Mr. FRANK W. YOUNG, for the appellee.

Per CURIAM: This action was brought in debt by the city of Chicago against Stephen Gosselin, to recover of defendant a penalty for a violation of an ordinance of the city forbidding the obstruction of streets and public grounds. Final judgment was rendered in favor of defendant on the 4th day of August, 1877, from which judgment the city prayed an appeal to the Supreme Court, which was granted. The law creating and establishing Appellate courts in the several districts in the State was then in force, and the appeal should have been

prayed to the Appellate court of the proper district. Although no motion has been made by defendant for that purpose, this court, of its own motion, orders the cause to be stricken from the docket for want of jurisdiction to hear the appeal.

The cause will be stricken from the docket, each party to pay the costs he has made in this court.

Stricken from docket.

THE SOUTH PARK COMMISSIONERS
v.
FRANCIS DUNLEVY *et al.*

1. EMINENT DOMAIN—*time at which valuation is to be fixed.* On petition to condemn lands for public use, the compensation to be paid must be fixed by the valuation of the property at the date of the filing of the petition, and not at the time of the trial.

2. SAME—*evidence on question of value.* If land, sought to be condemned for public use, has a market value for the purpose of subdivision into lots and blocks, it may be properly proven. The jury may take into consideration each and every element that may enter into the true market value of the property.

3. SAME—*rule for ascertaining compensation.* In estimating the compensation to be paid for land taken for a public park, the jury may consider the location and situation of the land at the time of the taking, without regard to the possible increase of value thereafter by reason of the prospective improvement in the vicinity.

4. SAME—*interest on value of property not allowable before it is taken.* Under proceedings to condemn land for public use, the filing of the petition is not a taking of the property, and it would be a trespass to take possession before the damages are ascertained and paid. The owner having the right to the use of the land until the damages are paid, is not entitled to interest on the value of the land from the commencement of the suit to the trial.

5. INTEREST—*municipal corporation.* A municipal corporation is not liable to pay interest in the absence of any agreement to that effect.

6. SAME—*on judgment of condemnation for public use.* Until possession is taken of property sought to be condemned for public use, the compensation found by the jury should not bear interest, and it is error to order that it shall bear interest in the entry of judgment or final order.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. W. K. MCALLISTER, Judge, presiding.

Mr. RICHARD S. THOMPSON, and Mr. JOHN N. JEWETT, for the plaintiff in error.

Mr. E. ROBY, and Messrs. MCCAGG, CULVER & BUTLER, and Messrs. WILLIAMS & THOMPSON, for the defendants in error.

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

This was a proceeding, instituted in the circuit court of Cook county, by the South Park Commissioners, for the condemnation of two certain tracts of land, containing twenty acres each, for park purposes.

The petition in the case was filed on the 18th day of April, 1873, but the trial which resulted in the judgment under consideration was not begun until the 18th day of December, 1876, and was not concluded until January 8, 1877, when a verdict was rendered, in which the value of one tract of land was estimated at $74,783.41, and the value of the other tract at $49,856.20.

The commissioners entered a motion for a new trial, which was overruled on the 2d day of June, 1877, and judgment entered upon the finding of the jury, to reverse which the park commissioners have sued out this writ of error, and contend, by their counsel, that the judgment should be reversed, on the following grounds:

1. The court erred in refusing to admit the evidence offered by the plaintiff to show the value of the property in question at the time of the trial; and in limiting the inquiry as to the value of the property to April 18, 1873, the date when the petition was filed.

2. The court erred in instructing the jury to add to their estimate of the value of the land on April 18, 1873, interest at the rate of six per cent per annum, from April 18, 1873, to

the time at which the instruction was given, and to include the same in the verdict.

3. The court erred in entering the order or judgment on the verdict in such manner that the amount found by the verdict should bear interest from the date of the entry of such order until payment.

4. The court erred in admitting evidence as to what would have been the value of the property had it been subdivided into lots, blocks, streets, etc.

5. The court erred in admitting evidence of valuation based upon the special benefits the property received from its supposed frontage upon the South Park.

6. The evidence does not support the verdict.

These several grounds of reversal will be considered in the order in which they have been made by counsel for the commissioners.

In regard to the first question presented, it probably would not have arisen had a trial occurred soon after the petition was filed, but owing to the long delay in a trial of the cause, after the petition was filed, property depreciated, and consequently the question, when the value should be placed upon the property, became an important one to the parties in interest.

Section 2 of the act to provide for the exercise of the right of eminent domain, in force July 1, 1872, under which this proceeding was commenced, provides that when the party authorized to take property under the act can not agree with the owner or party interested as to the amount to be paid for the same, application may be made to the judge of the circuit or county court by filing a petition either in vacation or term time.

Section 3 provides that if a petition is presented in vacation the judge shall note thereon the day of presentation and also the time when he will hear the same. These sections of the act would seem to imply that it was contemplated that a speedy trial and determination of the amount of damages to be allowed

as compensation for property to be taken would be had after a failure to agree upon the amount, and if a trial should be had immediately after the parties had failed to agree upon the amount, and the petition had been filed, there would be no probability of a rise or fall, in the market, of the value of the property. Why should the statute provide for the petition to be presented to the judge in vacation, and for him to fix upon a time for trial, unless it was intended that the compensation should be at once ascertained, and the value be confined to the time of filing the petition? But independent of the statute, the evident object and import of filing a petition where parties can not agree, is to ascertain the just and true amount of compensation for property to be taken, not five years before the petition is filed, or three or five years thereafter, but at the time of filing the petition. Suppose the property in question was worth, at the time the petition was filed, $100,000, and the commissioners, knowing that to be its true value, had provided themselves with money necessary to pay that amount of damages, and filed a petition to condemn the property, but owing to delays, which are sometimes incident to legal proceedings, over which the commissioners had no control, a trial was not had until three years after the petition was filed, and in the meantime, the property had increased in value to $200,000, would it be reasonable to hold that this increased valuation could be proven, and the commissioners compelled to take the property at double its value when they instituted proceedings to condemn and take it? We apprehend a rule of this character would neither be reasonable nor just, and yet the principle contended for by the commissioners would lead to this result.

In an action for a breach of contract for a failure to deliver goods, the true measure of damages is the value of the goods at the time required by the contract for delivery, and in an action for a conversion of property, the evidence is confined to the value at the time of conversion, and in neither case can proof be introduced of the value of the property after suit commenced, as was aptly illustrated by counsel for the de-

fendants. The same principle may be applied to a case of this character. The filing of the petition is the commencement of the action. Those interested in the land by that act are brought into court, and the inquiry is, what amount shall be then allowed as a just compensation for the property described in the petition.

Counsel for the commissioners have, however, referred to *Cook* v. *The South Park Commissioners*, 61 Ill. 115, as an authority in support of their view of the case. In that case, on the trial in the circuit court, the evidence, in regard to the value of the land which the commissioners petitioned to have condemned, was confined to the value of the land at the time the Park act went into force. This was held to be error, and it was said: "The legislature has not the power, by mere declaration of law, to set apart the land of the citizen for the use of corporations, and divest the owner of the right to sell and improve it. It can not, by arbitrary enactment, take property for public use, and limit the owner's right to recover compensation to the date of the law, when the property might greatly enhance in value between the passage of the law and the time when proceedings to condemn are commenced. We therefore think that the evidence excluded by the court should have been admitted, and that the value of the land should be estimated at the date of condemnation."

If the last sentence which we have quoted stood alone, it might be somewhat difficult to determine definitely what time was intended by the words, "at the date of condemnation," but when this is taken in connection with the preceding sentence, it was doubtless intended to mean, by the words "at the date of condemnation," the date of filing the petition to condemn. If we are correct in this view, the case cited is an authority against the view taken by the commissioners, rather than in their favor.

We have been referred to some authorities in other States as sustaining the view of the commissioners, but it will not be necessary to review them. This is a statutory proceeding,

and we are satisfied that, under the laws of this State, the true measure of compensation to be allowed is the value of the land at the time the petition was filed.

The next question presented by the record is, whether the court erred in instructing the jury to allow interest on the value of the property from the time the petition was filed until the trial. It is insisted by the defendants that it is inequitable to have their property taken from them and not allow interest from the time of the taking. The commissioners had no right to take the property or to disturb the defendants in the enjoyment of the possession thereof, until the damages had been ascertained in the mode provided by law, and paid. The filing of a petition to condemn property is not a taking of the same. If the commissioners took possession of defendants' property before the damages were assessed and paid, they were trespassers, for which the law gives an ample remedy. There is some slight evidence in the record tending to prove that the commissioners assumed control over the property, but there was no issue of that kind in the case, and the instruction is not predicated on the existence of that fact. The evidence, therefore, bearing upon that point, we do not regard of any importance. The defendants had the right to the possession and use of their property after the petition was filed, the same as before, and we perceive no reason why they should have the use of the property and at the same time be allowed interest upon its value, before it was actually taken.

In *City of Pekin* v. *Reynolds*, 31 Ill. 529, it was held, that at common law interest was not allowed in any case,—it is the creature of the statute alone; that a city or town is not liable for interest on its indebtedness, in the absence of an express agreement to pay interest. In *The People* v. *Salomon*, 51 Ill. 52, it was held, that the South Park Commissioners was a municipal corporation, and this was followed by the case of *City of Chicago* v. *The People*, 56 Ill. 328, where it was held that a municipal corporation is not liable to pay interest, except by express agreement so to do. In the late case of *City*

of Chicago v. *Allcock*, 86 Ill. 384, which was an action to recover damages to certain property, resulting from the constructing of an improvement by the city, it was held to be error to instruct the jury to allow interest on the amount of damages awarded by the jury from the time the damages were sustained.

If these decisions, which have been deliberately made, are to be regarded as the law, we perceive no ground upon which the instruction under consideration can be sustained. There is no statute authorizing or requiring the South Park Commissioners to pay interest in a case of this character. The charter under which they were organized does not empower them to raise money, by taxation or otherwise, to pay such interest. The commissioners never agreed to pay interest. A municipal corporation can not be held liable for interest where there has been no agreement to pay, and this has been held to be a municipal corporation. Our conclusion, therefore, is, that interest could not be recovered.

The case of *Cook* v. *South Park Commissioners*, 61 Ill. 115, has been cited as an authority sustaining the view of defendants. We do not so understand the decision. It is there (see page 124) expressly said: "We think there was no error in refusing to allow interest on the amount of the verdict intermediate its finding and return and the rendition of the judgment of the court thereon."

The next question involves the validity of the judgment rendered by the court on the verdict,—that the amount found by the jury should bear interest from the date of the entry of the order until payment. In *Cook* v. *South Park Commissioners, supra*, it was held that a judgment in a case of this character would bear interest. The same doctrine was announced in *Illinois and St. Louis R. R. Co.* v. *McClintock*, 68 Ill. 296. Each of these cases, however, arose under the Condemnation act of 1852, and in each case it appeared that the land condemned had been taken possession of by the party in whose

behalf the proceedings were commenced. These cases can not, therefore, control here.

The 10th section of the act of 1872, under which this proceeding was had, declares: "The judge or court shall, upon such report, proceed to adjudge and make such order as to right and justice shall appertain, ordering that petitioner enter upon such property and the use of the same, upon payment of full compensation, as aforesaid; and such order, with evidence of such payment, shall constitute complete justification of the taking of such property."

In *St. Louis and Southeastern R. R. Co.* v. *Teters*, 68 Ill. 144, this section of the statute was considered, and it was said: "We have no doubt, under the language employed in the act, that the court has power in such a case, and when the jury found that they have taken the property into possession, or where it conclusively appears from the record, to render judgment and award execution. But where the company has not appropriated the land at the time of the trial, it would be improper to render a judgment for the recovery of the money, or to award execution, because it could not be known that the company will ever enter upon the land."

The fair inference from the language used would seem to preclude the rendition of a final judgment which would bear interest, unless the land has been actually appropriated. So, too, the language of the section of the act *supra*, in these words, "ordering that petitioner enter upon such property and the use of the same, upon payment of full *compensation*, as *aforesaid*," would seem to mean that compensation, as determined by the jury only, was to be paid where the land had not been appropriated by the company.

In the case of *City of Chicago* v. *Barbian*, 80 Ill. 482, the character of a judgment in a proceeding of this kind was considered, and it was there said: "The compensation to be made is for the property taken or damaged, and no property shall be taken or damaged until compensation shall be made. The rights of the parties are correlative, and have a reciprocal

relation,—the existence of the one depending on the existence of the other. When the party seeking condemnation acquires a vested right in the property, the owner has a vested right in the compensation; but since no vested right can be acquired in the property, without the owner's consent, until compensation shall be paid, it must follow there can be no vested right in the compensation until after the amount is paid."

Our conclusion on this branch of the case is, that until the possession of the property has been taken, interest can not be allowed; that so long as the owner holds the possession and use of the property, the compensation should not bear interest —in other words, that the possession and use of the property must be regarded as an equivalent for interest.

The fourth error relied upon we do not regard as well taken. If the property had a market value if subdivided into lots or blocks, we perceive no reason why such value might not be proven. The owners were entitled to receive just compensation for the property to be taken, and in determining this compensation the jury had the right to take into consideration each element that might enter into the true market value of the property. If the property, when subdivided into lots or blocks, was of greater value than it would be without such subdivision, it was proper to prove that fact. The real question was what the property was actually worth for any and all purposes for which it might be used. If the property was mostly covered with water, and could not be made available as lot property, the petitioners could easily establish that fact. Besides, the jury were not likely to be misled by the character of evidence complained of, because they, under the statute, examined the property, and could see and determine for themselves whether the property was valuable when divided into lots and blocks.

In regard to the fifth point made by petitioners, that was substantially disposed of by the fourth instruction given in its behalf, in which the jury was directed, that in estimating the compensation to be paid for the land they should consider the

location and situation of the same at the time of taking, without regard to the possible increase of value thereafter, by reason of the prospective park improvements in that vicinity.

In regard to the last point relied upon, that the verdict is not sustained by the evidence, as the judgment will have to be reversed for other reasons we refrain from the expression of any opinion upon the testimony, as we do not desire, by discussing the evidence, to prejudice or prejudge another trial.

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

Judgment reversed.

JOHN C. STEWART *et al.*

v.

CINCINNATUS C. MUNFORD.

1. ESTOPPEL—*to claim property after inducing its purchase.* When a lessee of a mine surrenders his lease to the lessor to enable him to lease to another, who had agreed to buy the lessor's interest, but which he afterwards refused to do, and no new lease was ever executed to such lessee, and when the improvements were partly burned, the lessee said he was unable to take and work the mine, and requested the lessor to do the best he could with the property, and assisted in procuring another to take a lease of the property without informing him of his claim to the machinery included in the leasing, it was *held*, that the original lessee was estopped from claiming his improvements of the second lessee, or compensation therefor, in the absence of any agreement to pay for the same.

2. LEASE—*effect of surrender.* Where a lessee of a mine makes a written surrender of his lease in view of a contemplated sale of his improvements and machinery, to enable the lessor to make a new lease to the purchaser, the original lease, in law, if not in equity, is canceled, and the lessor reinvested with the legal title to the term, and, without any new writing to restore the term, the lessor may again lease and pass the legal title free from the claim of the first lessee.

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

Mr. F. C. SMITH, for the appellants

Mr. F. S. MURPHY, and Mr. F. A. WILLOUGHBY, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that on the 16th of November, 1872, Munford, the appellee, leased, for the term of fifteen years, of S. G. Dean, a tract of land for mining purposes. Appellee entered under the lease, sunk a shaft, ran some entries, put in machinery and erected a building above ground at an expense, as he claims, of over $3000. He sold his lease, machinery, etc., to an agent of the Lathrop Coal and Mining Company, for $2000, of which $300 was paid in hand, and the papers were drawn, executed, and were to be delivered within ten days, but the Lathrop Coal and Mining Company repudiated the contract before the expiration of that time, on the ground that their agent had exceeded his authority.

When this sale was made to that company, the lease to Munford contained covenants to which its agent objected, and that the objection might be obviated, Munford surrendered his lease by written indorsement thereon to Dean, and a new lease was made to the company omitting the objectionable covenants.

Munford brought suit against the Lathrop Coal and Mining Company to recover the balance of the purchase money, but failed to recover. When the lease was executed to the company, Dean took possession, as appellee claims, under an arrangement between them that Dean should hold it and turn it over to the company if they should accept it, or if not, then to return it to him. After Dean took possession a fire occurred which destroyed the building and machinery.

Soon after this, Dean, who was claiming the mine, got Munford to see appellants and deliver to them a letter written by Dean, who had previously conversed with Stewart in reference to leasing the mine to him, and to induce Stewart to lease

the mine. It is claimed by Munford that Stewart in this conversation agreed that if he and McFarland should lease the property, they would pay him for his improvements what they were worth. It was soon afterwards discovered that Dean had no title to the property, but the title was in his wife, and on the 15th of July, 1873, appellants took a lease from Dean and his wife for the mine, and went into possession under it. The lease contains this clause: "Also the shaft already dug upon said premises, with the coal cars and everything else situated upon the following described premises." Munford, after he failed in his suit against the coal company, demanded the premises of appellants and they refused to surrender them, and thereupon he brought suit in equity against appellants and recovered a decree for $1700, which was reversed in this court on the ground that equity had no jurisdiction. He thereupon instituted this action of assumpsit. Appellants filed a plea of the general issue, and on a trial the jury found for plaintiff a verdict of $2500, but the court required a *remittitur* of $1300, which was made, and the court rendered judgment against defendants for $1200 and costs. The case is brought to this court on appeal.

On reading the evidence contained in this record, we find it impossible to concur in the conclusion reached by the jury. They, it seems to us, misapprehended the entire force and effect of the testimony. It stands admitted that appellee, when it was supposed that a sale was made to the coal company, made a formal written surrender of his lease to Dean. This is not only not disputed, but is conceded. This, then, vested the legal title to the term, if any existed, in Dean, whatever may have been the purpose or understanding of the parties. Nor is there the slightest pretence that any writing was ever afterwards executed to revive or restore the term in appellee. By the written surrender, the lease, in law, if not in equity, was canceled, and all of appellee's legal rights were terminated. And as a verbal lease for a term of more than one year would have been void under the Statute of Frauds, any verbal agree-

ment at the time of the written surrender or afterwards, being void, failed to vest any legal title in appellee. If he had any rights they were equitable.

When, therefore, the property was destroyed by fire, and appellee said to Dean that he was wholly unable to repair and could not go on under the lease, and that Dean should do the best he could, that was a surrender of all equitable claim to the lease or the premises. If he could reserve an equitable interest in the lease by a verbal agreement, it must follow that by the same character of contract he could surrender that interest. It could not require a higher degree of evidence to surrender and cancel than to create the interest. This must be obvious to all persons in the profession.

Then, did he so surrender the interest which he claims he reserved by verbal agreement with Dean? Of this we think there can be no question. He admits that he said to Dean he was unable to repair or perform the requirements of the lease after the fire, but says he does not remember saying to Dean to do the best he could with the property. But Dean swears he did, and is corroborated by his son and by Curry. The latter says, appellee said in his presence and a number of others, after the fire, that he had surrendered the lease to Dean. We must, therefore, conclude that he did surrender it in the manner Dean swears he did. This is more probable from the fact that he was then looking to the Lathrop Coal and Mining Company for pay for his improvements. Dean's son testifies that appellee said to his father, he was unable to repair and go on under the lease, and would prefer to look to the company. He was then pressing his suit against the company, and it is unreasonable to believe that he would then, or at the time Dean leased to appellants, make claim to property he claimed to have sold to the company and for which he was endeavoring to recover the price. He could not be presumed to make such a claim, which, if proved, in the suit with the company, would have inevitably defeated a recovery. Such a claim would have been fatal to his interests in that case.

The property, it is conceded, belonged to the wife of Dean. That being true, it may be seriously doubted whether appellee acquired any legal rights by the lease to him. There does not appear from the transcript, so far as we have been able to find, any evidence that in making the lease Dean was acting by authority of his wife, or that she in anywise recognized his authority or ratified the act. But we shall pass this question, as the point is not made or discussed in argument.

The evidence is, we think, overwhelming, that appellee, in his first interview in reference to appellants leasing from Dean, and his next, on the day and before the lease was signed, or on that of the day after, made any claim of ownership or claim for the property or improvements. Appellee does say, in direct examination, that Stewart said he ought to be paid for his improvements if he failed to recover of the coal company, and it was agreed he should be paid what they were worth. But in his cross-examination he says he made no claim therefor. How is it possible to believe appellants, without any claim, would agree to pay so large a sum? It is too improbable for belief. And it could not be that he would make such a claim and thereby endanger a recovery from the coal company. Both of appellants swear unequivocally that he did not make such claim, nor does he swear that he did. They both positively deny they ever promised to pay him. From the evidence we are abundantly satisfied that he made no such claim before the lease was executed, nor until after he had failed in his suit against the Lathrop Coal and Mining Company, or that appellants promised to pay him anything.

If, as it appears, he made no such claim and they did not promise to pay him before they leased the property, it would be monstrous injustice to permit him to recover when he urged them on to take the lease, supposing, as the lease said, they were obtaining the shaft, coal cars and everything else on the premises. The law is not subject to the reproach that a man may withhold such information when he is apprised of the intention of parties to so act, and he urges them to do so,

and still recover for what he knows they supposed they were purchasing and were getting with an unincumbered title. Common honesty required him to assert his title or to be forever estopped from asserting his claim.

We are clearly of opinion that appellee has failed to establish any ground for a recovery.

The judgment of the court below must be reversed.

Judgment reversed.

THE ILLINOIS LINEN COMPANY

v.

ROSELLE M. HOUGH.

1. MEASURE OF DAMAGES—*where price is fixed by special contract.* Where an article is sold and delivered under a special contract, in which the price is fixed by the parties, that price must govern, and because there is a conflict in the evidence as to what the price was, does not authorize the jury to allow what the article was reasonably worth, but they must find, from the evidence, what the contract price really was, according to its weight and credibility.

2. INSTRUCTION—*calling attention to particular facts.* An instruction which calls attention to particular facts in the testimony on one side, and omits any reference to facts shown on the other side bearing upon the point in issue, is faulty.

3. SAME—*when one does not cure a faulty one.* The giving of a correct instruction upon a point in a case will not obviate an error in an instruction on the other side, where they are entirely variant, and there is nothing to show the jury which to adopt.

4. CORPORATION—*right of officers to pay for services.* Where the by-laws of a private corporation provide that the officers shall receive such compensation for their services as shall be determined at the annual meeting of the stockholders, or at any special meeting called for that purpose, and none are ever so fixed, an officer performing the ordinary duties and services pertaining to his office will not be entitled to recover for such services of the corporation, in the absence of any agreement to pay him for the same.

5. AGENT—*neglect to keep proper accounts, construed against him.* It is ordinarily the duty of agents to keep regular accounts and vouchers of the business in the course of their agency, and if this duty is not faithfully performed, the

omission will always be construed unfavorably to the rights of the agent, and care will be taken that the principal shall not suffer thereby.

6. Where a president of a private corporation has power to draw drafts upon the treasurer, and does so, indiscriminately and undistinguishably, for private and company uses, in a suit between him and the company in reference to that matter, the burden of distinguishing between the drafts will be imposed upon him; and in the absence of such showing on his part, he will be chargeable with the whole.

APPEAL from the Circuit Court of Du Page county; the Hon. H. H. CODY, Judge, presiding.

Mr. WILLIAM E. LEFFINGWELL, for the appellant.

Messrs. E. N. & N. E. GARY, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit upon the common counts, by Roselle M. Hough against The Illinois Linen Company, resulting in a verdict and judgment for the plaintiff for $15,000. The defendant appealed, and assigns for error the giving and refusing of instructions, and that the verdict is not supported by the evidence.

The plaintiff's claim was of the amount of $25,000, embracing various items of account. One item was 809 tons of flax fibre, $10—$8090. Touching this, the court below, on the part of the plaintiff, instructed the jury, in substance, that if the minds of the plaintiff and one Crane, acting for the linen company, did not meet upon the price to be paid for the flax straw in question, and that the plaintiff had, at all times, understood and believed that the company agreed to give him $10 per ton for such straw, and that the defendant company understood that the price they agreed to give for the straw was $3.50 per ton, then there was no contract for the price of the straw made between the parties, and the plaintiff would be entitled to recover what the evidence showed the price of the straw to be reasonably worth.

Under the evidence in the case, we regard this instruction

erroneous. That there was a contract for this straw, and that a price was agreed upon, is asserted by both parties. The witnesses on the one side say it was $10 per ton, those on the other side $3.50. The only question arising was, what was that price which was agreed upon. This the jury should have determined upon the weighing of the testimony and passing upon the credibility of the witnesses. Because there was contradictory evidence upon the point, the jury should not have been encouraged, as they were here, by instruction from the court, to decline the more difficult task of a determination upon conflicting testimony of what the contract price was, and adopt the easier mode of saying what was a reasonable price. We can see nothing in the evidence which was calculated to create anything of mistake or misapprehension of what the contract price was, thus leaving the question entirely one of the credibility of witnesses.

The fifth instruction on the part of the plaintiff, with reference to the amount of flax straw delivered, was faulty, under repeated decisions of this court, in calling attention to particulars of testimony on that subject on the side of the plaintiff, and omitting any reference to defendant's testimony on the point. The eleventh instruction for the plaintiff, on this point, was the proper one, and the only one plaintiff was entitled to in this regard, with the exception that the last clause of it was wrong, in being suggestive of the number of tons delivered.

Another item of charge was for services,—$5000. During the time of these services, some fourteen months, plaintiff was the president of the company. Upon this head there was given, on the part of the plaintiff, this instruction:

"6. Although the jury may believe, from the evidence, that the plaintiff was not to receive any compensation as president of the company, yet if they further believe, from the evidence, the plaintiff, with the knowledge and consent, and at the request of the defendant, performed other and different services for the company than were required of him as such

president, and such as did not properly pertain to said office, then the plaintiff has the same right to recover for such extra services so rendered by him (if such are shown, by the evidence, to have been performed,) as though he was not, at said time, president of said company; hence, if the jury believe, from the evidence, that the plaintiff, with the knowledge of the defendant, rendered services for the company to the value of $5,000, or any other sum, and that such services were outside of and not included in his duties as president, then the jury, in making up their verdict, should allow the plaintiff for such extra services, if any have been proven, to the amount of $5000, or any other sum which the proof shows such services to have been worth."

The by-laws of the company provided, that the officers should receive such compensation for their services as should be determined at the annual stockholders' meeting, or at any special meeting called for that purpose. Plaintiff admits that no compensation was ever thus fixed. Mr. Crane, the largest stockholder at the time, and the treasurer of the company, testifies that it was agreed between plaintiff and himself and the other officers and directors of the company, that the president, secretary and treasurer should not have any salary; that the superintendent was to be paid, the by-laws requiring he should devote all his time to the interests of the company; that the other stockholders besides himself were the plaintiff, Wilber and Smith,—that they were all directors, and Smith the superintendent; that the witness performed many services outside of his duties as treasurer, and never received any salary for his services or made any charge therefor. The secretary of the company gives confirmatory testimony as to the making of such agreement. The plaintiff alone denies the agreement.

The prescribed duties, by the by-laws, of the officers of the company were such duties as are generally required of such officers in similar corporations, and such other peculiar duties as the necessity of the business might, from time to time, require.

As to his services, the plaintiff testified: "I spent my whole time, while I was president of the company, night and day, except when superintending farm. I purchased fibre and looked after whole business, outside and inside. I averaged about twelve hours per day. My services were reasonably worth $5000 for eighteen months."

The evidence shows, that during this time the plaintiff was largely engaged about his own private affairs, in addition to superintending his farm of some nine hundred acres. We are of opinion that, under the evidence in the case, the plaintiff was not entitled to compensation for his services, and that the instruction should not have been given.

The correct instruction upon the subject was given for the defendant, as follows:

"The court instructs the jury, if you shall believe, from the evidence, that by the articles of incorporation and by-laws of the defendant, it is provided that no officer of the defendant shall receive any other compensation for his services than shall be determined and allowed by the stockholders at the annual meeting, or a special meeting called for that purpose, and that no such allowance was ever made or provided for the services of the plaintiff, or if you shall believe, from the evidence, that it was agreed by the plaintiff and other officers of the defendant that they should not charge for or receive any compensation for their services rendered by them, then the plaintiff would not be entitled to recover upon his claim for such services."

But this did not cure the error. The jury were left at liberty to follow either instruction, unenlightened as to which one was the law.

The defendant asked the following instruction:

"The court instructs the jury, that if you believe, from the evidence, that the plaintiff, while acting as president of defendant, drew certain drafts upon the treasurer of defendant

for the payment of money to himself and other persons therein named, and signed the said drafts with the word 'president' appended to his name, and upon the face of said drafts, directed the same to be charged to the account of the defendant, and if you shall further believe, from the evidence, that the defendant paid the money on said drafts, then you are instructed, as a matter of law, that the fact of the plaintiff's so signing said drafts, and directing the amount thereof to be charged to the defendant, would not relieve him of his responsibility to account to the defendant for the amount of money so drawn by him, and the burden of proof is upon the plaintiff to show that he has applied all of said money so, as aforesaid, drawn from the treasury of the defendant, to the use of the defendant, and if he has failed to so satisfy you in relation to any of the said drafts, by a preponderance of evidence, then the defendant would be entitled to recover therefor from the said plaintiff."

—which the court refused to give, but modified to the effect that the plaintiff could only be held to account for such money as the evidence showed he had drawn for his own use and benefit, or such as he had appropriated to his own use, and as thus modified gave the instruction,—all which was excepted to.

There was a set-off in the case, on the part of the defendant, of moneys paid and advanced, etc., of a large amount. The evidence shows that the plaintiff had authority to draw upon the treasurer of the company for money. This he often did, and all his drafts were paid. Some of the money so drawn was for the use of the company, and some for his own use. All the drafts, however, with the exception of one or two, were signed "R. M. Hough, President," and were, upon their face, directed to be charged to the account of the Illinois Linen Company. The treasurer's office was in Chicago, and the factory of the company was at Roselle, some twenty-eight miles distant. The plaintiff's place of business was at the latter place, and the treasurer, as may be supposed, could know nothing of the intended use of these drafts, except as

appeared upon their face. Though the assertion is made that upon the face of many of the drafts it appeared that they were drawn expressly for the benefit of the company, upon examination of the portion of the record referred to in support of the assertion, we find but a single draft so showing.

There were one hundred and sixteen of these drafts thus drawn upon the company, amounting to the sum of $36,736.68. The plaintiff himself admits that certain ones of them, amounting to $10,520.58, were for his own individual account, and testifies: "I kept no account, record or memorandum of any individual transactions with the company, supposing it would be on the company books."

There was remissness of duty here, on the part of the plaintiff, in his manner of dealing with this large amount of the company's money, drawing it, as he did, from the treasury of the company, upon drafts with no trace upon them to show for whose use (his or the company's) they were drawn, and keeping no account or memorandum thereof, but leaving, for whose use the drafts were drawn, to be shown, as best might be, from memory.

It is ordinarily the duty of agents to keep regular accounts and vouchers of the business in the course of their agency, and if this duty is not faithfully performed, the omission will always be construed unfavorably to the rights of the agent, and care will be taken that the principal shall not suffer thereby. Story on Agency, § 332. In 1 Story's Eq. Jur. § 468, after observing upon the duty of agents to keep regular accounts and vouchers, it is remarked further: "Upon similar grounds, as an agent is bound to keep the property of his principal distinct from his own, if he mixes it up with his own the whole will be taken, both at law and in equity, to be the property of the principal, until the agent puts the subject matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part,—in other words, the agent is put to the necessity of showing, clearly, what part of the property belongs

to him; and so far as he is unable to do this, it is treated as the property of his principal."

Analogous to the mixture of property was this confusion of private and company uses of these moneys, admitting, we think, of the application against the plaintiff of a similar principle to the above. The drafts having been drawn, indiscriminately and undistinguishably, for private and company uses, we think the burden of distinguishing between them was imposed upon the plaintiff. He knew the purposes for which the drafts were drawn,—whether for his own or the company's use. The company, presumably, did not know, there being nothing in the form the drafts were drawn to give information.

We are of opinion that, at least under the facts of this case, the instruction, as drawn, should have been given, and that there was error in the modification of it.

The error in respect of instructions makes it unnecessary to consider the point as to the verdict not being sustained by the evidence.

The judgment will be reversed and the cause remanded.

Judgment reversed.

Chicago, Rock Island and Pacific Railroad Company

v.

Charles Todd.

1. Abatement—*non-joinder of plaintiff in tort.* In an action for a tort, the non-joinder of a person as plaintiff may be pleaded in abatement. The defendant has the right to have the cause of action adjudicated in a single suit.

2. In an action on the case to recover for the destruction of property through the negligence of the defendant, the declaration alleged that the plaintiffs, father and son, were possessed of the property as partners. The proof showing that the property belonged to the son and his mother as partners, the court gave leave to substitute the mother as co-plaintiff with the son, when the defendant asked for a continuance, and thereupon, by leave of court,

the suit was discontinued by the plaintiff as to the father, and the trial ordered to proceed at the suit of the son alone: *Held*, to be error, as denying the defendant the right of pleading the non-joinder in abatement.

3. Amendment—*changing parties.* The amendments allowed by section 24 of the Practice act, (Rev. Stat. of 1874,) are in furtherance of justice and the rights of the parties, and not in denial of such rights. It should not be allowed so as to deprive the defendant of the right to have the entire cause of action disposed of in one suit.

4. Variance—*between pleading and evidence.* Where the declaration, in an action on the case, alleges that the plaintiffs are partners, and, as such, owners of property destroyed by negligence of the defendant, and the suit as to one of the plaintiffs is discontinued without amendment of the declaration, and the proofs show the property belonged to the remaining plaintiff and another person not made a party, the variance will be fatal to a recovery.

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

Mr. George S. Eldridge, and Mr. Thomas F. Withrow, for the appellant.

Mr. E. F. Bull, for the appellee.

Mr. Justice Scholfield delivered the opinion of the Court:

This is an action on the case, commenced by Walter Todd and Charles Todd, who sue as partners, against The Chicago, Rock Island and Pacific Railroad Company, for negligence resulting in the destruction of a flouring mill and its contents, in the city of La Salle.

The declaration contains but two counts. In the first it is alleged that the plaintiffs were the lessees of a certain flouring mill, and in the possession thereof, situated, etc., which flouring mill the defendant, by negligently, carelessly and unskillfully permitting the fire to escape from its engine, permitted, etc., to be burned and destroyed, as also a large amount of valuable machinery, wheat, flour, bags, tools and other furniture, then being in the mill.

In the second count it is alleged that plaintiffs "were the

lessees in possession of the mill aforesaid, in which they had a large amount of valuable machinery, etc., and concludes by alleging the burning of the same by the carelessness, etc., of the defendant."

The plea is, not guilty.

The cause was submitted to a jury, on this issue, and the appellee, Charles Todd, on being first examined as a witness, testified that he and his father, Walter Todd, his co-plaintiff, were in partnership and in possession of the mill as lessees, when it was burned. After this the trial progressed until the evidence in chief and the evidence in the defence was all given to the jury; and the appellee, Charles Todd, being then recalled to rebut evidence given on behalf of the defendant, testified that his mother, Emily Todd, and not his father, Charles Todd, was in partnership with him as lessee of the mill and owner of the property therein, when the mill was burned.

As there is dispute as to what then occurred, we quote literally, from the record.

"Mr. Bull—I desire to enter a motion under the 24th section of the Practice act, to substitute the name of Emily Todd in the place of Walter Todd.

"Which motion the counsel on the part of defendant objected to, which objection was overruled by the court, and the court gave leave to substitute Emily Todd as co-plaintiff in the place of Walter Todd, to which ruling of the court the counsel for the defendant then and there duly excepted.

"Mr. Eldridge—I desire to submit an affidavit on the part of the defendant for a continuance of the case.

"The Court—I think, under that state of facts, I will have to grant it.

"Mr. Bull—I will remedy that, if your honor please, and let the suit be discontinued as to Walter Todd.

"Thereupon the court allowed the plaintiff to dismiss his suit as to Walter Todd, one of the plaintiffs named in the summons and declaration, and to proceed with the trial of the cause in the name of Charles Todd as said plaintiff, the motion

to substitute Emily as co-plaintiff being abandoned,—to which ruling of the court the counsel for the defendant then and there duly excepted."

It is conceded by counsel for appellee that had the suit, in the first instance, been brought in the name of Charles Todd alone, the non-joinder of Emily might have been pleaded in abatement, and such has been the ruling of this court. *Edwards* v. *Hill*, 11 Ill. 22; *Johnson et al.* v. *Richardson et al.* 17 id. 302.

It was a matter of substantial right to the appellant to have the cause of action adjudicated in a single suit. But by the ruling here it was denied that privilege. It was, against its protest, required to proceed with the trial, after the suit was dismissed as to one of the original plaintiffs. The issue was joined before the party was dismissed out of the case, the jury impanneled and the principal part of the evidence heard, and there was no opportunity to plead in abatement. The trial had to proceed, by the order of the court, on the issue then joined.

The amendments allowed to be made by section 24 of the Practice act, (Rev. Stat. 1874, p. 778,) are in furtherance of justice and the rights of the parties, and not in denial of such rights.

The amendment here made was not to make the evidence conform to the allegations in the declaration, for there was, after the amendment, as clear a variance between the allegations and the proofs as there was before.

The allegations in the declaration that Charles and Walter Todd were partners, and, as such, lessees of the mill and owners of the property therein, were left unchanged, the only change being in striking out the name of Walter Todd as a plaintiff in the suit,—and, as before observed, the proof is Emily Todd, and not Walter Todd, was the partner of Charles Todd, and as such, with him, lessee of the mill and owner of the property therein.

Here is a fatal variance between the allegations and proofs,

which, of itself, is sufficient to authorize a reversal of the judgment. *Insole* v. *James et al.* 37 Eng. Law and Eq. 523; *Satchell* v. *Doram*, 4 Ohio, (N. S.) 542; *Davidson* v. *Nicholson*, 8 Allen, 75.

We are of opinion the court erred in requiring appellant to proceed with the trial against its protest, after the discontinuance of the suit as to Walter Todd, and also in overruling the motion for a new trial.

The judgment is reversed and the cause remanded.

Judgment reversed.

Mr. Justice Dickey: I am not satisfied that this decision is right. My view of the matter is this: The record shows that the application to substitute Emily Todd as co-plaintiff instead of Walter Todd, after having been allowed, was abandoned, and with the abandonment of that measure the application for a continuance made by defendant fell with it. Then the suit was dismissed by leave of the court as to Walter Todd. This left the case standing as an action by Charles Todd alone. Upon the making of this change, the defendant had the right to plead over, and had application been then made for leave to plead in abatement, for the non-joinder of Emily Todd, it should have been granted. This would have involved the necessity of setting aside all proceedings subsequent to the declaration. This application, however, was not made, and the plaintiff had lawful right to proceed as it was done.

I think there was no variance, in substance, between the proof and the declaration. After the suit was dismissed as to Walter Todd, every allegation in the declaration stating an interest in him, was to be treated as withdrawn, and, in legal effect, the declaration charged the property to be that of Charles Todd. Under that allegation proof was competent that he owned half of the property as joint tenant with another. So I think the judgment ought to be affirmed.

MATHEUS GOTTFRIED

v.

THE GERMAN NATIONAL BANK OF CHICAGO.

PRACTICE—*affidavit of claim.* An affidavit of claim, filed with a declaration upon promissory notes, which states the amount of the principal in the notes as the sum due, with interest according to their tenor, and refers to copies of the notes filed with the declaration, is substantially good. The better practice is to state the amount of principal and interest due to the date of the affidavit, but it will answer where the amount can be ascertained from copies filed, to which reference is made.

APPEAL from the Appellate Court of the First District; the Hon. THEODORE D. MURPHY, presiding Justice, and the Hon. GEORGE W. PLEASANTS and Hon. J. M. BAILEY, Justices.

Messrs. RUBENS & HIESTAND, for the appellant.

Messrs. TENNEYS, FLOWER & ABERCROMBIE, for the appellee.

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

This was an action of assumpsit, brought by the German National Bank of Chicago against Matheus Gottfried, on two promissory notes. To the declaration was attached an affidavit of claim, as follows:

"Daniel K. Tenneys, one of the plaintiff's attorneys, being duly sworn, says that the demand of the plaintiff in the above entitled cause is for the amount due and unpaid on two promissory notes, copies of which are attached to the declaration herein, the originals being in possession of deponent, and that there is due to the plaintiff from the defendant, after allowing to him all his just credits, deductions and set-offs, $1690.75, with interest according to the tenor of said notes, and that defendant is a resident of Cook county, aforesaid.

D. K. TENNEYS."

This affidavit, it is contended by appellant, was not sufficient to require him to file with his pleas an affidavit of merits, and this is the only question presented by the record for decision.

The 37th section of the Practice act, (Rev. Stat. 1874, p. 779,) requires an affidavit of claim to show the nature of the demand sued upon and the amount due from the defendant, after allowing all just credits, deductions and set-offs. Does this affidavit meet the substantial requirements of the statute? If it does, then the ruling of the circuit and Appellate courts was correct.

The affidavit is claimed to be defective because the interest was not computed to the date of making it, and added to the principal, and the total amount then due stated in dollars and cents. While it would, doubtless, be a better practice for a plaintiff to state in his affidavit of claim the precise amount due at the time of filing the affidavit, yet to hold an affidavit insufficient which states, fully, facts from which, by a mere calculation of interest, the amount due may be determined, would be adopting a technical rule in the construction of a statute, which might, in many cases, defeat the ends of justice. This we are not prepared to do.

In the affidavit the amount of the notes was given, and it is therein stated copies are attached to the declaration; that there is due $1690.75, with interest according to the tenor and effect of the notes. If the purpose of the affidavit was to apprise the defendant of the amount due the plaintiff, upon reading the affidavit and turning to the copies of the notes referred to in the affidavit, the information is as fully furnished as if the interest had been computed, added to the principal, and the gross amount stated.

In testing the sufficiency of an affidavit of claim, we see no reason why it may not be considered in connection with the declaration. Indeed, this practice was expressly approved in *Haggard* v. *Smith*, 76 Ill. 507, where it was said: "The affi-

davit was properly made by one plaintiff, and is sufficiently definite when taken in connection with the declaration."

In *Haggard* v. *Smith*, 71 Ill. 226, an affidavit of claim, sworn to by one of the plaintiffs, in which reference was made to the "annexed account," as showing the nature of plaintiff's demand and the amount due from defendants, was held to be a substantial compliance with the statute. In that case the account referred to in the affidavit was filed with the declaration, as a part thereof.

The principle announced in the two cases cited will sustain the affidavit under consideration. When the affidavit is read in connection with the copies of the notes referred to in the affidavit and attached to the declaration, the amount due the plaintiff is not uncertain or in doubt.

We are of opinion that the affidavit in substance complied with the requirements of the statute, and the judgment was right. It will be affirmed.

Judgment affirmed.

RICHARD B. ELLIS

v.

GEORGE WHAN.

SURVEY—*to establish boundary, when conclusive.* The report of a commission of surveyors to establish lost or disputed corners and lines, when confirmed by the court, is final and conclusive on the parties to the petition and their privies, and can not be questioned collaterally for errors. It fixes the disputed corners permanently and unalterably.

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

Messrs. SWEENEY, JACKSON & WALKER, for the appellant.

Messrs. PEPPER & WILSON, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears from the record, that Richard B. Ellis, in 1871, filed a petition, under the act of the General Assembly, adopted on the 25th of March, 1869, (Sess. Laws, p. 241,) providing for the permanent survey of lands, to have the lines and corners of the tract in controversy permanently established. The proper notices were given to other owners, who held adjoining lands, and whose lines and corners were liable to be affected by the survey. On the petition being presented to the circuit court of Mercer county, in which the lands are situated, a commission of three surveyors was appointed to make a survey and permanently establish the lines and corners of the lands described in the petition. The commissioners made the survey, and by it established the lines and corners of the land as required by the order of their appointment. They reported their survey to the court, and no exceptions being taken to the report, it was confirmed, and it remains in full force, never in anywise reversed, impeached or set aside.

Appellee brought an action of ejectment in the Mercer circuit court, to its November term, 1877, against appellant, to recover a strip of 14 rods in width, on the east side of forty acres of land, off the west side of the northeast quarter of the northeast quarter of section 20, in township 15 north of range 1 west of the 4th principal meridian. This strip was, by the survey made by the commissioners, given to appellee, who owned the west part of the northeast quarter of the northeast quarter of section 20, containing, according to conveyances, forty acres.

The land was conveyed by appellant to one George Blum, and by him to appellee, by that description, and the petition and commission required the commissioners to permanently establish the lines of this forty and adjoining lands. Appellee purchased after the lines were thus established, and claims to own according to the lines and corners of the forty thus

established by the commissioners and confirmed by the circuit court.

Appellant contends that he only sold forty acres on the west side of the fourth of the quarter section, and that the quarter section being fractional and in excess he has never parted with the title to this strip, which is the excess in that fourth of the quarter section, and that, therefore, appellee has no right to recover.

Until the survey was made by the commission and confirmed by the court, there would have been plausibility in the position. But that was a proceeding expressly authorized by the statute, and so far as we can see, from this record, the circuit court had complete jurisdiction of the persons of appellant, Blum, the grantor of appellee, and of the subject matter in dispute. The material question in issue, and to be decided by the commission, was the line and corners between appellant and Blum as well as other lines and corners in section 20.

Section 4 of the act provides, that when the report is filed in, and approved by the final judgment of, the court, if not appealed from, the lines and corners shall be held and considered as permanently and unalterably established according to the survey. Now, the report of this survey was approved by the final judgment of the court, and that judgment was not appealed from, nor was it reversed on error. Hence it became permanently and unalterably binding on all parties to it, by the very terms of the statute.

The court had complete jurisdiction of the parties and the subject matter, and its judgment must be held conclusive upon the parties to the proceeding and their privies. All persons who take from them, by purchase, devise or descent, take subject to the judgment of the court approving and confirming the lines and corners. The parties and such privies can not question the judgment and again litigate the questions then determined, and which thereby became *res judicata,* and it must have the same effect as the final judgment rendered at the termination of any other litigation. Public policy and

the security of persons in the enjoyment of their rights, alike require that litigation should have an end, and where there is a final judgment, that must conclude all further contest between the parties and their privies, as to the matter involved.

Here, the question was as to the true lines and corners which the petition says were in dispute. The commissioners have settled the dispute, and the statute has made their decision, when approved by the final judgment of the court, permanent and unalterable. Hence it follows that appellant is concluded from showing the lines and corners were not correctly established. If not satisfied with the correctness of the survey, he should, on the coming in of the report, have interposed objections and shown to the court wherein it was incorrect. This the statute authorized, but failing to do so, he must be held as having waived all objections, and can not be heard to question the judgment in a collateral proceeding. All the objections urged against the survey are, therefore, without force and can not be allowed.

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

Judgment affirmed.

THE BOARD OF TRADE OF CHICAGO

v.

THE PEOPLE *ex rel.* William N. Sturges.

1. APPEALS *from circuit court—whether to the Appellate or to the Supreme Court—what is a franchise.* An appeal or writ of error does not lie from the circuit to the Supreme Court in a *mandamus* to compel the restoration of a member of the Board of Trade of Chicago after his expulsion, the right to membership in a private corporation not being a franchise within the meaning of the law giving the right to prosecute appeals and writs of error to the Supreme Court. Such appeal should be taken to the Appellate Court.

2. A franchise is a privilege emanating from the sovereign power of the State, owing its existence to a grant, or, as at common law, to prescription, which presupposes a grant, and is invested in individuals or a body politic.

The word is used in this restricted sense in the statute giving appeals and writs of error from the circuit to the Supreme Court.

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

Messrs. LAWRENCE, CAMPBELL & LAWRENCE, and Messrs. DENT & BLACK, for the appellant.

Mr. C. BECKWITH, Messrs. MCCOY & PRATT, and Messrs. MONROE, BISBEE & BALL, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The relator, having been expelled from the Board of Trade of the city of Chicago, filed a petition in the circuit court of Cook county for a *mandamus*, to compel that body to restore him to membership. On the hearing a peremptory writ of *mandamus* was awarded, in accordance with the prayer of the petition, and respondent brings the case directly to this court, on appeal, notwithstanding the law establishing Appellate Courts was in force when final judgment was pronounced in the cause. The relator moves to dismiss the appeal, on the ground this court has no jurisdiction to hear the errors assigned.

The decision of the motion made involves a construction of the statute under which the appeal was taken that is supposed to confer the right, and which provides as follows: "Appeals and writs of error shall lie from final orders, judgments or decrees of the circuit * * * courts * * * directly to the Supreme Court in all criminal cases, and in cases involving a franchise or a freehold or the validity of a statute." The Practice act, upon the same subject, provides, that "in all criminal cases, and in cases in which a franchise or a freehold or the validity of a statute is involved, appeals shall be taken directly to the Supreme Court in case the party appealing shall so elect, excepting in chancery cases." As this is

not a chancery suit, it is maintained the appeal will lie because it is claimed a "franchise" is involved.

The board of trade is a corporation organized under a special act of the General Assembly, and is a corporation organized solely for the purpose of transacting commercial business, and for no other purpose whatever. The relator was a member of the board, and was entitled to all the benefits of membership. Whether relator was lawfully or illegally expelled, is not a matter that need now be considered. The subject of the present litigation concerns his membership, and his right to be restored to the enjoyment of its privileges. No question is made that in any degree concerns the validity of the corporation, nor has the litigation any relation to it. The inquiry, then, must be, does the membership of the relator come within the definition of a "franchise," as that term is used in the statute? Our conclusion is, it does not.

This court, in *Chicago City Ry. Co.* v. *The People,* 73 Ill. 541, adopted the definition of a franchise as given by Blackstone, that it "is a royal privilege or branch of the king's prerogative subsisting in the hands of the subject, and being derived from the crown must arise from the king's grant," and added, that "corporate franchises in the American States emanate from the government or sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are invested in individuals or a body politic." Precisely the same definition has been uniformly given of a franchise by text writers and courts of the highest authority. Angell & Ames on Cor. sec. 4, 737; *Bank of Augusta* v. *Earle,* 13 Peters, 579; *Morgan* v. *Louisiana,* 3 Otto, 217; *City of Bridgeport* v. *New York and New Hampshire R. R. Co.* 36 Conn. 255; *People* v. *Ætna Ins. Co.* 15 Johns. 358.*

In *The Bank of Augusta* v. *Earle,* it was said by the court: "It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of

the State." As was said in *City of Bridgeport* v. *New York and New Hampshire R. R. Co.* the "term franchise has several significations, and there is some confusion in its use; but when it is used in a statute, or elsewhere in the law, it is generally, if not always, understood as a special privilege conferred by grant from the State or sovereign power, as being something not belonging to the citizen of common right." In *Morgan* v. *Louisiana*, the court very justly remarked that much confusion of thought had arisen from "attaching a vague and undefined meaning to the term franchise."

It must have been in this restricted sense the term "franchise" was used by the General Assembly in the statute we are considering, and not in that broad sense contended for. No doubt the word "franchise" is sometimes used as synonymous with privileges and immunities of a personal character; but in law its appropriate meaning is understood to be something which the citizen can not enjoy without legislative grant. Many of our religious, benevolent, literary and scientific societies and associations are incorporated under general or special laws, but it was never understood that members of such societies or associations possessed or exercised any franchise. What they obtain is what is most appropriately termed "membership," which means freedom of the privileges it confers, and nothing more. That is precisely the case at bar. Relator had membership in this corporation and the freedom of its privileges, whatever they were, but in no just sense did he exercise any franchise granted to him or the corporation by the General Assembly.

It is lawful for any person or association of persons to transact commercial business without legislative grant for that purpose. A corporation for such purposes is a mere convenience, and nothing more. A member of such a corporation exercises no other right in the buying or selling of commodities than what any citizen of common right may do, except, as in the present instance, by virtue of his membership he may transact such business in a room belonging to the corporation, which

is a mere privilege and not a franchise, in the sense that term is used in the statute. One test that might well be applied is, that in case of the non-user or mis-user by the party owning membership in such a corporation, an information would not lie against him at the suit of the people. It is not understood the people are prosecuting this case further than to give the writ, which any citizen may invoke as a statutory right. Further than that the people lend no aid to this prosecution. So far as the General Assembly has granted a franchise to this corporation, it is a matter of no public concern who owns a membership in the corporation.

No franchise, in the sense that term is used in the statute, being involved in this litigation, the motion made must prevail, and the appeal will be dismissed.

Appeal dismissed.

SCHOLFIELD and DICKEY, JJ., dissenting:

We do not concur in this opinion. We think that the word "franchise," as used in the constitution and in the statute, was not used in the strict technical sense, but in its broader and more popular sense.

JOSEPH B. QUINN

v.

PETER P. SCHMIDT.

1. CHATTEL MORTGAGE—*misdescription of date of note.* A misdescription of the note secured by a chattel mortgage as to its date, reciting it as of even date with the mortgage, when it in fact bears date prior thereto, can have no such effect as to vitiate the mortgage. It can have no other operation than its bearing upon the question of the good faith of the transaction.

2. SAME—*evidence of the debt secured.* In replevin for mortgaged chattels, or in trover for their value, by the mortgagee against a party levying upon them as the property of the mortgagor, when the mortgage fully describes the debt, it is not necessary to prove the contents of the note by the note itself to sustain the mortgage.

3. SAME—*effect of an insecurity clause.* Where a chattel mortgage provides

for the possession of the property to remain with the mortgagor for a specified time, and contains a clause that if any writ from any court shall be levied upon the same, the debt shall become due and the mortgagee may elect to take possession of the property and sell, etc., the mortgagee may maintain replevin or trover for the property after demand for its possession from a party levying upon the same, and refusal to surrender it.

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

Mr. S. W. RAWSON, and Mr. T. L. HUMPHREYVILLE, for the appellant.

Messrs. ELDRIDGE & TOURTELLOTTE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action in replevin with a count in trover, brought by the appellee, to recover certain goods, or their value, taken by the appellant on a writ of attachment against one Paul Meyer, having possession of the goods, and who had previously mortgaged the same to the appellee to secure a debt of $400. Upon the taking of the goods by the appellant on his writ of attachment against Meyer, the appellee made demand for the goods, as he had a right under the mortgage to take possession of them in such an event, and upon refusal of appellant to surrender the same, this action in replevin was commenced, and the property not being obtained on the writ, a count in trover was added. The plaintiff recovered a verdict and judgment for $150, and the defendant appealed.

The principal errors assigned are in respect to the non-production at the trial of the promissory note the mortgage was given to secure the payment of, and a variance between the note described in the mortgage and the one given.

The mortgage describes the note as one of even date with the mortgage, from the mortgagor, Meyer, to the mortgagee, Schmidt, for $400, payable two years after date with ten per cent interest.

The testimony of the mortgagor and mortgagee was, that

the note had been given some time previously to the mortgage, that of the mortgagor some eleven months before. They both agree in saying that the mortgage was given to secure the payment of a note for $400 owing by the mortgagor to the mortgagee.

This is all the variance or defect in the description of the note appearing, as to its date. This is but a circumstance of misdescription, which, of itself, can not have any such effect as to vitiate the mortgage. It could have no other operation than in its bearing upon the good faith of the transaction.

The note itself was not produced at the trial. But it appeared from appellee's testimony that the note was yet in his hands—that he had left it at home. The mortgage itself fully described the mortgage debt, and the contents of the note were not necessary to be proved by the note itself to sustain the mortgage. The note was the principal, the mortgage the accessory; and *omne principale trahit ad se accessorium. Jackson* v. *Blodget*, 5 Cow. 206. All that was necessary was that there should have been no transfer of the note, thereby passing the interest in the mortgage, but that the note should still remain with the mortgagee in order to entitle him to enforce the rights under the mortgage. We think this appeared from the other evidence in the case, although the note was not produced. Its non-production was accounted for.

What has been said sufficiently disposes of the question as to instructions.

We regard the verdict as sustained by the evidence. The mortgage provided for the possession of the property to remain with the mortgagor for two years, but it contained a clause that if any writ from any court should be levied upon the property, the note should become due, and the mortgagee might elect to take possession of the property and sell and dispose of it at public auction, etc. The writ of attachment was levied upon the property three days after the date of the mortgage.

The judgment will be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* Hugh Maher

v.

ERASTUS S. WILLIAMS.

1. CERTIFICATE OF EVIDENCE—*when may be signed after time fixed.* Where an order, granting an appeal in a chancery suit, gives thirty days to the party to prepare a certificate of the evidence and present it to the judge for signature, but before the expiration of such time, the judge leaves the State, without signing the same, the party will have the right to have the same signed after the return of the judge, and after the expiration of the time originally fixed, when he is not chargeable with *laches*, and this court will grant a writ of *mandamus* to compel the judge to sign a proper certificate.

2. CHANCERY PRACTICE—*preserving the evidence.* When oral evidence is heard in a chancery suit, it is the duty of the court to see that the testimony is in some mode incorporated into the record.

3. If the judge, hearing a chancery suit upon oral testimony, can not remember the evidence, he may send for the witnesses who testified before him and examine them again, and in this or some other way ascertain the facts to be incorporated into the certificate of evidence. If a phonographic report is taken by a reporter, that may be resorted to.

4. This court will not by *mandamus* compel a circuit judge to sign a particular certificate of evidence as presented to him. He must determine its accuracy before signing it, and he will not be required to sign one he does not believe to be correct.

This was an application in this court, by the relator, for a writ of *mandamus* to compel Erastus S. Williams, the respondent, to sign a certificate of evidence in a certain chancery suit tried before him. The opinion states all the material facts.

Mr. JESSE COX, JR., for the relator.

Mr. JOHN J. KNICKERBOCKER, and Mr. GEO. W. SMITH, for the respondent.

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

This was a petition for a writ of *mandamus* to compel Erastus S. Williams, one of the judges of the circuit court of Cook

county, to sign and seal a certificate of evidence in a certain cause in chancery which had been tried before him. An answer was filed to the petition, to which a demurrer was interposed. The question, therefore, to be determined is, whether the facts set up in the answer constitute a legal defence to the case made in the petition.

It appears, from the answer, that the final decree in the chancery cause in which the certificate of evidence is desired, was filed on the 29th day of June, 1875, at which time an appeal was prayed by the petitioner, and granted upon his filing bond in the sum of $300 and a certificate of evidence within 30 days. The bond was filed and approved within the time allowed, but before the expiration of the 30 days, and on or about the 16th day of July, respondent left the city of Chicago and the State of Illinois for "his summer vacation," and remained abroad until the 18th day of September. After his return, and in the month of September, petitioner's counsel called respondent's attention to the fact that the certificate of evidence had not been signed. Respondent then requested petitioner's counsel to notify the counsel interested on the other side of the case, when he desired to present the certificate of evidence for respondent's signature.

It also appears, from the answer, that on the 26th day of October the certificate was presented for signature. All the parties in interest being present, the counsel for defendant in the chancery cause objected to the certificate being signed, and claimed petitioner had lost his right by *laches*. Respondent, however, overruled the objection, and announced that he would sign a certificate of evidence whenever he was satisfied the one presented was correct. Time was then given counsel for defendant to examine the certificate, and it was not again presented until the 25th day of February, 1876, when respondent refused to sign the same, because it was incorrect, but notified counsel for petitioner if they would correct it so that it would conform to the facts, he would still sign it.

It also appears, from the answer, that again, on the 11th

day of March, 1876, a certificate of evidence was presented, but the matter was postponed to allow counsel for defendant in the chancery case an opportunity to examine it, and afterwards, and on the 17th day of May, a certificate of evidence was again presented, but defects and errors appearing in the same, respondent declined to sign it, but announced, if he could be satisfied by a consultation with B. G. Caulfield, one of the attorneys who was present when the cause was tried, what the evidence in the case was, he would still sign a certificate of evidence.

On the 26th day of December, 1876, the certificate of evidence was again presented, but defendant refused to sign it, upon the ground and for the reason that he was not satisfied the same was a true and correct transcript of the evidence.

Under the order of the court granting the appeal, the petitioner had 30 days in which to prepare a certificate of evidence and present it to the judge to be signed, but before the time expired the judge left the State, and the petitioner was thus prevented from appearing before the judge and obtaining his signature to the certificate. Under such circumstances, the petitioner ought not to be prejudiced on account of the absence of the judge from the State. *Laches* ought not to be imputed to him where the failure to comply with the order was occasioned by the act of the judge, over whom he had no control.

It appears that some time after the judge returned counsel for petitioner called his attention to the matter, and upon being informed that counsel representing the defendant in the case would have to be notified, it was but a short time before notice was given, and the parties all appeared before the judge to have the matter disposed of. At the very first meeting of the parties, it was contended by the counsel for the defendant that petitioner was too late,—that the time had expired, and the certificate of evidence could not then be signed, but the judge held, and properly too, that the presentation of the certificate on account of the absence of the judge from the State, under the circumstances, was in apt time.

It would be an act of gross injustice for a circuit judge to allow a party 30 or 60 days to file a certificate of evidence in a case, then leave the State on pleasure or business, remain out of the State until the time expired, and then hold that the party was barred by lapse of time. The petitioner had the right to take his case, if he saw proper, to an appellate court. To do so, it became necessary to incorporate the evidence taken on the trial into the record, and we do not think he should be deprived of his legal rights by the acts of others over whom he has no control, when he has not been in fault himself.

If, then, the presentation of the certificate of evidence for execution was in time, as we are clearly satisfied it was, the next question that arises is, whether petitioner has, since that time, through negligence or a failure to prosecute the matter with proper diligence, lost his rights.

The consideration of the matter was postponed from time to time for the purpose of giving opportunity to examine the certificate of evidence for amendment until the 26th day of December, 1876, when the judge finally dismissed the matter on the alleged ground that the certificate of evidence presented was incorrect, and that he was not able to determine what the evidence was on the trial, so that a correct certificate of evidence could be prepared. It may be true that the petitioner did not press this matter and follow it up as regularly as he might have done, still there seems to have been no such *laches* as should bar the right to have the evidence introduced on the trial incorporated into the record.

The delay was mainly caused by counsel who represented the defendant in the suit, who requested time to examine the certificate before it should be signed, and it would not be right to permit them to reap an advantage from a delay for which they are, to a great extent, responsible. Indeed, where oral evidence is heard in a chancery case, it is the duty of the court to see that the evidence is in some mode incorporated into the record.

In *White* v. *Morrison*, 11 Ill. 361, it is said: "It may be stated in the decree, in a bill of exceptions, in a certificate of the judge, or in a master's report. We conceive it to be the duty of the circuit court to see that the testimony is incorporated in the record in some one of these ways." See, also, on the same point, *Hughes* v. *Washington*, 65 Ill. 245.

It is, however, contended, that so long a time has elapsed since the trial of the cause that it is impossible for the judge to determine what the evidence was on the trial. We do not apprehend there can be much trouble on this score.

It is set up in the petition, and not denied in the answer, that a full phonographic report of all the evidence offered on the trial was made at the time by skilled reporters. If this be true, we can not see how there can be much room for controversy in regard to the evidence. But if this was not the case, the judge who tried the cause, with the aid of counsel on each side of the case, ought to be able, without unnecessary trouble, to determine what evidence was given on the trial, and incorporate the same in the certificate of evidence. If the judge can not remember the evidence he might send for the witnesses who testified before him, and examine them again, and in this or some other mode determine the facts to be incorporated in the certificate.

We do not hold that the certificate of evidence prepared by petitioners and presented to the judge is the one to be signed by the respondent. We merely decide that, under the circumstances of this case, the petitioner is entitled to have a certificate of evidence signed. It is for the respondent, the judge before whom the cause was tried, to determine the accuracy of the certificate and the matters and things to be incorporated in it. As said in *The People* v. *Pearson*, 2 Scam. 189, he must sign such a one as he believes to be correct, and none other. See, also, *The People* v. *Jameson*, 40 Ill. 96.

The peremptory writ of *mandamus* is granted.

Mandamus granted.

Mr. JUSTICE DICKEY took no part in the decision of this case. While the chancery suit was pending he was a partner in the practice of law with Mr. Caulfield, who was solicitor for Mr. Maher.

WILLIAM S. JOHNSON *et al.*

v.

THE HUMBOLDT INSURANCE COMPANY.

INSURANCE—*limitation of suit on policy.* Where a policy of insurance provides that no action shall be brought thereon until an award is made fixing the amount of the claim, and no recovery had unless the suit or action shall be commenced within twelve months next after the loss shall occur, the suit to recover for a loss must be brought within twelve months after the destruction of the property by fire. If not brought within that time, no recovery can be had. It does not mean within twelve months after an award fixing the amount of the loss.

APPEAL from the Appellate Court of the First District; the Hon. THEODORE D. MURPHY, presiding Justice, and the Hon. GEO. W. PLEASANTS and Hon. J M. BAILEY, Justices.

Mr. M. W. ROBINSON, for the appellants.

Mr. THOMAS C. WHITESIDE, and Mr. FRANK J. SMITH, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action on a policy of insurance, brought by appellants against appellee. To the declaration appellee filed a plea of limitations, that the suit was not brought within twelve months from the time the loss occurred, according to the terms and conditions of the policy. To this plea appellants filed a demurrer, which was sustained by the Superior Court, in which the suit was pending, and a judgment was rendered against appellee. An appeal was prosecuted to the

Appellate Court of the First District, where the judgment was reversed, and plaintiffs in the Superior Court appeal, and ask a reversal.

It is stipulated that the policy contained this provision: "The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proof of the same made by the assured, and received at this office, in accordance with the terms and conditions of this policy, unless the property be replaced, or the company have given notice of their intention to rebuild or repair the damaged premises." That there was annexed to the policy this condition: "It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim, in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, any statute of limitation to the contrary notwithstanding."

The fire producing the loss occurred on the 14th of July, 1874, and proofs of loss were furnished by appellants, to which no objections were made by the agents of appellee, at its office, on the 21st of July, 1874. This action was commenced on the 13th of September, 1875, on the policy, to recover for the damages sustained by the fire. The action was not brought within twelve months after the loss occurred, but within twelve months from the expiration of sixty days after the loss.

When the judgment of the Superior Court was reversed by the Appellate Court, counsel for plaintiffs in the Superior Court stipulated that they could not amend so as to obviate

the effect of that decision, and that its decision was, in fact, final, and that court thereupon granted this appeal.

It is agreed that the only question presented by this record is, whether, under the above condition, the suit was brought in time. Appellants contend that the twelve months did not begin to run until the expiration of sixty days after the occurrence of the fire, whilst appellee contends that it began to run from the time of the fire. It all depends on the meaning of the language the parties have employed to express their intention when the contract was executed by them. As they expressed and must have understood it, we must carry it into effect.

All persons know that in giving force to laws and contracts of every description, the intention as therein expressed must govern. That intention must and can only be sought in the language employed in the instrument itself, and from the ordinary or popular meaning of the words themselves, unless it is apparent they are used in a technical or particular sense. According to these rules, we are wholly unable to perceive how the meaning of this language can be misunderstood, or that different persons could arrive at other than one conclusion by simply reading the clause. The words are plain, simple, and have a well understood and accepted meaning. There can be no equivocal or doubtful definition attached to them, either separately or in their grammatical arrangement. The language that a suit or action shall not be brought until after an award shall be obtained fixing the amount of the claim, in the manner therein provided, can only mean what it says: that such an award is an indispensable prerequisite to the bringing of a suit or action, unless the assured should be prevented by the company.

The next clause of the condition, "nor unless such suit or action shall be commenced within twelve months next after the loss shall occur," is equally clear and explicit. When did the loss occur? Manifestly at the time the fire destroyed the property. In what consisted the loss? Obviously in the

destruction of the building by fire. We are wholly unable to conceive that language could have been used that could have rendered the meaning plainer. Other words might have been employed to express the same meaning, but to our minds they could not have been clearer or freer from doubt. This seems to us to be one of those propositions which are so plain that reasoning can not add anything to their perspicuity.

It is, however, urged, that the word "occur" is used in the sense of "accrue," and that this sense requires us to apply it to the suit or action. The word "occur" means "to happen," in its general and most popular sense, whilst the word "accrue" is to be added or attached to something else, in its generally received sense; but if we were to substitute the word "accrue," then, in its grammatical connection, it would mean that the loss had attached to appellants, and that was when the fire destroyed the property, and would not change the obvious meaning from what it is as written. It would not be construction to say, the condition means a suit or action might be commenced within twelve months after an action had accrued. It would not only be to change the grammatical structure of the clause, but it would be to make a new and different contract for the parties.

It is, however, insisted, the clause in the policy that the loss was to be paid sixty days after due notice and proof of the same should be made by the assured, and received at the office of the company, limits and controls the after-inserted condition prohibiting the bringing of an action more than twelve months after the loss should occur. We are unable to perceive that it controls this condition. If either has that effect, it would seem the latter controls the former. The two clauses considered together, obviously provide that the company shall have sixty days within which to make payment, after notice and proof of loss, but in no event should a suit or action be commenced after the expiration of twelve months from the date of the fire producing the loss. Any other meaning attached to the language, it seems to us, would be strained,

unreasonable, and in direct violation of the plain intention of the parties, clearly expressed.

We are referred to authorities which are supposed, by appellants' counsel, to hold, similar language in other policies means that the assured may sue at any time within twelve months after the sixty days reserved by the company to make payment has expired. We have examined the authorities referred to, but think they fail to sustain his position; but even if they did, although by respectable courts, we should not feel bound by them as authority, and should hesitate long in reaching and adopting such a conclusion.

We are, therefore, of opinion the Appellate Court decided correctly in holding the plea presented a defence, and that the judgment must be affirmed.

Judgment affirmed.

FREDERICK HENKEL

v.

JULIA HEYMAN.

1. LIMITED PARTNERSHIP—*statute must be substantially complied with.* As the common law does not admit of partnerships with a restricted responsibility, the statute authorizing limited partnerships must be substantially complied with, or those who associate under it will be held as general partners.

2. The statute requires that the certificate of a limited partnership, acknowledgment and affidavit shall be filed and left in the office of the clerk of the county court, and not merely left temporarily for record and then withdrawn. If taken away voluntarily on the neglect of the clerk to record the same, the limited partnership will not be formed. The statute requires the certificate to be recorded, but not the affidavit of the partners.

3. Even if the object of filing such papers was temporary, for the purpose of being recorded, if they are voluntarily taken away before being recorded, the neglect to file and record being attributable to the clerk, the partners knowing such fact, no limited partnership will be created. The partners can compel the filing and recording.

4. PLEADING—*how construed.* An averment in a pleading will be taken most strongly against the pleader. So, where a partner, by plea, states the

giving of the necessary papers to form a limited partnership to the clerk, and his neglect to file and record the same, and the taking of the same away, it will be held that such partner knew the same were not filed and recorded when he took them from the clerk.

APPEAL from the Appellate Court of the First District; the Hon. THEODORE D. MURPHY, presiding Justice, and the Hon. GEO. W. PLEASANTS and Hon. J. M. BAILEY, Justices.

This was an appeal from the Appellate Court of the First District. Suit was brought by Julia Heyman against Emanuel Hartman, Simon Hartman, and the appellant, Frederick Henkel, as partners, on a bill of exchange for $254.25, dated September 13, 1877, and payable four months after date, drawn by Julia Heyman upon Hartman Bros., and by them accepted.

The appellant, Frederick Henkel, pleaded the following special plea, to which a demurrer was sustained by the circuit court, and the affirmance of that ruling in the Appellate Court is the only error assigned which requires our consideration:

And for a further plea in this behalf, upon leave of the court first had and obtained, the said defendant, Frederick Henkel, by his said attorneys, says, that the plaintiff ought not to have her aforesaid action against him, the said Henkel, because he says that the said several supposed causes of action in said declaration mentioned are one and the same, to-wit: the supposed cause of action in said first count in said declaration mentioned, and not other or different causes of action; and that at Chicago, to-wit: in the county of Cook aforesaid, on, to-wit: the first day of March, A. D. 1877, the said defendant, Frederick Henkel, made and entered into an agreement with Emanuel Hartman and Simon Hartman, in and by which they, the said Henkel, Emanuel Hartman and Simon Hartman, agreed to form a limited co-partnership, for the purpose of carrying on the rectifying and wholesale liquor business in the city of Chicago, in said county of Cook, under the style and firm of "Hartman Bros.," and that the said Emanuel Hart-

man and Simon Hartman, and this defendant, then and there executed the following certificate, to-wit:

"This is to certify that Emanuel Hartman, Simon Hartman and Frederick Henkel, of the city of Chicago, county of Cook, and State of Illinois, have formed a limited co-partnership for the purpose of carrying on the rectifying and wholesale liquor business in the city of Chicago, county of Cook, and State of Illinois, under the style and firm of 'Hartman Bros.,' said partnership to continue until January 1, 1879, commencing from March 1, 1877. The said Emanuel Hartman and Simon Hartman are the general partners and the said Frederick Henkel is the special partner, and has contributed fifteen thousand dollars ($15,000) in cash towards the capital of said co-partnership.

"In witness whereof, we, each and severally, hereto set our hands, this first day of March, A. D. 1877.

EMANUEL HARTMAN,
SIMON HARTMAN,
FREDERICK HENKEL."

And that the said Emanuel Hartman, Simon Hartman and this defendant, then and there acknowledged the said certificate before a notary public of Cook county, which said acknowledgment is in the words and figures following, to-wit:

"STATE OF ILLINOIS, } ss.
County of Cook. }

"There personally appeared the within named Emanuel Hartman, Simon Hartman and Frederick Henkel, known to me to be the individuals named in and who executed the foregoing certificate, and severally acknowledged the same to be their free act and deed, and in all particulars correct, before me, Benjamin W. Shaffner, a notary public in and for said county, this second day of March, A. D. 1877.

"In witness whereof I have hereunto set my hand and notarial seal, the day and year last aforesaid.

[L. S.] BENJAMIN W. SHAFFNER,
Notary Public."

And that the said Emanuel Hartman and Simon Hartman then and there executed the following certificate, to-wit:

"We, Emanuel Hartman and Simon Hartman, general partners in the within named co-partnership of Hartman Bros., hereby certify that Frederick Henkel, special partner in said co-partnership, has actually and in good faith paid in cash the sum of $15,000 towards the capital stock of said co-partnership, as set forth in the above certificate.

EMANUEL HARTMAN,
SIMON HARTMAN.

"Dated at Chicago, this first day of March, A. D. 1877."

And duly made oath to the truth of the same, in the words and figures following, to-wit:

"*Chicago, March* 1, *A. D.* 1877.

"STATE OF ILLINOIS, } ss.
County of Cook. }

"There personally appeared the above named Emanuel Hartman and Simon Hartman, and made oath to the foregoing statement by them subscribed.

EMANUEL HARTMAN.

"Subscribed and sworn to before me by the said Emanuel Hartman, this second day of March, A. D. 1877.

[L. S.] BENJAMIN SHAFFNER,
Notary Public."

That on, to-wit: said first day of March, in the year 1877, at Chicago, aforesaid, the said Frederick Henkel paid and contributed to the common stock of said limited partnership, actually and in good faith, the sum of $15,000 in money; and that on said last mentioned day, to-wit: at Chicago, in said county, the said defendants caused to be published in the "Chicago Evening Journal," a newspaper then printed and of general circulation in the said county of Cook, in which such business was to be carried on, for the period of —— days, successively, the following notice, to-wit:

"*Limited Co-partnership.*—This is to certify that Emanuel Hartman, Simon Hartman and Frederick Henkel, of the city

of Chicago, county of Cook, and State of Illinois, have formed a limited co-partnership, for the purpose of carrying on the rectifying and wholesale liquor business in the city of Chicago, county of Cook, and State of Illinois, under the style and firm of Hartman Bros. Said co-partnership is to continue until January 1, 1879, commencing on the first day of March, 1877. The said Emanuel Hartman and Simon Hartman are the general partners and the said F. Henkel is the special partner, and has contributed fifteen thousand dollars ($15,000) in cash towards the capital of said co-partnership.

"In witness whereof we have hereunto set our hands, this first day of March, 1877.

EMANUEL HARTMAN,
SIMON HARTMAN,
FREDERICK HENKEL."

And that the date of the first paper containing the same was the third day of March, A. D. 1877, and of the last was the 13th day of April, A. D. 1877.

That on said second day of March, 1877, the said defendants took the said certificate of limited partnership, together with the said acknowledgment and the said certificate of Emanuel Hartman and Simon Hartman that the said sum of $15,000 in money had been paid towards the capital stock of said partnership, and the said affidavit of the said Emanuel Hartman to the truth of the said last mentioned certificate, to the office of the county clerk of Cook county, and there delivered the same to the said county clerk of Cook county, and requested of him that he file and record the same, and paid the said clerk of Cook county his fees therefor.

The following allegation in brackets is the amendment afterwards allowed:

[And the said Henkel avers, that the said clerk, neglecting his duty in the premises, did not file and record said papers, as required by law, but returned them to the said defendants, after having the charge and custody of the same for a time sufficient to file and record the same, and that said papers

were then, on said third day of March, by said defendants taken from the office of said clerk, and thereafter remained in the custody and under the control of the said defendants.]

And the defendant, Henkel, further avers, that on said second day of March, 1877, at Chicago, in said county, the said firm of Hartman Bros., under the firm name and style of "Hartman Bros.," so, as aforesaid, formed, commenced and carried on the said business; and so this defendant says, that he was not, at the time of the formation of said partnership, has not since been, and is not now a general partner of said firm of Hartman Bros., but was then, has since been, and is now, a special partner, only, in said firm, according to the statute in such case made and provided, of which premises the plaintiff then and there had notice. And this the said defendant, Henkel, is ready to verify.

Messrs. MONROE, BISBEE & BALL, for the appellant.

Mr. ADOLPH MOSES, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The common law did not admit of partnerships with a restricted responsibility, and the statute, therefore, authorizing limited partnerships must be substantially complied with, or those who associate under it will be liable as general partners. *Bowen* v. *Argall*, 24 Wend. 496; *Smith* v. *Argall*, 6 Hill, 479; Same again in 3 Denio, 435; *Richardson* v. *Hogg*, 38 Penn. St. 153; *Andrews* v. *Schott*, 10 id. 47; *Van Ingen* v. *Whitman*, 62 N. Y. 513.

Our statute in relation to "Limited Partnerships" requires that the certificate showing the formation of the partnership, when properly acknowledged, shall be *filed* in the office of the county clerk and recorded at large, etc., and that there shall also be filed in the same office, at the same time, "an affidavit of one or more of the general partners, stating that the amount in money, or other property at cash value,

specified in the certificate to have been contributed by each of the special partners to the common stock, has been actually and in good faith contributed and applied to the same." And it is expressly provided that "no such partnership (*i. e.* limited partnership) shall be deemed to have been formed until such certificate, acknowledgment and affidavit shall have been filed as above directed." Rev. Stat. 1874, p. 678, secs. 6, 7, 8.

The averment in this plea comes far short of the requirement of the statute. The statute requires that the certificate, acknowledgment and affidavit shall be *filed*—that is, placed to be kept (13 Vin. Abrid't. 211) in the office of the clerk of the county—and not, as averred, merely temporarily deposited there. Had the certificate, acknowledgment and affidavit been left with the county clerk, with directions to file them, his refusal to comply with the directions would not, doubtless, have affected the rights of the parties. In that case the parties would have done all that they could have done to comply with the law. But here the papers are taken away by the parties themselves. By their own voluntary act they prevent the papers from being on file.

But counsel insist the statute does not require that the certificate, acknowledgment and affidavit shall be kept on file: and that the rules applicable to deeds, etc., filed for record must apply to these documents.

The statute uses no qualifying language in regard to the filing of these papers. It does not say they shall be filed "for record," or "until recorded," but that they *shall be filed;* and the *certificate* so acknowledged and certified shall also be recorded—but the affidavit of the partners is not required to be recorded. See Rev. Stat. 1874, p. 678, secs. 6, 7.

Deeds, mortgages and other instruments relating to or affecting the title to real estate, are required to be recorded, and the statute makes them void as to creditors and subsequent purchasers without notice, until they are *filed for record,* and the record is made evidence of the deed or other instrument in behalf of all persons not having the original in possession.

In those cases, the sole object of the filing of the instrument is, to enable it to be recorded. After filing and until the recording, the deed or other instrument is, itself, constructive notice, —after the recording, the record affords such notice.

As before observed, the language here does not indicate that the filing is to be temporary merely, but permanent. Like the filing of a declaration, and other papers required in practice to be filed, it would seem the papers filed are to become part of the permanent records of the court.

But even if we were prepared to hold that the object of filing is only temporary—to allow the papers to be recorded—it would be impossible, under this plea, to hold that Henkle has done all that the law required him to do, to limit his liability.

It is averred the papers were not filed and recorded, by reason of the neglect of duty by the clerk; but it is also averred that the papers were taken away from the clerk's office, by Henkle, and that he has since retained their possession,—and it is not averred that he did not know they were not filed and recorded when he took them away. This averment, under an old and familiar rule of pleading, must be taken most strongly against the pleader, (1 Chitty's Pleadings, 7 Am. ed. 578;) and so we must conclude, when he took the papers away, he knew they were not filed and recorded.

No case cited by counsel goes to the extent of holding that the mere neglect of a clerk to record a paper will justify a party in knowingly taking it away from the office unrecorded, and in dispensing with all further efforts to have it recorded. If he knew the papers were not filed and recorded, he was inexcusable in taking them away from the office in that condition. It was his duty, and the law gave him ample remedy, to compel the clerk to file and record the papers.

We think the plea was clearly insufficient and the demurrer to it was properly sustained.

The judgment below is affirmed.

Judgment affirmed.

Syllabus.

The Ottawa, Oswego and Fox River Valley R. R. Co.

v.

Samuel McMath.

1. New trial—*points for, may be filed during term.* Under section 57 of the Practice act, Rev. Stat. 1874, only one copy of the reasons for a new trial is required, and that is to be filed in the papers of the case, and may be filed during the term final judgment is entered, in which case the mover is entitled to a temporary stay of the judgment, if already entered.

2. Same—*reasons for, need not be preserved in bill of exceptions.* The points in writing, relied on for a new trial, need not be preserved in the bill of exceptions before the appellate court can examine into the weight of the evidence, or consider the propriety of refusing a motion for a new trial. It is sufficient if the bill shows the motion was made and overruled and an exception taken.

3. Same—*giving points in writing.* The better practice is to file the points in writing relied on for a new trial, and preserve them in a bill of exceptions, and the trial court may, on its own motion, require such reasons to be filed, and the opposite party may, by rule, compel this to be done. But if neither the court nor the opposite party requires such points in writing to be filed, it will be regarded as waived.

4. Same—*waiver of points in writing.* Where a motion for a new trial is submitted, without any statement in writing of the grounds therefor, without objection, such statement will be treated as waived, and the want of it can not be urged in the appellate court.

5. Same—*confined to points filed.* If a party files certain points in writing, specifying the grounds of his motion for a new trial, he will be confined in the appellate court to the reasons so specified in the court below, and will be held to have waived all causes for a new trial not thus set forth in his written grounds.

6. Same—*what questions may be considered on error assigned for refusing.* Under the general assignment of error, in refusing to grant a new trial, the plaintiff in error may urge the rejection of proper and the admission of improper evidence, the giving of improper and the refusing of proper instructions, and that the evidence does not sustain the verdict.

7. Appellate Court—*when its judgment may be reversed.* While it is true that the judgment of the Appellate Court is final as to all matters of fact in controversy, yet, when that court refuses to investigate the evidence, and make any finding of the facts, and erroneously determines, as a matter of law, that it has no power to investigate or decide the questions of fact presented

on an assignment of error for refusing a new trial, this court will reverse its judgment, and remand the cause to that court to determine the error assigned.

Writ of Error to the Appellate Court of the Second District; the Hon. Joseph Sibley, presiding Justice, and the Hon. Edwin S. Leland and Hon. N. J. Pillsbury, Justices.

This was an action of assumpsit, brought by plaintiff in error, against defendant in error, in the circuit court of LaSalle county. The amount involved exceeded $1000. The declaration contained several counts upon a written contract. To the declaration there were filed the plea of the general issue, and also a plea verified by affidavit, denying the execution of the contract, upon both of which pleas issue was joined and a trial had, resulting in a verdict and judgment in favor of the defendant, from which the plaintiff appealed to the Appellate Court of the Second District.

In the Appellate Court the following errors were assigned upon the record, and none other:

"1. The court erred in admitting improper testimony offered by defendant.

"2. The court erred in admitting improper testimony against the objection of plaintiff.

"3. The court erred in refusing to admit competent evidence offered by plaintiff.

"4. The court erred in overruling the motion of plaintiff for a new trial.

"5. The verdict of the jury is manifestly against the law and the evidence."

The bill of exceptions as contained in the circuit court record purported to contain all the evidence and the instructions given and refused upon the trial, and showed that the plaintiff, upon the trial in the circuit court, introduced evidence tending to prove the issues on its part, and the defendant introduced evidence tending to prove the issues on his part; that upon the rendition of the verdict by the jury, the

plaintiff moved the court to set aside the verdict and grant a new trial, but the court overruled the motion and rendered judgment upon the verdict against the plaintiff, to which ruling of the court, in overruling its motion to set aside the verdict and grant a new trial, and in rendering judgment against it on the verdict, the plaintiff then and there excepted.

There was no statement in the bill of exceptions that the plaintiff had filed in the court below its points in writing particularly specifying the grounds of its motion for a new trial, nor did the record in said cause contain said points in writing, or any statement whatever in regard thereto.

It appeared from the record, however, that the motion for a new trial was made July 17, 1877, and was not overruled, nor was judgment rendered on the verdict until July 28, 1877, and after the court had heard the arguments of counsel thereon.

The Appellate Court examined the record upon the 1st, 2d and 3d assignments of error, and finding no error under those assignments, affirmed the judgment of the circuit court, but declined to investigate or decide the questions raised by the 4th and 5th assignments of error, for the reason that the bill of exceptions did not show that the plaintiff had filed in the circuit court any points in writing particularly specifying the grounds of its motion for a new trial.

The bill of exceptions, however, showed that exceptions were duly taken by the plaintiff to the giving of each and every one of the defendant's instructions, and to the overruling of the motion for a new trial.

Upon the record of the Appellate Court, brought to this court by writ of error, the following errors are assigned:

"1. The Appellate Court erred in refusing to decide whether the verdict was contrary to the law and the evidence.

"2. The Appellate Court erred in refusing to decide the questions raised by the 4th and 5th assignments of error.

"3. The Appellate Court erred in refusing to decide whether the circuit court erred in giving instructions on the part of the defendant.

"4. The Appellate Court erred in refusing to decide whether there were any other errors upon the record of the circuit court for which said circuit court should have granted a new trial."

Mr. Edwin S. Lewis, and Mr. H. T. Gilbert, for the plaintiff in error.

Mr. D. P. Jones, for the defendant in error.

Mr. Justice Baker delivered the opinion of the Court:

It appears from the certified statement of facts from the Appellate Court, that court affirmed the judgment of the circuit court in this case, but declined to investigate or decide the questions raised by the 4th and 5th assignments of error as assigned in said Appellate Court, for the reason the bill of exceptions did not show the plaintiff had filed, in the circuit court, any points in writing particularly specifying the grounds of its motion for a new trial. Said assignments of error were that the circuit court erred in overruling the motion of plaintiff for a new trial, and that the verdict of the jury was manifestly against the law and the evidence.

Section 24 of chapter 83, Rev. Stat. 1845, provided: "If either party may wish to except to the verdict, or, for other causes, to move for a new trial, he shall, before final judgment be entered, give, by himself or counsel, to the opposite party or his counsel, the points in writing, particularly specifying the grounds of such motion, and shall also furnish the judge with a copy of the same, and final judgment shall thereupon be stayed until such motion can be heard by the court."

In none of the cases which arose while said section 24 was in force was the question directly raised in this court, whether we would examine as to the verdict of the jury being against the law and the evidence, where the bill of exceptions failed to show the points in writing specifying the grounds of the motion had been furnished the opposite party or counsel and

the judge. In all such cases it seems to have been assumed, both by the court and by counsel, that the points in writing, if not furnished or called for in the court below, were waived. It was uniformly held, however, that if the bill of exceptions did not show a motion for a new trial had been made and overruled, and an exception taken, the court would not investigate whether the evidence sustained the verdict.

In *Boyle* v. *Levings*, 28 Ill. 316, it was said: "We can not examine the decision of the court overruling the motion for a new trial, for the reason that it is not shown in the bill of exceptions. The clerk states in the record that the defendant excepted to the overruling of the motion for a new trial; but that does not make it a part of the record. It could only be made so by a bill of exceptions. The law requires the certificate of the judge, and not of the clerk, to that fact."

In *Gill* v. *The People*, 42 Ill. 323, it was said: "There is, indeed, an entry by the clerk, showing a motion for a new trial was made and overruled, but this motion, and the action of the court upon it, should have been preserved in a bill of exceptions in order to be reviewed in this court." And in the same case it was further said: "This record, then, furnishes us no evidence, of which we can take notice, that a motion for a new trial was made."

The statute required, not that a copy of the motion itself should be given to the judge and opposite counsel, but "the points in writing particularly specifying the grounds of *such* motion," and these cases, and many others that might be cited, plainly intimate that if it had been shown by the bill of exceptions a motion for a new trial had been made and overruled and an exception taken, then this court would have examined whether the verdict was sustained by the evidence.

The section of the statute referred to was amended in the Practice act of 1872, and is now found as section 57 of chapter 110, Rev. Stat. 1874, and provides: "If either party may wish to except to the verdict, or, for other causes, to move for a new trial, he shall, before final judgment be entered, or

during the term it is entered, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment shall thereupon be stayed until such motion can be heard by the court."

Under this amended statute only one copy of the reasons for a new trial is required, and that is to be filed with the papers, so that both court and counsel may have access to it. One copy on file accomplishes all and more than was accomplished by the two copies required before the amendment, as no provision was made by the former statute for either the filing or retention, by the mover, of a copy of the points. The only other change made by the amendment is the provision that the points in writing may be filed during the term the final judgment is entered, and this change was undoubtedly made for the reason this court had held the motion for a new trial might be made at any time during the term, notwithstanding final judgment had previously been rendered by the court. It was intended the maker of the motion should, in either event, on filing his grounds in writing for the motion, have a temporary stay of the final judgment.

We see nothing in these amendments that would necessarily change, or show a legislative intention to change, the rule of practice theretofore established, or that would require the points in writing should be preserved in the bill of exceptions before the Appellate Court could examine as to the weight of evidence, or consider the matter of the overruling in the court below of the motion for a new trial.

The decisions of this court since the amendment of the statute fail to recognize any such change in the practice. In *Reichwald* v. *Gaylord*, 73 Ill. 503, we said: "In regard to the second point made, that the verdict is not sustained by the evidence, the bill of exceptions contained in the record does not show that a motion was made for a new trial, or that the court ever passed upon or overruled a motion of that character. Even if it were true that the evidence was not sufficient to authorize the judgment, we would not disturb it, unless a motion

had been made for a new trial, overruled by the court, and exception taken, and this preserved by a bill of exceptions." Here was a clear intimation that if it had appeared from the bill of exceptions a motion for a new trial had been made and overruled in the court below and an exception taken, then this court would have examined as to whether the verdict was sustained by the evidence. Numerous other cases are to the same effect. In none of them was the point now made distinctly raised and presented for adjudication. But the court has time and again, both under the present and prior statutes, impliedly held it would pass upon the evidence and the action of the lower court in overruling the motion for a new trial, regardless whether it appeared from the bill of exceptions that the points in writing were filed, or given to court and counsel, or not.

The rules of practice are frequently of small moment in and of themselves, and may indifferently be the one way or the other, and the object of all legal proceedings, the furtherance of justice, be equally attainable. But when it is considered that while the great end aimed at is justice, yet that such end can only be reached through the courts in the way pointed out by the law and according to the practice of the courts, it is readily perceived these rules of practice, unimportant as they may be in the one aspect, are often of paramount importance in the effect they have upon the substantial rights of the citizen. Even an objectionable rule of practice, which has been recognized by the courts and is known to and followed by the profession, is better than an uncertain rule or even a much better rule enunciated unnecessarily, and so as to injuriously affect the rights and property of parties litigant who have relied upon prior adjudications and practice.

There is nothing in said section 57 requiring us to hold that the radical change contended for is demanded by its phraseology. We may readily admit the correct and better practice is to file the points in writing and preserve them in the bill of exceptions. Such, also, was the correct and better practice under the statute of 1845; and such would be the better prac-

tice were there no statute on the subject. There can be no doubt the trial court may, under the statute, of its own motion require to be filed the points in writing giving the grounds for which a new trial is asked. And the opposite party may by rule compel the same thing to be done. The opposite party is most largely interested in having these causes for a new trial on file, but no good reason is perceived why he may not, the court not objecting, waive them. The analogies of the law all force us to the conclusion these written points may be waived, and to the further conclusion that when the motion for a new trial is submitted for decision without any statement in writing of the grounds therefor, and that too without objection, then they are to be considered as waived. This court has repeatedly held, where parties have gone into the hearing of a chancery cause without a replication, it was waived, and the objection could not be heard for the first time in this court, and we have applied the same rule where law cases have been tried without issues being formed on pleas or replications. And other instances where the same principle has been held applicable have frequently occurred.

It appears, from the record, the motion for a new trial was made July 17, 1877, and was not overruled until the 28th day of that month, and then only after the court had heard arguments of counsel thereon. Neither the court nor the defendant called on the plaintiff for the points in writing on which he based his motion, and defendant must be held to have waived them; it would be unjust and unfair to permit him, when he could have had the written reasons for the motion before the argument by asking for them, to quietly lie by and argue the motion without them and submit it to the decision of the court, and then object for the first time in the Appellate Court. He should not thus be permitted to trifle with the rights of his opponent.

If plaintiff in error had filed certain points in writing particularly specifying the grounds of his motion, then he would, of course, be confined in the Appellate Court to the reasons

specified in the court below, and would be held to have waived all causes for a new trial not set forth in his written grounds. The same rule and principle that preserves his rights in the now case, would, in the case we have suggested, protect the rights of his opponent and hold plaintiff to have waived all reasons for a new trial not enumerated.

Emory v. *Addis*, 71 Ill. 277, and *Jones* v. *Jones*, id. 562, cited by defendant in error, are cases of this latter character, and not only are not inconsistent with what we now hold, but are based upon the selfsame principle. In the latter case it was assigned for error the damages were excessive, and this court said, "the court below had the right to suppose that appellant acquiesced in the amount of the finding, but relied on the grounds specified, alone, for a new trial." In the former case we said "it is not assigned for error, nor as a ground for a new trial in the motion made in the court below, that the damages are excessive, and the appellant is, therefore, in no position to have that question reviewed in this court." As the questions whether the verdict was contrary to the law and against the evidence, and whether the court erred in overruling the motion for a new trial, are fully discussed in the opinion of the court, it is evident that some reasons for a new trial were filed in the court below.

The question is raised by the assignment of errors, in this court, as to what questions were raised under the assignment in the Appellate Court of the general error that the circuit court erred in overruling the motion for a new trial. In the case of *Chicago, Rock Island and Pacific Railroad Co.* v. *Northern Illinois Coal and Iron Co.* 36 Ill. 60, it was said, "under the general assignment of error that the court should have granted a new trial, the plaintiff in error may urge the rejection of proper and the admission of improper evidence. Also the giving of improper and the refusal of proper instructions, and that the evidence does not sustain the verdict. These are all grounds for granting a new trial, and need not be specifically stated, but are embraced in the general assign-

ment of error that the court refused to grant a new trial." The rule is stated to the same effect and in very similar language in *Shaw* v. *The People*, 81 Ill. 150, and in that case the judgment was reversed under the general assignment of error that the circuit court erred in overruling the motion for a new trial for the sole and only reason that an improper instruction had been given to the jury, and to the giving of which an exception had been taken.

The case of *Indianapolis, Bloomington and Western Railway Co.* v. *Rhodes*, 76 Ill. 286, seems to announce a different rule so far as instructions are concerned, but the judgment was reversed on other grounds, and what is there said on the subject of instructions was wholly disconnected with the point on which the decision therein was based, and was unnecessarily said, and is inconsistent with both earlier and later decisions of the court.

It is urged, this court has no power to reverse the judgment of the Appellate Court for the reason that court refused to investigate and determine the question whether the verdict was contrary to the law and the evidence. It is true the judgment of the Appellate Court is final and conclusive as to all matters of fact in controversy in this cause, yet that court expressly refused to investigate the evidence and make any findings of the facts, but determined, as matter of law, that it had no power to investigate or decide the questions of fact. Section 89 of the Practice act expressly provides, the Supreme Court shall re-examine cases brought to it from the Appellate Courts by appeal or writ of error, as to questions of law. We, therefore, see no force in the objection.

For the errors indicated in this opinion the judgment of the Appellate Court is reversed, and the cause remanded to that tribunal with directions to examine the record in the cause and decide whether there are any errors therein, under either the 4th or 5th assignments of errors as heretofore assigned in said Appellate Court, for which the circuit court of La Salle county should have granted a new trial, and, if there be such

errors, to reverse the judgment of said circuit court and remand the cause, with directions to award a *venire facias de novo*.

Judgment reversed.

THE ILLINOIS LAND AND LOAN COMPANY

v.

WILLIAM R. BONNER *et al.*

1. TENANTS IN COMMON—*unequal interests united in common—relations of the parties as to title.* If two persons claiming unequal interests in land enter into a written agreement to become tenants in common and owners in undivided halves, in equity they will become equal owners of the premises without regard to their prior several legal titles of record, whether good or bad, and as between themselves any failure of the title in respect to either of the original interests should be borne equally between them.

2. SAME—*partition between them—deeds of partition with covenants of warranty—subsequent incumbrancers—partition as to one claiming title to part.* If A, the owner of an undivided three-fourths of a lot, and B claiming the other one-fourth interest, make partition of the property, each warranting the title of the part set off to the other, after which, A mortgages his part in severalty to secure a loan to him of more than its value, and becomes insolvent, and the title which B originally had fails in consequence of the avoidance of the deed to him on the ground of infancy in his grantor, and the party succeeding to his interest seeks a partition, that interest in equity should be set off and assigned out of the land of B in the prior partition, so as to leave the part of A subject to the mortgage. The rule would be different between A and B if the burden was sought to be enforced against them alone.

3. PARTITION—*minor avoiding his deed—refunding money paid on incumbrance—preserving lien for its payment.* Where one of several tenants in common of land claiming under a minor's deed pays off a mortgage given by the minor's guardian for money for the minor's use, and such deed is avoided by an heir of the minor who seeks a partition, it is proper to require him to pay his proportion of the incumbrance as a condition to relief, as well as his proportion of taxes and assessments paid by his co-tenants. The amount should be decreed a lien on the land set off to such heir, and a reasonable time fixed for its payment, and sale ordered in case of default in payment.

4. COVENANTS OF WARRANTY *in deeds of partition—rights and remedy of subsequent purchasers.* When two parties, on making partition of land, convey each to the other, with a covenant of warranty as to the other's portion, so

long as they hold the lands each will be estopped, by reason of the covenant he has made to the other, to claim damages of the other for a failure of title. But such covenant not being a charge on the land of either, if either conveys or mortgages his part of the land his grantee may enforce the covenant against the other, and in such case equity may enforce an incumbrance affecting the title out of that part of the land belonging to the party liable on his covenant, and thus avoid circuity of action.

5. SAME—*running with land, not be affected by equities.* A covenant of warranty runs with the land, passes to the assignee with the land, and can not be affected by the equities existing between the original parties any more than the legal title to the land itself.

6. CONSIDERATION *in deed—upon whom conclusive.* As a general rule the consideration clause in a deed of lands is open to explanation, but in an action on a covenant of warranty brought by one to whom the grantee in the deed has conveyed, the grantor is not at liberty to show the consideration paid for the land to be less than the sum expressed in the deed.

7. Whatever may have been the actual consideration for deeds made in a partition of land, an innocent purchaser for value from either is entitled to rely upon the sum agreed in the deed as the amount of the consideration and as the measure of liability, upon breach of the covenant fixed by the parties themselves.

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

Mr. GEORGE SCOVILLE, for the appellant.

Messrs. PAGE & PLUM, for appellee Bonner.

Messrs. ISHAM & LINCOLN, for the Connecticut Mutual Life Insurance Company.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The original bill was filed in this case by William R. Bonner to recover and have partition of his alleged share of a certain tract of ground in the city of Chicago on the southwest corner of Monroe and La Salle streets, being 16½ feet on Monroe by 189 on La Salle street; he claiming to be entitled to an undivided one-fourth of it as heir at law of Percy W. Bonner, deceased, his nephew, and as tenant in

common with the Illinois Land and Loan Company, the Cook County Land Company and L. B. Otis.

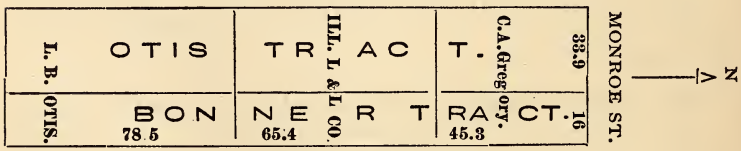
James D. Bonner, the former owner of the land, died leaving it to his children, Percy, Galila and Rosalia, an undivided one-third each. Galila died leaving her one-third to her brother and sister, Percy and Rosalia, making then, in them, one-half in each.

Rosalia died, and her undivided one-half was purchased by C. A. Gregory, at her administrator's sale.

Percy died leaving his half to his uncle and aunt, William R. Bonner, the complainant, and Cassandra Anderson, an undivided one-fourth each. Gregory purchased Cassandra Anderson's fourth, thus making an undivided three-fourths in him.

The Illinois Land and Loan Company's title was claimed to be an undivided one-half, by deed from Percy Bonner, in his lifetime, a minor. This was the state of the title as it appeared from the public records.

Gregory and the Illinois Land and Loan Company agreed to partition, and as their land was a long narrow strip, only 16 or $16\frac{1}{4}$ feet deep fronting on a principal street, they induced L. B. Otis to unite with it a tract belonging to him lying in the rear $33\frac{9}{12}$ feet deep, and the three then made exchange and partition, as shown in the annexed plat:



—and executed between themselves on August 31, 1872, a tripartite deed, whereby the south $78\frac{5}{12}$ of this Bonner tract was conveyed to Otis by Gregory and the Illinois Land and Loan Company, and he conveyed to them portions of his lot in the rear of theirs, as appearing by the plat; and by the same deed partition was made between Gregory and the Illi-

nois Land and Loan Company of the remainder of this Bonner tract,—Gregory taking the north $45\frac{3}{12}$ feet on La Salle street, and the company that portion lying between Gregory and Otis, being $65\frac{4}{12}$ front on La Salle street.

In this deed, Gregory warranted the title of that part of the Bonner tract which went to the Illinois Land and Loan Company, and the Illinois Land and Loan Company warranted the title of the part which went to Gregory; and Otis warranted severally to Gregory and the Illinois Land and Loan Company the title of the several portions of his lot which he conveyed to them, the deed fixing $25,000 as the measure of liability upon each of the respective covenants, the same as if such amount were inserted in the deed as the consideration received in each case.

Afterwards, but before the bringing of this suit of Bonner, Gregory mortgaged the whole tract he got in the partition to the Connecticut Mutual Life Insurance Company, to secure the payment of a loan of $28,000. The mortgage contained also a full covenant of warranty by Gregory. Shortly afterward, Gregory conveyed his equity of redemption to the Cook County Land Company.

Such was the condition of things when the present bill was filed by William R. Bonner. The title has already been adjudicated as respects William R. Bonner, as above set forth, and he adjudged to be the owner of one-fourth, as determined by this court when the cause was once previously before us. See 75 Ill. 315.

The Connecticut Mutual Life Insurance Company, the mortgagee of Gregory, was made a party defendant, and that company filed its cross-bill asking that the interest of William R. Bonner be allowed to him wholly out of that part of the Bonner tract held in severalty by the Illinois Land and Loan Company, because of its covenant of warranty of title contained in its deed to Gregory and because the claim of the complainant is asserted against the title claimed by that company at the time of making the partition.

The court below so decreed, and the main question now is, as to the correctness of the decree in that respect. Bonner, the complainant, is content with the decree in this regard, the only party complaining being the Illinois Land and Loan Company. The record shows that the land mortgaged is not worth the mortgage debt, and worth not to exceed $25,000; that the mortgagor is insolvent; so that the Insurance company will have to take the land for its debt. When the Insurance company took its mortgage, it appeared by the records that Gregory, its mortgagor, had, at the time the partition was made, a record title to an undivided three-fourths of the land, (allowing the deed from Cassandra Anderson to have conveyed one-fourth,) and the Illinois Land and Loan Company a like title to the undivided remainder of the land by deed from Percy Bonner. The claim of title to the one undivided fourth by William R. Bonner in this suit, is asserted against the title which the Illinois Land and Loan Company put in the partition, and he has succeeded in the establishment of it; the deed from Percy Bonner to that company having been set aside under prior decisions in this cause. The title of Gregory remains entirely unaffected and complete. In partitioning this interest then, of one-fourth thus recovered, it is just that it should be set off from that portion of the lot held by the Illinois Land and Loan Company: That company should bear the whole burden of it, as it arises by the failure of its title. *Dawson* v. *Lawrence*, 13 Ohio, 544, is an authority to that effect. It is equitable as between these parties, the Connecticut Mutual Life Insurance Company and the Illinois Land and Loan Company, as thereby the latter bears the loss of its own title, and is made to perform its covenant for title running with the land by protecting the insurance company's land from the incumbrance. What has been said is with reference to what appeared from the records, and what purchasers would see and be entitled to regard as the condition of the title. Were the question one between Gregory and the Illinois Land and Loan Company, it would be different.

The proofs show that previously to the making of the tripartite deed, to-wit: on October 9, 1870, Gregory and the Illinois Land and Loan Company entered into a written agreement, whereby they agreed to become tenants in common of the whole Bonner tract, and owners of the same in undivided halves. Under this agreement, they became, in equity, equal owners of the premises, without regard to their prior several legal titles, and titles of record, whether good or bad, and as between themselves, under this agreement, the loss from this recovery of title by Bonner should be borne equally between them. But this agreement was never recorded, and the Connecticut Mutual Life Insurance Company had no notice of it. That company, therefore, is not to be in anyway affected by this agreement, and it is to be laid aside and not considered in the case as respects this company.

It could only know, and was only bound to look to the legal estate which existed and appeared of record, to-wit: three-fourths in Gregory and the rest in the Illinois Land and Loan Company. The covenant of warranty runs with the land, passes to the assignee with the land, and can not be affected by the equities existing between the original parties any more than the legal title to the land itself. *Suydam* v. *Jones*, 10 Wend. 180.

A similar result too would follow, from the interchange of covenants of warranty between the Land and Loan company and Gregory in their partition deed, each having given a personal covenant of title to the other, to run with such other's parcel of land. While the original parties to these cross-covenants still held their respective lands, each might be well estopped by reason of the covenant which had been made to the other, to claim damages of the other for failure of title. Gregory covenanted for the title of this parcel of land taken by the Land and Loan company. He was liable on that covenant personally, and that personal liability would make a set-off which, in equity, would disenable Gregory from recovering on the covenant of the Land and Loan company to him, if the cov-

enant remained in him. But this covenant of Gregory concerning other land did not create a charge upon his land so that it stood charged in the hands of his grantees to indemnify the Land and Loan company, if that company should become chargeable on its covenant running with the land it conveyed to Gregory. Gregory's covenant was personal to him, did not descend upon his grantees, respected another parcel of land, and it is not perceived how it can in any way be set up against the Insurance company in defeat of its remedy upon the Land and Loan company's covenant for title which it holds as grantee of Gregory; it not being affected, as before remarked, by equities existing between Gregory and the Land and Loan company.

The Insurance company having made no covenant, and so there being no counter-covenant to be interposed, as there would be if Gregory were now the party in interest, there seems to be no obstacle in the way of the full enforcement of the Insurance company's right of action upon the covenant for title which it holds, made by the Land and Loan company; and if not, then there is a propriety in allowing its enforcement in the present suit, as has been done by the decree rendered, allotting Bonner's interest to him wholly from that portion of the Bonner tract held in severalty by the Land and Loan company, thus protecting the Insurance company's title, and avoiding circuity of action.

The point is made that the measure of damages on breach of the covenant of warranty is the consideration paid,—that there was, here, no consideration paid, and hence there could be no substantial recovery upon the covenant. It is expressly agreed by the tripartite deed, that the measure of liability of the parties upon their respective covenants shall be $25,000 each, the same as if such amount were inserted in the deed as the consideration in each case. Whatever the actual consideration, innocent purchasers for value were entitled to rely upon this agreed sum as the amount of the consideration, and as the measure of liability upon breach of the covenant fixed

by agreement of the parties themselves. May be, when this mortgage was taken, the Insurance company, from inspection of the records, had knowledge or doubts in respect to this adverse title which has here been established, but seeing this covenant by the Land and Loan company to answer for the goodness of the title to the extent of $25,000, and the defect appearing, from the record, to be in the latter's part of the title, that it parted with its money and took the mortgage in reliance upon this assurance of title by the Land and Loan company, as an indemnity to the amount of $25,000 against any defect of title. We do not perceive why it would not have the right to so rely, and why there would not be an estoppel upon the Land and Loan company to claim to the contrary. As a general rule, the consideration clause in a deed of lands is open to explanation; but in an action on a covenant of warranty brought by one to whom the grantee in the deed has conveyed, the grantor is not at liberty to show the consideration paid for the land to be less than the sum expressed in the deed. *Greenvault* v. *Davis*, 4 Hill, 643.

This covenant running with the land was, in effect, a promise by the Land and Loan company to the Insurance company that if the latter should take a mortgage of this land, it (the Land and Loan company) would protect the Insurance company from this Bonner title to the extent of $25,000; and this promise may now be made good, in affording that protection in this suit, by the Land and Loan company taking upon itself the loss of the failure of title, by having the assignment of complainant's recovered interest made from out the Land and Loan company's land exclusively. This exempting of the Insurance company's land from the burden affords full protection to its title, as should be done, and avoids circuity of action in another suit upon the covenant for damages.

The liability upon this covenant for title enforced by the decree here against the Illinois Land and Loan Company in favor of the Connecticut Mutual Life Insurance Company, is but the legitimate result of the former's recorded covenant

running with the land to the Insurance company, on the faith of which, as a part of its muniment of title, the latter is to be supposed to have loaned its money and taken its mortgage; and as between these parties in interest, the Insurance company not knowing and not being bound to know anything respecting the title and interests of the parties, except what appeared from the public records, we regard the decree in this respect as just and equitable. As between the original parties to the deed, as already said, it might have been different.

When the case was here before, the Illinois Land and Loan Company made this same assignment of error,—that the complainant's interest was assigned to him exclusively out of that company's portion of the premises,—which was dismissed, with the mere remark that we saw no reason why the assignment should have been ordered to be made exclusively out of the Illinois Land and Loan Company's portion, and we found there was error in that. The matter of this affecting the interest of the Connecticut Mutual Life Insurance Company was not then brought to the attention of the court, and what was said was without reference to its bearing on the interest of that company. Subsequently, application was made to this court, on the part of that company, to set aside the former judgment of the court and to modify the former opinion in this respect, setting forth the reasons of the failure of the presentation of the case on the part of the company at the hearing. We reserved the decision upon this application to the time of the hearing. We regard the reasons so set forth as sufficient, and allow the company the benefit of the application as if granted at the time it was made.

It appears, from the proof, that while Percy Bonner, under whom the complainant claims, was a minor, his guardian mortgaged his interest in the premises, to secure the payment of money borrowed for the interest of the ward. This mortgage was discharged by the Illinois Land and Loan Company, and the court decreed that complainant should repay the company $6506.25, as the just proportion of the indebtedness that

complainant's part of the land should bear. To this the complainant objects.

As this mortgage was an incumbrance upon the land, and was paid off and the land discharged therefrom by the Illinois Land and Loan Company, it was a proper condition of granting relief to the complainant that he should do equity by repaying his proportion of the money which was necessary to pay off the mortgage. The decree, however, was not as specific as it should have been. The amount should have been decreed a lien on the land set off to the complainant, and in case it should not be paid within a reasonable time, to be fixed by the court, the land ordered to be sold for the payment of the same, thus saving any necessity of another suit to enforce payment.

It appears, also, that some taxes and assessments have been paid, and we think complainant should be required to pay his proper proportion of such taxes and assessments as his cotenants have necessarily paid to discharge the land from the lien thereof, the same as in the case of the mortgage paid.

In these last two respects the decree is reversed, and the cause remanded for further proceedings in conformity with this opinion; in all other respects the decree is affirmed.

Decree reversed in part, and in part affirmed.

Mr. CHIEF JUSTICE CRAIG, dissenting:

I am unable to concur in the opinion of the majority of the court in this case. The land and loan company was in possession of the portion allotted to it under the deed from Gregory making the partition, and, as has been repeatedly and uniformly held by this court, its actual possession was notice to the world of its claim of title, as fully as if all its title papers and agreements relating to the land had been duly recorded.

By the agreement executed by Gregory and the company when the partition was made, it was stipulated, that should it become necessary to purchase and take up an outstanding title,

each should contribute one-half of the sum necessary for the purpose. This Bonner claim was adverse to their title, and, under the agreement, each should contribute one-half towards its extinction, or half of the loss occasioned by its successful assertion. Had Gregory sued the land and loan company to recover for the loss of the fourth of his lot by the assertion of this Bonner claim, that agreement would have effectually precluded a recovery, because he had bound himself to bear one-half of the loss. That agreement was part of the arrangement by which the partition was effected and entered into, and formed a part of it as between Gregory and the land and loan company; and when the Connecticut Mutual Life Insurance Company took its mortgage on Gregory's share, it was charged with notice of the agreement, and all of its terms and conditions. As Gregory could not recover from the land and loan company for this failure of the title to his share, his mortgagee can be in no better condition. That company took from Gregory charged with notice, and hence subject to all the equities existing between Gregory and the land and loan company; and as equity would have restrained Gregory from recovering, it follows his mortgagee should, by the same rule of equity, be restrained from imposing any portion of the burthen on the share of the land and loan company.

Mr. JUSTICE WALKER: I concur in the above dissenting opinion, and further hold, that as Gregory and the land and loan company had each covenanted to the other to warrant the title they had severally conveyed, to effectuate the partition, equity would have restrained either, under the circumstances, from recovering against the other on the covenant; and if a recovery could have been had by one against the other at law, the damages could only have been nominal. When the Connecticut Mutual Life Insurance Company took the mortgage on Gregory's lot, these deeds and covenants were of record, and should, I think, be held to operate as notice that the covenants were mutually made for the purposes of a partition,

and in equity were not binding in such a case as the present. Having taken with such notice, that company should not be permitted, in equity, to impose the burthen of the failure of title on the lot of the land and loan company, any more than Gregory could have done had he sued. For these reasons I think the decree should be reversed.

JOHN M. REYNOLDS

v.

JARED GAGE.

1. FORCIBLE DETAINER—*complaint not marked filed.* Where a complaint in writing in a forcible detainer suit is transmitted with the papers on appeal from a justice of the peace, and the justice's transcript shows that a complaint was filed, this will be sufficient to give the court jurisdiction, there being no law requiring a justice of the peace to mark the papers filed in a case before him.

2. SAME—*evidence of termination of tenancy.* In case of a tenancy at will, a notice of its termination is competent evidence, on the trial of an action of forcible detainer to recover possession by the landlord.

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

Mr. RUFUS KING, for the appellant.

Mr. PLINY B. SMITH, for the appellee.

Per CURIAM: This was an action of forcible detainer, commenced on the fourth day of August, 1876, before a justice of the peace in Cook county, to recover possession of a certain lot in Chicago, occupied by the defendant, John M. Reynolds. On the trial before the justice, the plaintiff, Jared Gage, obtained a judgment for the possession of the lot. The defendant, Reynolds, appealed to the circuit court, where another trial resulted in favor of the plaintiff, to reverse which the defendant has taken this appeal.

It is first contended, that there was no complaint in writing filed before the justice of the peace, and, upon this account, neither the justice nor circuit court had jurisdiction of the case. There was a complaint among the papers in the case transmitted from the justice to the circuit court, and the transcript of the justice shows that a complaint was filed, and on the same day a summons issued. This we regard sufficient. There was no file mark of the justice on the complaint, but this does not affect its validity, as we are aware of no law requiring a justice to mark the papers filed in a case before him.

On the trial of the cause, a notice in writing was read in evidence, signed by the plaintiff and directed to E. C. Felton, in which he was notified that the lease from Gage to him of certain premises therein described was terminated. The notice was dated June 27, 1876, and the termination was to take effect July 31, 1876. Also, a notice signed by Gage, directed to defendant, John M. Reynolds, bearing the same date, in which he was notified that the lease of the premises from Gage to Felton (a portion of which had been sub-let by Felton to Reynolds) was terminated, to take effect July 31, 1876. These notices were deemed to be incompetent evidence, on the ground that the lease of the premises, made in 1874 by Gage to Felton, had been terminated. There was some testimony tending to sustain that view, but the clear preponderance of the evidence was, that Gage had leased to Felton in 1874, and Felton had sub-let a part of the premises to Reynolds, and the premises were occupied under this leasing when the action was brought. We perceive no ground for holding that the notices were incompetent evidence. If the testimony of Felton and the evidence in chief of Gage be true, then Felton was a tenant at will, and the notices were competent evidence of a termination of that tenancy, and of a demand of possession of the premises.

The defendant also contends, that some of plaintiff's instructions are erroneous, and that the court erred in the modifica-

tion of one of his instructions. The instructions, some of them, may contain slight errors, but, so far as we are able to perceive, the law involved in the case has been fully and fairly given to the jury, and although slight errors may exist, we see no ground for disturbing the judgment.

It is also contended, that the verdict is not sustained by the evidence. The evidence, in some respects, is somewhat conflicting, but we think the decided preponderance of the proof is in favor of the plaintiff.

The judgment will be affirmed.

Judgment affirmed.

Catharine McCarthy *et al.*

v.

Peter Neu *et al.*

1. Pleading and evidence—*when execution of contract must be proved.* Where the plaintiff files the common counts only, if he relies on a written contract as evidence, a copy of which is not filed with the declaration, he must prove its execution by the defendant, but if he is, before the trial, allowed to file such copy by consent, as the instrument sued on, the defendant can not deny its execution except under plea verified by affidavit.

2. Practice—*right to file additional plea.* Where the plaintiff declares under the common counts only, filing a copy of account, and after pleas filed of the general issue and set-off, by consent, files a copy of a written contract as the agreement sued on, the defendant will have the right to plead to such cause of action, either to deny the execution of the contract or to avail of a set-off to it.

3. Where the plaintiff amends his declaration in matter of substance, the defendant should be permitted to file additional pleas, and the filing of a copy of an agreement as a cause of action relied on, when the common counts only are used, is analogous to a material amendment of the declaration.

4. It is no sufficient ground for refusing leave to the defendant to file an additional plea of set-off of damages for the non-performance of a special contract, that such damages may be recouped under the general issue. The defendant has the right to recover any excess of damages in his favor, and should not be driven to a new suit in order to recover the same.

Statement of the case.

5. Same—*when the specific objection should be made.* Where leave to file an additional plea is refused on a certain ground, which was the only ground specified in the objection, and which is not sufficient, other and different reasons can not be urged in this court for the first time why the leave should not have been granted. Objections not made in the court below will be considered as waived.

Appeal from the Circuit Court of Cook county; the Hon. Lambert Tree, Judge, presiding.

In July, 1873, the appellees brought suit in assumpsit against the appellants, the declaration containing the common counts only, and the account filed therewith being for "balance due on contract, $4000," and two other small items.

On October 11, 1873, the defendants filed two pleas,—1, General issue; 2, Set-off for money had and received, $6000.

On November 6, 1873, leave was given to the plaintiffs, on motion, to amend the declaration by inserting the name of Agnes McCarthy therein. On October 14, 1874, there was filed a copy of an agreement between the parties, by which the plaintiffs agreed to furnish the materials and do the mason work on a building for the defendants for $22,000, to be finished on a particular day, with a stipulation appended, signed by the attorneys of the defendants, consenting that "this be filed with the declaration as copy of agreement sued on." On the same day, October 14, defendants filed a third plea, setting forth that agreement, alleging payment of $18,000 by defendants on the contract and a breach of its conditions by plaintiffs, wherefrom defendants sustained damages to the amount of $15,000, offering to set off the same to the extent of plaintiffs' demand, and asking for judgment for the remainder. On October 15, 1874, the plaintiffs moved to strike the third plea from the files, as not having been filed by leave of court, which was done. Thereupon defendants moved for leave to file the third plea, to which leave plaintiffs' counsel objected, for the reasons that the plea amounted to the general issue, and that the issues had been made up, and that the cause was about to be called for trial and had been placed on the trial

docket for October 9. The court sustained the objection, and refused leave to file the plea, and defendants excepted.

On October 15, 1874, a replication of *nil debet* to the second plea was filed. After amending the third plea by inserting an averment that plaintiffs' cause of action was for work and materials done and furnished under said agreement, defendants again on October 19, 1874, asked leave to file this third plea, which leave the court refused because the case was No. 100 on the trial calendar, and No. 80 was on trial;—it appeared that the call for that day did not extend beyond No. 93. Defendants excepted. On October 29, 1874, the defendants withdrew their first plea, and a trial of the issue upon the second plea was begun and some evidence heard, when defendants, on leave, withdrew that plea, and the jury assessed plaintiffs' damages at $3900, for which judgment was rendered. The defendants appealed.

Messrs. Gookins & Roberts, for the appellants.

Messrs. Cooper, Garnett & Packard, for the appellees.

Mr. Justice Sheldon delivered the opinion of the Court:

Refusing leave to file the additional plea is assigned for error. Appellants' counsel concede the general rule to be, that it is matter of discretion with the court to allow or refuse the application to file an additional plea, but claim that this case is to be excepted on account of the filing of the copy of the agreement on October 14, 1874.

It is a provision of the statute, that no person shall be permitted to deny on trial the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defence or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit. R. S. 1874, p. 779, § 34. As the case stood before the copy of the agree-

ment was filed, plaintiffs, on trial, would have been obliged to prove the execution of the agreement by the defendants. But after the filing of such copy, under the statute, plaintiffs were relieved from the necessity of making such proof, and defendants would not be permitted to deny on trial the execution of the agreement, unless they should have filed a plea of denial verified by affidavit. Thus the filing of the copy necessitated the filing of a further plea denying the execution of the instrument and verifying it under oath, in order to avail of the defence of the non-execution of the agreement. In such case there would be the right to file a further plea. And we incline to think that the filing of the copy of the agreement made such a change that defendants should have been permitted to plead in respect to it, whether to deny the execution of the agreement, or to avail themselves fully of a set-off against it.

Until the filing of the copy, defendants presumptively did not know what was the particular cause of action, and when it was thus disclosed, there was a propriety in allowing the presentation of such defence as there might be against it.

The declaration had been amended, since the filing of the first two pleas, by inserting the name of another plaintiff. The filing of the copy of the agreement, too, was analogous in effect to the amendment of the declaration, in the respect of the need of a plea to meet it; and the application of the rule of allowing the filing of additional pleas, where there has been a material amendment of the declaration, would seem to have been proper in this case. It was held in *Griswold* v. *Shaw*, 79 Ill. 449, that when the plaintiff amends his declaration in a material respect, the defendant should be permitted to file additional pleas.

The plea offered was necessary in order to the recovery from the plaintiffs of the balance of damages claimed. It does not suffice that, as appellees' counsel say, defendants might, under the plea of the general issue, recoup their damages to the extent of preventing any recovery by plaintiffs, and have brought

a new suit for any excess. As the whole question of the damages would have been gone into in this suit, it would be fit that full recovery for them should there be had, and all litigation in respect to them ended. There should not have been imposed on defendants the unnecessary inconvenience of being turned around to a new action, and a re-investigation of the same matter, in order to recover the remaining portion of their damages. The law disfavors a multiplicity of suits.

It is objected that the plea was not verified, and that it was defective in form. It was not required by the court to be verified. Had the court made it the condition of filing the plea that it should have been verified, the question would be different. Specific objections were made to the filing of the plea, and the refusal of leave to file it was, for specific reasons assigned.

The objections and reasons now urged are entirely different, not suggested in the court below. We think they should not be made here for the first time, but be considered as having been waived, the plea having been objected to in the court below and not permitted to be filed for specific reasons other than those now urged. *Kankakee and Illinois River Railroad Co.* v. *Chester*, 62 Ill. 235; *Wickenkamp* v. *Wickenkamp*, 77 id. 92.

So far as appears from the record, there is reason to believe that injustice was done the defendants in refusing leave to file the plea, and the judgment will be reversed and the cause remanded.

Judgment reversed.

Syllabus.

WILLIAM COWEN

v.

EDGAR LOOMIS.

1. SPECIFIC PERFORMANCE—*against subsequent purchaser.* Where A sold a part of a block of land to B, giving a contract for a deed upon the payment of certain specified sums, which was duly recorded, and B then sold C a lot included in his purchase and received a part of the purchase money and was to convey the same to C upon full payment, and C took and retained possession of his lot, but, before completing his payments, B reconveyed all his interest in the block to A, who conveyed the same to D, it was *held*, that C, upon tendering the balance due from him to B, to C or D after B conveyed, would have been entitled to a deed, and a court of equity would have decreed one.

2. NOTICE—*by possession of land.* The possession of land by a party is notice to all persons of whatever title or equities he may have, whether of record or not.

3. MORTGAGE—*agreement to release on condition.* Where a mortgagee agrees with a purchaser from the mortgagor, upon certain payments being made by the mortgagor, to hold a certain half of the mortgaged premises liable for only one-half of the residue of the mortgage debt, and the purchase is made on the faith of such agreement, which is duly recorded, and the full amount necessary to release the half of the premises is paid in accordance with the contract, a lot in such half bought from the purchaser of the mortgagor will become released from the mortgage, and a sale of such lot made under a power in the mortgage, the latter purchaser being in possession, will be a nullity and pass no title.

4. SALE—*when subject to equitable title.* Where A, the owner of a block of land subject to a mortgage thereon given by him, sold one-half of such block to B, who purchased upon an agreement in writing of the mortgagees to release such half from the lien of the mortgage, upon certain payments being made by the mortgagor, which agreement with the contract of purchase was duly recorded, and B then sold a lot in such half block to C, who went into possession, and the payments were made to the mortgagees in accordance with the agreement to release, and B, before full payment by C to him, conveyed to A all his interest in the half block, and A conveyed the same to D, it was *held*, that A and D, by the respective conveyances to them, having notice of the prior sale to C, took the title subject to C's equitable rights, which a court of equity would have enforced on a tender of the balance due from C, and that C, having procured a conveyance from D without proceedings for specific performance, acquired the legal title under the purchase of B from A, and held the same discharged from the lien of the mortgage.

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

This was an action of ejectment, brought by Edgar Loomis, against William Cowen, for the recovery of the possession of lot 17, in the subdivision of the west half of block 90 of Canal Trustees' Subdivision of the west half of section 27, township 39, range 14, Cook county.

On the 23d day of May, 1856, Winchester Hall purchased of Enos Ayers and J. G. Hamilton block 90, including the lot in controversy, for $26,000, paying down $6500, and giving his six promissory notes, two of which were for $3835 each, two for $3640 each, and the other two for $3435 each, payable two at the same time, in one, two and three years, with 6 per cent thereon, and to secure their payment executed to said Ayers and Hamilton a deed of trust upon the block so purchased.

On March 23, 1857, Winchester Hall and Joseph Smith entered into an agreement in writing by which Hall sold Smith the west half of said block for the sum of $18,000, $4500 of which was then paid, the balance to be paid in three equal annual installments. Previous to the making of such purchase, Hall had, at the instance of Smith, procured the agreement from Ayers and Hamilton, set out in the opinion, which was written on the back of Smith's agreement to purchase, both of which were duly recorded. The judgment below was for the plaintiff. The other material facts appear in the opinion.

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

Messrs. MONROE, BISBEE & BALL, for the appellee.

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

This case stands upon a different footing from that of *Bush et al.* v. *Sherman*, 80 Ill. 160. In that case neither Smith nor

his grantee was seeking to enforce the contract of March 23, 1857, under which the mortgagees, Ayers and Hamilton, agreed, upon certain conditions, to release the west half of block 90, while here, appellant claims title under a contract of purchase made with Smith. In the decision of the case *supra* it is said: "It is a misconception of the meaning of the agreement to suppose that Hall, by reason of the reconveyance of the property to him by Smith, obtained it with the privilege of having future payments applied in reduction of the incumbrance upon the west half. Clearly, any one claiming under Smith as grantee would be entitled to the benefit of the contract, but Hall claimed nothing as the grantee of Smith."

The main inquiry in this case, then, is, whether appellant established title under Smith. If he did, under the decision cited he will be entitled to protection.

It appears, from the proof offered on the trial, that on the 23d day of March, 1857, Joseph Smith bought the west half of block 90 of Winchester Hall, and on that day received a contract providing for a deed upon the payment of certain specified sums of money at specified times named in the contract. On the same date Ayers and Hamilton, who held a mortgage on the land, entered into a writing on the back of said contract, to the following effect:

"In event of the payment to us by Winchester Hall, at maturity, of the installments due on May 23, 1857, the undersigned agree to hold the west half of block 90, as described within, liable for only one-half the residue of the unpaid purchase money owing to us by said Hall, not meaning hereby to release said Hall from the payment of any portion of the unpaid purchase money.

Chicago, March 23, 1857.

(West half of block 90.) ENOS AYERS,

J. G. HAMILTON."

On the day following, these two contracts were duly recorded, and during the same month, Smith, by his contract in writing,

sold the lot in question, which is a part of block 90, to appellant for the sum of $625. Appellant paid Smith on the contract $181, and in the year 1858 he went into the possession of the property, and has remained in possession ever since.

It was also proven that the installments mentioned in the contract executed by Ayers and Hamilton as due May 23, 1857, were paid at maturity, and that one half of the balance of the unpaid purchase money due from Hall on the premises was paid to Hamilton and Ayers, being the full amount required by their agreement with Smith to clear the west half of the block from the mortgage.

It is true the contract between Hall and Smith contained a clause of forfeiture in case of non-payment of the purchase money, and if Hall had declared a forfeiture, possibly appellant's title to the lot obtained of Smith might have been terminated, but this record fails to show a forfeiture of the contract. On the other hand, it appears that Smith conveyed his interest in the west half of the block to Hall on the 28th day of May, 1860, by deed of that date, and upon this account appellant made no further payments on the lot in question to Smith.

On the 5th day of June, 1860, Hall conveyed the west half of the block to Louis Bush, and on the 5th day of February, 1871, Bush conveyed the lot in question to appellant. In regard to this deed, Hall testified that it was made because Cowan held a contract under Smith and claimed some interest under and by virtue of this contract. But whether the deed was made for this reason or not cuts no figure in the case. As Smith had sold the lot to appellant, and appellant was in possession under that title when Smith conveyed to Hall, he took the conveyance subject to appellant's title, and the same is true of Bush, and appellant, had he seen proper, by paying or tendering the balance due Smith, under the contract, to Hall or Bush after Smith conveyed, would have been entitled to a deed, and a court of equity would have decreed a deed. If appellant saw proper to pay Bush more than the original

contract price rather than file a bill for specific performance, such fact does not militate against his title. When Bush conveyed to him, the deed related back to and confirmed the sale made by Smith to him.

Sherman, when he made sale under the mortgage bought of Ayers and Hamilton, had notice of the contract between Hall and Smith and also notice of the agreement of Ayers and Hamilton, under which the west half of the block would be released from the mortgage, as these contracts were all upon record. He also had notice of the title of appellant in the lot involved in this action, as appellant was in possession, and his possession was notice to all persons of whatever title he had, whether of record or not. Now, while it may be true that Hall was estopped from claiming that the west half of the block was released from the mortgage in consequence of the payments having been made thereon in full compliance with the agreement of March 23, 1857, executed by Ayers and Hamilton, yet, appellant, having claimed title under Smith, for whose benefit the contract to release was made, has a perfect right to rely upon the terms and conditions of that contract, and invoke its aid to protect him in his title.

In so far as appellant's rights are involved, when the money was paid, according to the terms of the contract of March 23, 1857, the lot he had purchased of Smith became released from the mortgage, and the sale of his lot under the mortgage was a nullity and passed no title.

We are of opinion, under the evidence, the defendant established title to the lot in question, and the court erred in rendering judgment against him.

The judgment will be reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE SCOTT: I can not concur in this decision. In *Sherman* v. *Bush*, 80 Ill. 168, this court decided the west half of the property *was not released* from the mortgage given to secure the purchase money, and that the sale thereafter made

by the trustee was effectual to bar the rights of the mortgagor and all parties claiming under him as grantees or otherwise. That decision, in my opinion, is conclusive of the case at bar, and ought to be allowed to control the present decision.

The judgment of the court below is in conformity with our previous decision and ought to be affirmed.

Mr. JUSTICE DICKEY: I concur with Mr. Justice SCOTT. The agreement indorsed on the back of the mortgage, and signed by Ayers and Hamilton, simply limited the amount for which the west half should be held to one-half of the balance of the purchase money to remain after payment of the installment of May 23, 1857. After that payment was made, Hall was personally liable for the whole of the balance unpaid, and the creditor had a lien on the west half of the land for one-half of that balance, and a lien on the east half for the whole of that balance. The creditor afterwards received payments on this balance of moneys, amounting to one-half of this balance, which payments were applied generally in reduction of the debt and which were not applied specially in payment of that part of the debt for which the west half of the land was sold. In this state of the case the creditor, having given the required notice, sold under the power in the mortgage, and in the sale the west half of the land was sold. It seems to me that Cowan, when this property was advertised for sale, might have intervened, and, upon proper application to a court of chancery, might have had an order requiring the creditor to have sold the other parts of the land before subjecting the west half to sale. Having had notice that the sale would be made, and having failed to intervene for the control of the sale, his rights in that regard were terminated by the sale and he can not now ask for relief.

HENRY A. KOHN *et al.*

v.

SARAH S. RUSSELL.

1. MARRIED WOMAN—*power to charge her separate estate.* Under the laws in force in 1873, a married woman was capable of charging her separate estate for the benefit of such estate or for her own personal use, but was incapable of so charging it with the debt of another with which she had no connection save that of security or guarantor. She could not guaranty the payment of a debt contracted at the same time by a firm of which her husband was a member.

2. GUARANTY—*waiver of homestead, etc., to land appearing of record.* A clause in a guaranty by a married woman, waiving all rights of dower and homestead in any real estate which appeared at the time on record in her name, and purporting to charge such land with the debt of another, can not embrace a tract of land not appearing in her name of record, when she has made no fraudulent representations that she had a record title to such tract.

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

Before, and on the 18th of September, 1873, one Russell, in partnership with one Bradbury, was doing business under the firm name of Russell & Bradbury. Appellee was the wife of Russell. Thereupon, Russell & Bradbury proposing to purchase a bill of goods from appellants, on that day Mrs. Russell executed and delivered to appellants a paper in the following words:

"*Chicago, September* 18, 1873.

In consideration of $1, to me in hand paid by H. A. Kohn & Bros., of Chicago, for purpose of securing a credit with them for the firm of Russell & Bradbury, of Colchester, Illinois, I hereby guarantee the full and punctual payment to H. A. Kohn &. Bros. of bill of merchandize purchased of them this day by Russell & Bradbury, on credit of four months, and amounting to a sum not to exceed $1000; and I further guarantee that the said bill shall be promptly paid at maturity, whether the same be on open account, or be settled

by note. And it shall not be necessary for the said H. A. Kohn & Bros. to prosecute the said Russell & Bradbury, but recourse can be had to me at once on failure of said Russell & Bradbury to pay for the bill at maturity.

"For like consideration I waive all rights of dower and homestead in any real estate which now appears on record in my name. Witness my hand and seal on the date above given.

Mrs. SARAH RUSSELL, (seal.)"

On that day Russell & Bradbury bought of appellants a bill of merchandize amounting to $1094.88, which was made out in the following words:

"*Russell & Bradbury,* *Dr.*

To H. A. Kohn & Bros.

Sept. 18, 1873. To merchandize, - - $1094.88."

On this bill Russell & Bradbury paid $104.48; the balance was not paid. At the time of making this guaranty, forty-six acres of the north-west quarter of section 16, township 9, range 1, Warren county, Illinois, was in possession of one Moore as the tenant of Mrs. Sarah S. Russell, and he paid rent to her. At that time the title to this tract of land was in Richard Johnson, held by a conveyance from Samuel Reynolds, dated March 7, 1853. Reynolds was the father of Mrs. Russell, and the title to the residue of the land was in William F. George, by conveyance from the government in 1836.

This is a bill in chancery, charging, among other things, that at the time of the execution of this guaranty defendant was and still is the owner of and in possession of that quarter section of land, and that she specifically charged the same with said guaranty, also charging that she and her husband were conspiring to defraud the complainants by claiming that she was not the owner of any real estate, and by keeping her deeds off the record; and the prayer of the bill was that defendant should be decreed to pay the $1000 with interest from September 18, 1873, and in default a receiver should be appointed to take possession of her personal estate not exempt from

execution, and to receive and sequester the profits of defendant's real estate in payment of said claim, and that they have other and further relief.

The circuit court, upon hearing of the case upon bill, answer and proofs, entered a decree dismissing the bill at appellants' costs. To reverse this decree this appeal is prosecuted.

Messrs. STEWART, PHELPS & GRIER, for the appellants.

Mr. J. M. KIRKPATRICK, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

It is not perceived how this bill can be sustained. Before our recent statutes a married woman in the State of Illinois was incapable of binding herself personally by such a guaranty as is presented in this case. The debt which she undertook to guaranty was not her debt, but that of the firm of Russell & Bradbury. Properly speaking, it was not contracted for her benefit or profit or for the benefit of her estate.

As the law then stood, a married woman was capable of charging her separate estate for the benefit of such estate or for her own personal use, but was incapable of so charging it with the debt of another with which she had no connection save that of security or guarantor.

By the instrument it is declared that she waives all right of dower and homestead in any real estate which then appeared on record in her name. This clause of the agreement seems to have been made under a misapprehension of the law, and upon the supposition that she was capable of making herself liable personally, at law, for the breach of such guaranty, and seems to have been intended to expose real estate, to which she had a record title, to execution for the satisfaction of any judgment which might be recovered at law against her for the breach of the guaranty, but it is shown by the proofs that she had no record title to the land in question. By the language of the agreement it has no reference to this tract of land.

It is charged in the bill, that in order to induce appellants to give credit thus to Russell & Bradbury, appellee represented to appellants that she owned a farm in Warren county, given to her by her father, worth $8000, and that she held the deed for the same in her own name. But this allegation is denied in the answer. One of appellants testifies that she told him she owned a farm worth $8000, free from incumbrance, which she had obtained from her father, but does not state that she said it lay in Warren county. Mr. Fox, the salesman of appellants, testifies that she made statements to him to the same effect, and adds that she said the farm lay not far from Abingdon, Illinois.

Appellee testifies that she did not tell Kohn that she had a farm worth $8000 in Warren county, Illinois, and told him nothing about any farm. Did not tell him that her father gave her the farm. That she heard no farm mentioned. And this is all the testimony in the case on this subject.

There is no charge in the bill that such representations alleged to have been made by Mrs. Russell were made fraudulently, or that they were false, nor does the bill charge or the evidence show that Mrs. Russell at any time represented that she had a record title to this tract of land. The only fraud alleged in the bill is the allegation of fraudulent conspiracy on the part of Mrs. Russell and her husband to cheat appellants by keeping her deed or deeds off the record. There is no proof whatever to support this allegation.

There is no evidence that she ever had a deed from her father or anybody else granting title to this tract of land.

The decree of the circuit court was right and must be affirmed.

Decree affirmed.

Syllabus.

JAMES HANRAHAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. INDICTMENT—*venue in the different counts.* Where an indictment in the caption shows the county and State in the proper form, the name of the county in subsequent counts, without using the word "said" or "aforesaid," will be construed as referring to the same county named in the caption.

2. CRIMINAL LAW—*assault with intent to murder.* If one person shoots at another with a shot gun, pistol or revolver, with intent, unlawfully, willfully, feloniously, and of his malice aforethought, either express or implied, to kill him, the person so shooting is guilty of an assault with intent to commit murder.

3. SAME—*presumption as to intent.* Every man, in law, is presumed to intend the natural and probable consequence of his act, unless a different intent be proven.

4. INSTRUCTION—*whether it discriminates as to what evidence is to be considered.* An instruction on the trial of one for an assault with intent to commit murder, that the intent with which the defendant shot at the prosecuting witness, if he did shoot, might be established by circumstantial evidence, and that in determining his intent in shooting, the jury should take into consideration all the circumstances in evidence surrounding and attending the act, is not open to the objection that the jury might understand they need consider *only* the circumstantial evidence.

5. SAME—*in criminal case—not necessary always to state the doctrine of reasonable doubt.* An instruction in a criminal case upon the subject of what will justify the use of fire arms in self-defence, and what the defendant must show to establish such defence, is not erroneous in not further stating the defendant's right to an acquittal in case of a reasonable doubt as to the existence of the facts justifying the use of such arms, when the jury are instructed on the part of the defence that if they entertain any reasonable doubt as to whether or not the shooting was done in self-defence they should acquit.

6. The omission of the words "beyond a reasonable doubt," in an instruction for the people in a criminal case, is not error, where an instruction is given for the defence that the jury must be convinced by the evidence, beyond a reasonable doubt, of the defendant's guilt before they can convict.

7. SAME—*singling out particular facts.* Where it appeared upon the trial of a party for an assault with intent to commit murder, that the defendant shot twice at the prosecuting witness, once at the door of the former, and afterwards from the window of his house, after the person assaulted had left the yard and gone into the public road, and the alleged circumstances justify-

ing the shooting as in self-defence occurred before the first time the defendant shot, it was held that an instruction distinguishing between the two different occasions of shooting, and calling the attention of the jury to the facts attending the second act of shooting, was not fatally open to the objection of singling out and giving undue prominence to certain parts of the testimony.

8. SAME—*may assume undisputed facts.* An instruction which assumes a certain fact without leaving the jury to find the same from the evidence, is not erroneous when there is no dispute made as to such fact, and it is not denied by either party.

9. SAME—*as to credibility of witnesses.* An instruction that if two witnesses for the prosecution swore to a particular fact, in which they were contradicted by the defendant and two other witnesses whose credibility was not affected by any evidence in the case, then the jury would not be justified in finding the fact in favor of the prosecution, is improper, as invading the province of the jury as judges of the credibility of the witnesses.

10. ADMISSIONS—*jury not bound to believe the whole.* Where the prosecution prove the statements or admissions of a defendant, the whole must be received in evidence, but the jury are not bound, as a matter of law, to believe the entire statement. If a part of such statement is disproved or contradicted by other evidence, the jury have the right to give effect to such contradictory evidence, and reject such part of the defendant's statement as not entitled to credence and accept the rest of it.

WRIT OF ERROR to the Circuit Court of Lee county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. B. H. TRUESDELL, for the plaintiff in error.

Mr. JAS. K. EDSALL, Attorney General, for the People.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an indictment for an assault with an intent to commit murder, made upon John Hetherington. The defendant was convicted and sentenced to the penitentiary for the term of two years. He sued out this writ of error to reverse the judgment.

The first assignment of error is in overruling the motion to quash the second and third counts of the indictment. The alleged defect in the counts is, that they do not show in what State the grand jury convened, nor in what State the alleged offence was committed.

The language of each count, in these particulars, is this: "And the grand jurors aforesaid, chosen, selected and sworn in and for the county of Lee, in the name and by the authority, etc., do further present that James Hanrahan, late of said county, on, etc., at and within the county of Lee, aforesaid," etc. The indictment is preceded by the proper venue clause in the margin, "State of Illinois, Lee county, ss." The county of Lee mentioned in the body of the indictment is to be construed to refer to the county of Lee named in the margin, which appears there to be in the State of Illinois. The indictment is sufficient in this respect.

The court below gave five instructions on behalf of the people, the giving of each of which is assigned for error.

The first was to the effect, that the jury should convict if they found that the defendant shot at the complaining witness, Hetherington, with a shot gun, pistol or revolver, with intent unlawfully, willfully, feloniously, and of his malice aforethought, either expressed or implied, to kill him. This would have clearly made the defendant guilty of an assault with an intent to commit murder, as charged in the indictment, the statutory definition of murder being, the unlawful killing of a human being in the peace of the people, with malice aforethought, either expressed or implied.

The second instruction was, that the intent with which defendant shot at Hetherington, if he did shoot, might be established by circumstantial evidence, and that in determining defendant's intent in shooting, they should take into consideration all the circumstances in evidence surrounding and attending the act. It is objected that the instruction assumes that the defendant did shoot. But this was no disputed fact. All the witnesses, including defendant himself, testified that he did shoot. It is said the jury might have well understood, from the instruction, that they need consider *only* the circumstantial evidence. We do not consider it as open to such objection.

The third instruction was:

"To justify the use of fire arms in self-defence, the defendant in this case must show that the danger to his person or to the person of some member of his family, or of some person upon his premises, was so urgent and pressing that a reasonable man would suppose, from the words, acts and conduct of Hetherington, at defendant's house, that it was necessary to shoot to save life or prevent great bodily harm, and that defendant, in shooting, believed, in good faith, that such urgent and pressing danger then existed."

The same objection is repeated to this instruction—that it assumes the defendant shot. The further objection taken to it is, that it required defendant to show that the facts justifying his shooting existed, whereas a reasonable doubt as to whether they existed should have acquitted. The instruction was upon the subject of what would justify the use of fire arms in self-defence, and did not profess to state anything upon the subject of the amount of the evidence with which the case of self-defence should be made out, or how fully the jury should be satisfied in respect to it. It was not inconsistent with the idea of acquittal, if there was a reasonable doubt as to the existence of the facts. And on behalf of the defendant, the jury were expressly instructed upon this very point, that if they entertained a reasonable doubt as to whether or not the shooting was done in self-defence, then they should acquit. We see no substantial error in this third instruction.

The fourth instruction was as follows:

"If the jury believe, from the evidence, that after the shooting at the door of defendant's house, (if the jury believe, from the evidence, there was any shooting at the door of defendant's house,) Hetherington drove away, and when at or near the fence on the public road he stopped his horse, and was then and there doing no violence and threatening no violence against the person, property, house or family of defendant, and that while said Hetherington was sitting there in his

buggy the defendant shot at him from a window in his, defendant's, house, with intent then and there unlawfully, willfully, feloniously, and of his malice aforethought, either expressed or implied, to kill said Hetherington, then the jury should find defendant guilty."

It is objected to this instruction, that it violates the rule which has been laid down by this court that portions of the testimony should not receive undue prominence in this manner in an instruction. Though seemingly somewhat open to this objection, we do not regard it as fatally so, under the circumstances here.

There was a reason for thus distinguishing, as the instruction did, between the two different occasions of shooting, from the fact that it was upon the first occasion alone, where all the alleged circumstances occurred which are claimed as justifying any shooting in self-defence. It is said there is no evidence in the record that after the shooting at the door "Hetherington drove away, and when at or near the fence on the public road he stopped his horse." As we understand it there was evidence to such effect. All the witnesses agree that at the time of the shooting at the door of the house, Hetherington was inside the yard of the house, and that after that he turned away, a witness on one side saying he stopped by the fence, and one on the other side that Hetherington was outside the fence at the time of the shooting from the window. It is further said that the instruction directs a conviction upon a mere preponderance of evidence, ignoring the question of a reasonable doubt. All the foundation for this is, the omission of the words "beyond a reasonable doubt" after the words "If the jury believe from the evidence." By the tenth of defendant's instructions the jury were told that in a criminal case the law requires that the jury shall be convinced, by the evidence, of the defendant's guilt, beyond a reasonable doubt, before they can convict him, and if not thus convinced it was their duty to find him not guilty. In *Peri* v. *The People*, 65 Ill. 19, it

was held that such an omission of these words in one of the people's instructions would not be error where such an instruction as that above was given in behalf of the defendant.

The fifth instruction for the people bears upon the question of presumption as to intent, and correctly states the law in that regard, that every man is presumed to intend the natural and probable consequences of his act, unless a different intent be proven.

The refusing of the eleventh and twelfth instructions asked by the defendant is assigned for error. The jury were the judges of the credibility of the witnesses, and to have told the jury, as asked by such eleventh instruction, that if two witnesses for the prosecution swore to a particular fact, in which they were contradicted by the defendant and two other witnesses whose credibility was not affected by any evidence in the case, then the jury would not be justified in finding the fact in favor of the prosecution, would have invaded the province of the jury and been improper.

Two certain witnesses had testified to statements made by the defendant, and such twelfth instruction was to the effect that the jury had no right to reject any portion of the statement made by the defendant.

While it is the rule that where the declarations of a party are given in evidence against him, the whole statement is to be received in evidence, it does not follow that the jury are bound to believe the entire statement if they believe any part of it, as the instruction was calculated to lead the jury to understand. If a part of such statement is disproved or contradicted by other witnesses the jury have the right to give effect to the contradictory evidence and reject such part of the statement as not entitled to credence if they so find, while they may accept as true the rest of the statement. The jury were fairly and fully instructed upon the law of the case, and we find nothing in respect of the instructions, either in giving or refusing them, which should cause a reversal of the judgment.

As regards the question of fact, it is true that the evidence is contradictory. It was the province of the jury to judge of the credibility of the witnesses. If they believed the witnesses in behalf of the prosecution, their finding was justified by the evidence. They had the better opportunity to judge of the credibility and weight to be attached to the testimony of the several witnesses. Upon consideration of the testimony we can not say that this is a case which calls for the interference of the court with the verdict of the jury upon the ground of its not being warranted by the evidence.

The judgment must, therefore, be affirmed.

Judgment affirmed.

TIMOTHY M. BRADLEY, use, etc.

v.

WILLIAM F. COOLBAUGH *et al.*

1. INSTRUCTION—*assuming facts.* It is error for the court, in an instruction, to assume material facts, essential to the defence, to be true, that depend on testimony for their existence, and some of which facts are matters of contention between the parties. Such an instruction invades the province of the jury. When the evidence is conflicting upon a vital question, the jury should be left to find the facts without the interference of the court.

2. ESTOPPEL—*by party's acts—whether a debt is against one or more.* Where a party issues a distress warrant against two for rent claimed of both, under which goods attached as the property of one are taken from the custody of the sheriff, in an action of trespass by the sheriff for the use of the attaching creditors, against the party so taking the goods, such party will be estopped by his acts from denying he was a creditor of the two against whom he proceeded, and from claiming to be a creditor of one only.

3. FRAUD—*as to creditors, when a question of fact.* An agreement between certain creditors of a common debtor for one to bring attachment and another to become the purchaser of the debtor's goods for the benefit of all, if not fraudulent *per se*, is not in violation of the fourth section of the Statute of Frauds, unless made with the intent to disturb, hinder, delay or defraud creditors or other persons, and such intent is a question of fact for the jury and not one of law.

Opinion of the Court.

4. CONTRACT—*one creditor attaching for the benefit of himself and others—whether illegal and against public policy.* An agreement between several creditors of an absconding debtor, that one should attach the debtor's goods on his claim and put them in the hands of another as custodian, who should become the purchaser for the benefit of all the creditors, and thus save a multiplicity of actions and save heavy expenses of litigation, with no intent to injure any one, is not an abuse of the process of the court, and is not void as being against public policy, and such an agreement does not work a forfeiture of such creditors' rights acquired by the levy of the attachment.

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

This was an action of trespass, by Timothy M. Bradley as sheriff of Cook county, for the use of John H. Mortimer and Charles S. Debost, against the appellees. The property was taken from the possession of the sheriff by the defendants and sold. The material facts appear in the opinion.

Messrs. BECKER & DALE, for the appellant.

Mr. MELVILLE W. FULLER, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

On the 23d day of January, 1874, Mortimer and Debost, claiming to be creditors of William Kurka, sued out of the Superior Court a writ of attachment against his effects, on the ground the debtor had departed from the State. The writ was placed in the hands of the sheriff and was by him levied on a stock of goods that it was said belonged to the attachment debtor. When the goods were seized the officer acting placed them in the hands of Le Gros as custodian, to be by him held for the sheriff. On the 7th day of February, 1874, Swinburn, who was an acting constable, levied upon the same goods while in possession of the sheriff's custodian, by virtue of a distress warrant issued by Coolbaugh, Powers and Wheeler against William Kurka and E. A. Le Gros, and also by virtue of a writ of attachment in favor of John McIntire against the same defendants, and took the goods into his own possession,

and such proceedings were afterwards had that the goods were sold to satisfy the amounts due plaintiffs in the distress and attachment proceedings against Kurka and Le Gros. Although Mortimer and Debost obtained judgment against William Kurka in the attachment case for the sum due them, no portion of the goods seized under the writ in their favor was ever applied in discharge of the same, nor were any of the proceeds of the sales of the goods appropriated for that purpose.

This action was brought in trespass, in the name of Timothy M. Bradley for the use of Mortimer and Debost, against William F. Coolbaugh, H. G. Powers, C. T. Wheeler, John Morris, John McIntire and William Swinburn, to recover the value of the interest the beneficial plaintiffs had acquired in the goods under their attachment.

In obedience to a rule laid upon the nominal and beneficial plaintiffs and their attorneys, the latter produced in court an agreement entered into between Mortimer and Debost, Ellis and Harrup, and E. A. Le Gros, all of whom were creditors of the attachment debtor. That agreement recited that the parties thereto were creditors of the absconding debtor, stating the amounts due each respectively, and that there were other small creditors for wages and rent, and then provided that Mortimer and Debost should commence an attachment suit against Kurka in the Superior Court, procure Le Gros to be appointed custodian of the goods levied upon, and at the sheriff's sale he should become the purchaser of the whole stock at a certain price and pay for the same with his notes at two and four months, with security, for a sum agreed upon, for the use of the other parties to the agreement. It seems to have been contemplated other creditors might institute legal proceedings against the property of Kurka, and in that event a *pro rata* rebate was to be made from the amount of the notes to be given by Le Gros. On the production of the agreement defendants gave it in evidence and it was read to the jury.

The case was three times tried in the lower court. On the first and second trials the jury found for plaintiff and assessed

his damages. Both verdicts were set aside on motion of defendants. Before the cause was submitted on the third trial McIntire and Swinburn were dismissed out of the case and the suit thereafter proceeded against the other defendants. On the last trial, under instructions from the court to do so, the jury found defendants not guilty. The motion made by plaintiff for a new trial was by the court overruled, exceptions taken and plaintiff brings the case to this court on appeal.

Our understanding is, the case was defended in the court below on two grounds: First, that the goods levied upon by the attachment writ were the property of Le Gros and Kurka, partners, and the surrender of the goods to Le Gros, one of the partners, as custodian, dissolved the attachment; and second, that the attachment was void because of the agreement entered into between the attaching and other creditors of Kurka. No discussion has been had on the first proposition by counsel for defendants in this court, and the defence is placed solely upon the question whether the attachment was valid, and not whether it had been dissolved or not.

On the trial the court instructed the jury, "as a matter of law, that the agreement between Mortimer and Debost, Ellis and Harrup, and E. A. Le Gros, for the commencement of an attachment suit against William Kurka, was fraudulent and void as to other creditors of William Kurka than those who signed it, and as it is proven in that case and is not disputed upon the evidence that Coolbaugh, Powers and Wheeler were creditors of Kurka at the time said agreement was entered into, and that said attachment suit was commenced in pursuance of said agreement, the jury are instructed that said attachment was void as to Coolbaugh, Powers and Wheeler, and they must, therefore, find defendants not guilty." That this instruction invades the province of the jury is a proposition so plain it admits of but little discussion. It assumes material facts essential to the defence to be true, that depend on testimony for their existence, some of which are matters of contention between the parties. It is apparent the verdict in this

case finds no fact, and the services of a jury might as well have been dispensed with.

The instruction is faulty in more than one respect. It assumes as true, the attachment suit was commenced in pursuance of the agreement between the attaching and other creditors of Kurka. Upon that question there is not a particle of evidence in the record except that which may arise by inference from the existence of the contract, if in fact it existed before the attachment suit was commenced. The contract is without date, and whether it was executed before or after the attachment suit was commenced is left in grave doubt by the evidence. Defendants assert with great confidence it was executed before that suit was commenced. It must be conceded the argument in favor of that position has force in it, and might with great propriety have been addressed to the jury. On the other hand Le Gros, who was himself a party to it, testified it must have been after the original attachment was levied and before the distress warrant was levied on the goods by Swinburn. Counsel make a point against this evidence, that it was read from the testimony of the witness given on a former trial, before the production of the agreement, but it is not perceived how that fact can militate against it. If it was true then, it is still true. Conflicting as the evidence is on this vital question, the jury should have been permitted to find the fact without the interference of the court.

The instruction is faulty for another reason. It asserts it "is proven in this case, and is not disputed in the evidence, that Coolbaugh, Powers and Wheeler were creditors of Kurka." This statement is not warranted by anything found in the record and is palpably variant from the facts. Defendants' claim was against Le Gros and Kurka, so it was not accurate to say they were "creditors of Kurka." The distress warrant issued and the evidence offered by defendants show the claim defendants were seeking to enforce was against Le Gros and Kurka, and they are estopped by their acts from asserting the contrary. They never claimed to be creditors of Kurka alone.

Another clause of the instruction is still more objectionable. It asserts as a matter of law, the agreement between the attaching and other creditors for the commencement of the attachment suit was fraudulent and void as to other creditors of the debtor. One reason assigned in the argument why the agreement was fraudulent and void is, that it is within the fourth section of the Statute of Frauds, but to bring it within the purview of that statute it should have been added, the agreement was made "with intent to disturb, delay, hinder or defraud creditors or other persons." Without that qualification the instruction is not the law. If the agreement was not fraudulent *per se*, the intent with which it was entered into by the parties signing it, is a question of fact which it was the province of the jury to find from all the facts and circumstances in evidence.

Another argument made against the agreement is, it is against public policy and for that reason is void. The object as expressed in the agreement itself is, that it was for the "benefit of said creditors that the best sum should be realized out of said stock, and proper titles passed to the purchaser without large law expenses." That in itself is not an unlawful purpose, and it is stating the law too broadly to so declare. Unless the testimony should show it was the intention of the parties to use the process of the court for purposes other than that mentioned in the agreement, it is not understood how it would contravene any sound public policy. Clearly if it was simply to avoid litigation and accomplish by a single suit what would otherwise require a multiplicity of actions, incurring large law expenses, and if that could be done without injury to any one, it would not be an abuse of the process of the court.

For the error of the court in giving the instruction it did on behalf of defendants, the judgment is reversed and the cause remanded.

Judgment reversed.

SCHOLFIELD, J.: I think the agreement was *per se* fraudulent as to creditors.

DICKEY AND BAKER, JJ.: We concur with Mr. JUSTICE SCHOLFIELD.

BENJAMIN RICKETSON *et al.*

v.

MARY A. GILES.

1. COVERTURE—*by whom to be relied upon.* Where a *feme covert* guarantees payment of a note of another, or becomes surety, and fails to plead her coverture when sued, and allows judgment to pass against her, and afterwards pays the debt, the principal, when sued by her to recover back the money paid for him, can not shield himself from liability on the ground she might have relied upon her coverture and defeated a recovery against her. The defence of coverture is a personal one, and can be pleaded only by the *feme covert.*

2. GUARANTY—*to hold principal liable, guarantor must sign by request.* A party guaranteeing the payment of a note given to a third person can not recover of the maker, on being compelled to pay the note, if the guaranty was made of his own accord, without a request, express or implied, from the maker.

3. SAME—*when request to guaranty will be implied.* Where a party selling sewing machines, as agent, to another, takes the notes of the purchaser, payable to the principal, in payment, informing the maker that he, the agent, will be required to guarantee the same, and the maker knows the fact that the notes are to be sent to his vendor's principal and had to be guaranteed by his vendor, a request to guarantee the same may be fairly implied.

4. SURETY—*extent of his undertaking construed.* Where a surety signs a bond for his principal, conditioned that the latter shall pay or cause to be paid to the obligee any and every indebtedness or liability then existing or which might thereafter exist or be incurred in any manner by him to the obligee, this will include the liability of the principal to the obligee under a guaranty by the latter of the principal's note at his request, and its payment by the guarantor.

5. Where a party gives bond, with surety, to another, conditioned for his payment to the obligee of any and every liability or indebtedness that might, thereafter, in any manner, exist or be incurred by him, and the principal buys goods of the obligee and gives his note therefor, but payable to a third person,

which he fails to pay at maturity, he and his surety will be liable on the bond for the amount of such note, under a proper state of pleading, whether the obligee has guaranteed the payment of the note or not.

APPEAL from the Circuit Court of Kane county; the Hon. H. H. CODY, Judge, presiding.

Mr. EUGENE CANFIELD, for the appellants.

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

Per CURIAM: This was an action of debt, brought by Mary A. Giles, in the circuit court of Kendall county, against Ricketson and Erasmus D. Bradley, upon the following instrument of writing:

"Know all men by these presents, that Benjamin Ricketson, of Kendall county, Illinois, as principal, and Erasmus D. Bradley, of Kane county, Illinois, as surety, are held and firmly bound unto Mary A. Giles, of the city of Aurora, Kane county, Illinois, in the sum of $800, lawful money of the United States of America, to be paid to the said Mary A. Giles, her representatives or assigns, for which payment, well and truly to be made, they bind themselves, their heirs, executors and administrators, jointly, severally and firmly, by these presents.

"Dated this 4th day of October, 1871.

"The condition of the above obligation is such, that if the above bounden Benjamin Ricketson, his heirs, executors or administrators, shall well and truly pay, or cause to be paid, any and every indebtedness or liability now existing, or which may hereafter in any manner exist or be incurred on the part of the said Benjamin Ricketson to the said Mary A. Giles, whether such indebtedness or liability shall exist in the shape of book accounts, notes, renewals or extensions of notes or accounts, acceptances, indorsements, or otherwise, hereby waiving presentment for payment, notice of non-payment, protest, and notice of protest and diligence upon all notes now or hereafter executed, indorsed, transferred, guaranteed or

assigned by the said Benjamin Ricketson to the said Mary A. Giles, then this obligation to be void, but otherwise to remain in full force and effect.

BENJ. RICKETSON, [seal.]
ERASMUS D. BRADLEY." [seal.]

In the second count of the declaration it was averred, that after the making of said writing obligatory, and before the commencement of the suit, Benjamin Ricketson gave two promissory notes to the Singer Manufacturing Company, one dated January 1, 1873, due in one year, with six per cent interest, for $252.37, and the other dated October 29, 1872, due in nine months, with six per cent interest, amount, $80, the payment of which was guaranteed by the plaintiff, at the special instance and request of the said Benjamin Ricketson. It is also averred, that neither of said notes was paid by Ricketson, and upon the maturity thereof plaintiff was required to pay the same. Two notes, as appears from the evidence, were taken by the plaintiff from Ricketson in payment for machines manufactured by the company and delivered to him. The defendants pleaded the general issue, and a stipulation was signed by the parties that all defences might be put in under that plea, and upon a trial of the cause before the court, a jury having been waived, the plaintiff recovered a judgment for the amount of the two promissory notes described in the declaration, and defendants appealed.

It is first contended, that as the plaintiff was, at the time of the guaranty, a married woman, the contract of guaranty was not binding upon her, and if she voluntarily paid the notes she can not recover the amount so paid from the defendant. We shall not stop to inquire whether the plaintiff could have defeated a recovery on her contract of guaranty by a plea of coverture, if she had interposed that defence, because such a defence, if it existed, was personal to her, and if she failed to take advantage of it, the defendants in this action are in no position to invoke her right to aid them here. If a *feme covert* should sign a note as surety, and fail to plead coverture

when sued, but permit judgment to pass, and afterwards pay the debt, the principal on the note, when sued by her to recover back the money paid for him, could not shield himself behind the fact that she might have relied upon coverture when originally sued.

It is also contended, that the defendants are not bound for the reason the guaranty was not made by the plaintiff at the instance or request of Ricketson. It is, doubtless, true, if the plaintiff, of her own accord, without a request, either express or implied, from Ricketson, guaranteed the notes, she would not be able to recover, under the averments of her declaration; but this was a question of fact for the court to determine, from the evidence, and if there was testimony to sustain the judgment, we can not, under the repeated rulings of this court, interfere.

The plaintiff, in her testimony, said: "The consideration of the notes was sewing machines and findings that I furnished the defendant Ricketson. I was agent for the Singer Manufacturing Company, but I really bought and paid for my machines. Ricketson was my agent for the sale of machines, and these notes were taken by me from him in payment for machines I let him have." On cross-examination she testified: "I took the notes I have produced from him, at the time of their respective dates. I did not put my name on the back of either at the time I received them, but I did put it on afterwards, when I came to send the notes to the company. The company gave me credit for the notes, and when the company returned them to me it charged me with them. * * * I think I told Ricketson that I had to guaranty the payment of the notes that I sent to the company. I don't know as he ever asked me to guaranty the payment of the notes, but I told him I should have to do so at some time, before the notes were returned to me."

William Giles, a witness on behalf of plaintiff, testified that he had told Ricketson that Mrs. Giles had to guaranty the payment of all notes she sent to the company.

From the evidence, it is apparent that Ricketson knew these notes were taken to be sent to the company,—they were made payable to the company,—and it is also clear that he was notified that notes sent to the company by the plaintiff had to be guaranteed by her. If it was not the understanding between Ricketson and the plaintiff that she should guaranty the notes, why should he, when informed that the notes had to be guaranteed, remain silent and interpose no objection whatever? If, therefore, he knew the notes were taken for the company, and that the plaintiff had to guaranty them, it is but a fair conclusion that an implied request was established, on his part, that plaintiff should guaranty the notes. If this be so, then an action for a breach of the condition of the bond could be maintained.

The condition of the bond, as to the liability of the obligors, is very broad. It requires Ricketson to pay any and every indebtedness or liability now existing, or which may hereafter in any manner exist or be incurred, by Ricketson to the plaintiff. This would include the liability that arose to the plaintiff by virtue of the guaranty and subsequent payment of the notes. Independent, however, of these considerations, these notes, although payable to the company, were the property of plaintiff, and were given for a debt due from Ricketson to the plaintiff, and when he failed to pay them, upon maturity, an action accrued on the bond; and had the declaration been drawn with a view to this theory of the case, whether the notes had been guaranteed at the request of the defendant or not, a recovery would have been proper.

The judgment, in view of all the facts, we regard right, and it will be affirmed.

Judgment affirmed.

Statement of the case.

THE HARTFORD LIFE AND ANNUITY INSURANCE COMPANY

v.

HARTWELL GRAY *et al.*

1. LIFE INSURANCE—*on false representations by assured.* No recovery can be had upon a life policy of insurance which is obtained by fraud and misrepresentation on the part of the assured as to material facts affecting the risk, and the age of his parents at their death and the disease of which they died, and the fact whether the brothers and sisters of the assured were all living are material and must be truly stated in the application.

2. Where the assured in his application answers "no" to the question, whether either of his parents, brothers or sisters ever had pulmonary, scrofulous or other constitutional or hereditary disease, the answer assumes his knowledge of the fact, and will preclude the plaintiff, in an action on the policy, from alleging the want of knowledge on the part of the assured as an excuse for not answering correctly.

3. SAME—*knowledge presumed of answers in application.* There is no presumption that an applicant for a policy of insurance was ignorant and misinformed of the contents of the application signed by him, but it devolves upon those alleging such ignorance and want of information to make proof of it. This proof may be found in the peculiar circumstances shown as attendant upon the transaction, but is not established by the mere fact that the assured signed a paper written out by another, when no attempt is made to mislead or deceive him.

4. PLEADING AND EVIDENCE. In an action on a life policy of insurance issued upon a written application, which is destroyed, when it is stipulated that the defendant may show any valid defence under the general issue the same as if specially pleaded, the pleadings will not bind the defendant to strict proof of any particular expression or phraseology in the application.

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

This was an action of assumpsit, brought by Hartwell Gray and Stephen Lambert, executors of the last will and testament of Charles A. Morey, deceased, against the appellant, upon a policy of insurance upon the life of said Morey.

The defendant pleaded the general issue, and it was stipulated, that under this plea the defendant might introduce evidence and prove any valid defence to the cause of action set

up in the plaintiff's declaration as fully as though such defence had been specially pleaded; and that any and all causes of action arising on the policy declared on might be litigated under the declaration filed, without regard to any matter of form or technical objection.

A trial was had, resulting in a verdict in favor of the plaintiff for $5590 damages. The defendant moved for a new trial, whereupon the plaintiffs entered a *remittitur* of $70, and the court then overruled the motion for a new trial and rendered judgment against the defendant for $5520.

Messrs. HITCHCOCK, DUPEE & JUDAH, for the appellant.

Messrs. BONNEY, FAY & GRIGGS, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This appeal is prosecuted for the purpose of obtaining a reversal of a judgment of the circuit court of Cook county against appellant and in favor of appellees, on a certain policy of life insurance.

The policy is dated June 15, 1869, and purports, "in consideration of the representations made in the application for this policy and of the quarterly premium * * * to be paid," to assure the life of Charles A. Morey for the benefit of his heirs, in the sum of $4000, for the term of his natural life. It contains the provision that it "is issued and accepted by the assured upon the following expressed conditions and agreements:

"If the declaration made in the application for this policy, or if any statement respecting the person or family of the one whose life is hereby assured, submitted by the assured to this company, and upon the faith of which application and statements this policy is issued, shall be found in any respect untrue, then and in every such case, all right or claim to the amount assured by this policy shall terminate and be forfeited, and the company shall not be liable for any payment under

the terms hereof, excepting the cash value of the policy, and any additions thereto, such cash value to be paid at the death of the assured and to be computed at the time of such forfeiture, and upon an assumption of mortality at the rates in the actuary's table, and at a rate of interest at four per cent per annum."

The evidence shows that the issuing of the policy was preceded by a written application on behalf of and signed by the assured, which has been since destroyed by fire. This is not seriously controverted by appellees, but there is controversy as to its precise terms. Appellant produced and gave in evidence, on the trial, what it claims was an exact copy of this application. It contains the following questions and answers:

"10. Have you ever had spitting of blood, inflammation of lungs, consumption, or diseases of any vital part? A. None whatever."

"13. Do you now possess a sound constitution and good health? A. Yes."

"15. Are your parents living or dead? A. Both dead."

"The causes of their death and their ages at time of death? A. Father died of fever, aged fifty-eight; mother of fever, fifty-four."

"How many brothers and sisters have you had? A. One brother and three sisters; two sisters are living, with good health; brother's health is excellent; my grand parents are dead; don't know the cause of their death; I most resemble my father."

"17. Have either of your parents, brother or sisters ever had pulmonary, scrofulous or any mental or constitutional or hereditary disease? A. No."

On the same page, at the conclusion of the questions and answers, is the following:

"DECLARATION.—It is hereby declared and warranted, that the above answers and statements are true; and it is agreed that this declaration and warranty shall be the basis of the

contract between the undersigned and said Hartford Life and Annuity Insurance Company, and that the undersigned will accept a policy for the amount stated above, subject to the conditions, stipulations and provisions prescribed therein.

Dated at Belvidere, Ill., this 4th day of June, 1869.

CHARLES A. MOREY.

Signed in the presence of Capt. B. Wheeler, witness."

It was stipulated by the parties, on the trial, among other things, as follows:

"In case defendant shall, during the trial, reach a point where it becomes material to prove whether the question in any application that shall be proved to have been made by said Morey to said company for said policy, relating to consumption or pulmonary diseases, in said Morey or his parents, or questions relating to the causes of death of such parents, called for information material to the risk on the life of the insured under said policy, then plaintiffs admit that the same are material, but do not admit the existence or authenticity of such application."

The assured died September 24, 1870, but before his death appellant had declined to receive the premiums on the policy, on the ground that the policy had been obtained by fraud and misrepresentation.

The evidence is uncontradicted and ample that the brother of the assured was dead, when he made the application for the policy—that the parents of the assured did not die of fever—the father at the age of fifty-eight and the mother at the age of fifty-four, but that, on the contrary, both parents died of pulmonary consumption more than twenty years before the application, the mother dying some two or three years later than the father, and the father being, at the time of his death, only forty-six years of age. The materiality of these representations, if made, being conceded and their falsity clearly proved, it only leaves us to inquire whether they were, in fact, made.

As before observed, that some kind of a written application

for the policy was made, is clearly proved, and not seriously controverted. One witness swears that the copy produced is an exact copy of the application of the assured. The only evidence that we regard as of any importance tending to contradict this, is that of Dr. Angell, who says that, by request of appellant's agent, he, as a physician, examined the assured for the policy in litigation and indorsed his certificate on the application of the assured. He thinks he was present when the assured signed the application. He says the questions in this copy are nearly the same as in the original application, but that the answers differ in this, that in the original the answer to the question, "have you ever had any of the following diseases," the answer instead of being, as in the copy, "none whatever," was, "none whatever—except bronchitis—a slight bronchitis." He says his certificate, indorsed on the original application, differs in these respects from that on the copy, that in the question, "has he ever had any severe, injurious illness," I asked him that question and he said, "no;" I told him at the time that I wanted him to tell me, as I had not treated his case. The words, "except a slight bronchitis," are omitted from this. The answer I wrote was, "except a slight bronchitis." To the question, "have his parents, brothers or sisters ever been afflicted with pulmonary or other diseases, hereditary in their nature," and it says, "has not," I put two dots. I answered another question above, "has he any predisposition, hereditary or acquired," "has not to my knowledge," and when I came to this question, I dotted it instead of writing again. I don't remember any other respect in which this copy differs from my certificate."

He further says, that his *impression* is, that in the original application of the assured he stated that one of his parents died from fever, and that the other he did not know. He also states, that his examination of the assured was commenced on one day and not concluded until the next, and that the application and his certificate thereon were not signed until the second day. He does not know whether the assured read

the application or not,—thinks the answers were written out by appellant's agent. He himself, however, read some portions of the application to the assured.

On cross-examination he says, appellant's agent requested him to look over the application, and he thinks he did so before the assured signed it; that he asked the assured if he had ever had any of the diseases mentioned in the question, and he said, "none, except bronchitis;" that appellant's agent then said, "you need not put that in," so witness modified it, and put "slight bronchitis" in his certificate. He concludes thus: "The certificate and application in evidence are the same as those I saw, so far as I can remember, except as I have stated."

Assuming that the jury were warranted in giving implicit faith to the testimony of this witness, so far as it amounts to a statement of what the certificate contained, it will be observed the modifications in appellant's evidence are but slight, and of no serious consequence, so far as affects the merits of the present controversy. It is not claimed by appellant that there was fraud or misrepresentation in respect to the diseases with which the assured had been afflicted previous to making his application. The fraud and misrepresentation chiefly complained of, are in respect to the diseases of which his parents died, and the respective ages of his parents at the time of death.

It must not be understood that, in the application, the *assured* stated, in answer to the question, "Have his parents, brothers or sisters ever been afflicted with pulmonary or other diseases hereditary in their nature?"—"Has not, to my knowledge." This was the answer of the witness alone, to the question propounded to and answered by him, and set forth in the certificate which he indorsed on the application as examining physician. The answer of the assured to the question, "Have either of your parents, brothers or sisters ever had pulmonary, scrofulous, or any mental or constitutional or hereditary disease?"—was "No," and this stands

uncontradicted by the witness. The witness might, doubtless, answer, "not to my knowledge," to the somewhat similar question propounded to him, quite truthfully, for it does not appear that he had any knowledge whatever of the parents or brothers or sisters of the assured. But the assured ought to have had the knowledge to answer this question intelligently and accurately, and his answer assumes that he had such knowledge, and, therefore, precludes the right of appellees to allege his want of knowledge as an excuse for his answer.

The *impression* of the witness that the assured only said that one of his parents died of a fever, and that he did not know of what the other died, does not amount to evidence. He does not state it as a fact, nor even as an indistinct recollection of a fact, but an impression only,—whether originating from a dream, or otherwise, is an unimportant matter of conjecture. Witnesses can only testify to what they recollect, not to that of which they may be impressed, only.

There is no question, here, of contradicting written evidence by parol. The question is simply, what was the writing? And the pleadings bind appellant to the strict proof of no particular expressions or phraseology. If the written application was as described by Dr. Angell, and not as described by appellant's witness, appellant is equally entitled to the benefit of it, as it is shown to have been.

We held, when the present case was before us at a former term, *Hartford Life Ins. Co.* v. *Gray et al.* 80 Ill. 28, that the genuineness of a signature to an application for a policy being proved, there was no presumption that the applicant was ignorant and uninformed of the contents of the application, but that it devolved upon those alleging such ignorance and want of information to make proof to sustain the allegation. This proof might, undoubtedly, be found in the peculiar circumstances proved as attendant upon the transaction, but there should be proof, other than the mere fact that the party signed a paper written out by another, to show that he did not know and comprehend the nature and effect of his act.

Instead of the evidence, here, warranting the belief of ignorance in the assured as to the contents of his application, the effect is directly the reverse. There is no attempt at proof that any effort was made to deceive or mislead him. The application was pending for two days, during which time the assured was examined and re-examined by the physician, and a portion, at least, of the application was also read to him by the physician before he signed it. The deliberation and care manifested by this medical examination preliminary to the completion of the application, was, of itself, ample notice that correctness and fullness in statement as to all that affected his liability to disease were required. He is not shown to have been unable to read, or wanting in ordinary intelligence. The statements of the application were before him, and no effort was made to prevent his reading them or having them read by others as often as he chose. His act has every appearance of having been wholly uninfluenced, voluntary and deliberate.

The evidence that both parents died of pulmonary consumption, of which they had each suffered for several years before their respective deaths, is all one way. It is proved by relatives, neighbors and physicians, and it is not reasonable to assume that the assured was even ignorant of this fact, for he seems to have been living with or near his parents during the time they were thus afflicted. There is no effort to prove that either of them died of a fever, or were even ever sick of a fever. The disease of which they died is generally believed to be hereditary, and it is impossible to escape the conviction that the truth, here, was withheld, because its communication would have either defeated the application for the policy, or materially increased the premiums for the risk.

We think the judgment is clearly unwarranted by the evidence, and it must, therefore, be reversed and the cause remanded.

Judgment reversed.

JOHN JENKINS

v.

ELIZABETH JENKINS.

1. DIVORCE—*allowance of solicitor's fees after appeal.* Under the statute, the circuit court, after an appeal is perfected from a decree of divorce in favor of a wife, has the power to make an order, on motion of the wife, for the allowance of solicitor's fees for attending to her case in the Supreme Court.

2. SAME—*allowance of solicitor's fees does not depend upon wife's absolute right to divorce.* It has never been regarded as a prerequisite to obtaining a decree for temporary alimony or solicitor's fees in favor of a wife seeking a divorce, that she should establish, to the satisfaction of the court, that she is entitled to a divorce. If she is without means to prosecute her suit, and it appears that she has probable grounds, this will be sufficient for an order requiring the defendant to pay her solicitor's fees.

3. SOLICITOR'S FEES—*whether excessive.* Where an appeal was taken by a husband from a decree of divorce to this court, and pending the appeal the circuit court ordered the husband to pay a solicitor's fee of $300 to attend to the wife's case on the appeal, from which order the husband appealed, it was *held*, that the fee allowed was not so excessive as to justify a reversal of the order.

4. REVERSAL *of decree for divorce—its effect on order to pay solicitor's fees.* The reversal of a decree of divorce in favor of a wife, by this court, does not require a reversal of an order of the circuit court requiring the husband to pay a sum for the payment of the fees of the solicitor of the wife, for services in presenting her case on the appeal.

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

Mr. ARTHUR D. RICH, for the appellant.

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

On the 8th day of December, 1875, a decree for divorce was rendered in favor of appellee in the circuit court of Cook county. The decree contained a provision for alimony and solicitor's fees. The defendant in the case prayed for and obtained an appeal to this court. While the appeal was pend-

ing in this court, and on the 21st day of October, 1876, appellee entered a motion in the circuit court for a further allowance of solicitor's fees to be used in the payment of her attorneys for attending to her case in this court. The court sustained the motion and awarded complainant $300. From this order or judgment appellant also appealed.

Three grounds of reversal are relied upon: first, that the court had no jurisdiction or right to entertain the motion and order solicitor's fees after the cause had been removed into the Supreme Court; second, that the court erred in decreeing the allowance, because no sufficient ground for divorce existed; third, that the amount allowed was excessive.

In regard to the first point relied upon, were it not for sec. 15, chap. 40, R. L. 1874, page 421, we would have no hesitation in holding that appellant's position was well taken,—that after the appeal was consummated and the cause was removed to this court, the circuit court had no right to require appellant, by decree or otherwise, to pay attorney or solicitor's fees; but the section of the statute referred to in plain and express terms confers the power upon the circuit court, and the law as enacted by the Legislature must control.

As to the second question presented, we are not aware that it has ever been regarded as a prerequisite to obtaining a decree for alimony or solicitor's fees, pending a divorce suit, that the complainant should establish to the satisfaction of the court that she was entitled to decree for divorce. Where a bill is pending for divorce and the wife is without means to prosecute her suit, and it appears to the court that complainant has a probable ground for divorce, it has always been regarded proper for the court to enter an order requiring the defendant to pay solicitor's fees.

It is true, this court, on the hearing of the appeal, held the evidence insufficient to sustain a decree for divorce, yet the facts before the court were, doubtless, sufficient to authorize the court to require the payment of solicitor's fees to enable complainant to present her case fairly in court. Sec. 15, R. L.

1874, page 421, provides that in all cases of divorce, the court may require the husband to pay to the wife, or to pay into court for her use during the pending of the suit, such sum or sums of money as may enable her to maintain or defend the suit. Under this statute it does not seem to be required that a wife should establish to the court that she was entitled to a decree before an order for solicitor's fees could be entered; but, independent of the statute, it has been the practice for many years, in courts of chancery, when a case was pending for divorce, to enter an order or decree requiring the payment of solicitor's fees without requiring the wife to establish absolutely the fact that she was entitled to a divorce. See Bishop on Marriage and Divorce, vol. 2, sec. 398, and cases there cited.

In regard to the last point, we do not regard the allowance of $300 so excessive as to authorize us to interfere. No doubt a smaller sum might have secured the services of attorneys capable of prosecuting the case in this court, yet the amount is not so far out of the way as to require a reversal of the judgment on that account alone.

This disposes of the questions properly arising upon the record. It has, however, been suggested by counsel, in argument, that the decree for divorce was reversed by this court, which necessitates a reversal of this order. The mere fact that the decree of divorce was reversed, does not require a reversal of this order; in other words, the reversal of the decree is not a ground of reversal here. Appellee, no doubt, obtained the services of counsel to present her case in this court on the faith of the order that was entered requiring the payment of solicitor's fees, and it would now be manifestly unjust, after the services have been rendered, to vacate the order on the ground that appellee was not successful in her action.

No ground is perceived for reversing the order, and it will be affirmed.

Judgment affirmed

Mr. JUSTICE SCOTT: I do not concur in this decision. Our former decision ought to control this case. *Jenkins* v. *Jenkins*, 86 Ill. 340.

THE MIDLAND PACIFIC RAILWAY COMPANY *et al.*

v.

JOHN J. MCDERMID *et al.*

1. AMENDMENT—*pleas to the jurisdiction.* Under the statute of this State the court may with propriety grant leave to amend pleas to the jurisdiction of the court as to the defendants.

2. SERVICE OF PROCESS—*on agent of foreign corporations.* Where a foreign corporation does business and has agents in this State with property, service may be had upon such corporation through such agents or officers doing business here, the same as upon domestic corporations.

3. But where a foreign corporation does not transact its business in this State, and has no office or agents located in this State, service of process upon one of its officers or agents while temporarily in this State on private business, or passing through it, will confer no jurisdiction on the courts over such corporation.

4. PLEA *to the jurisdiction.* A plea to the jurisdiction of the court, not as to the subject matter of the suit, but only as to the person of the defendant, need not allege what court has jurisdiction, but it is sufficient if it shows the court in which the suit is pending has not jurisdiction of the defendant.

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

This was an action on the case, brought by plaintiffs, in the Superior Court of Cook county, against the defendant corporations, to recover for a loss they allege they met with from making advances in their business, as commission merchants, upon bills of lading issued in the name of the Midland Pacific Railway Company in such form that they would be and were taken to be full or average car loads of wheat containing the usual number of pounds or bushels, when, in truth and in fact, they fell very far short of such average.

The return of the sheriff, upon the summons issued, is as follows: "Served this writ on the within named, the Midland Pacific Railway Company, by reading the same and delivering a copy thereof to J. N. Converse, general superintendent of said company, the 26th day of January, A. D. 1876, the president of said company not found in my county. Also served this writ on the within named, the Nebraska Railway Company, by reading the same and delivering a copy thereof to J. N. Converse, general superintendent of said company, the 26th day of January, A. D. 1876, the president of said company not found in my county."

Separate pleas in abatement to the jurisdiction of the court were filed by each defendant. In the plea filed by the Midland Pacific Railway Company, it is averred that company was "a corporation aggregate, existing and doing business under and by virtue of the laws of the State of Nebraska, and not elsewhere, with its principal office in the city of Lincoln, county of Lancaster, and State of Nebraska, and that, at the time of the commencement of said suit and service of summons on John N. Converse, the alleged general superintendent of the said Midland Pacific Railway Company, said Converse was not the general superintendent of the said Midland Pacific Railway Company, and was not at that time in the State of Illinois on business of defendant, * * * but was temporarily in said Cook county and passing through the same to his home and residence * * * in the State of Nebraska."

The plea filed by the Nebraska Railway Company was, in substance, the same as that filed by its co-defendant, except it contained no averment Converse was not its general superintendent, but it did contain an additional averment, "it had no property of any kind or nature whatsoever in the State of Illinois."

To these pleas a demurrer was sustained, but, before final judgment was rendered, defendants asked leave of the court to amend their respective pleas by the insertion in each of them of the following: "That at and prior to the commence-

ment of this suit, the defendants were respectively corporations existing and doing business under and by virtue of the laws of the State of Nebraska, and did not at that time exist or do business or have any property or offices or any agent or agents of any kind or nature whatsoever in the State of Illinois." But the motion was denied, and that decision, together with the decision of the court sustaining the demurrer to the pleas as first filed, are among the errors assigned. On sustaining the demurrer to the separate pleas of defendants, the court assessed plaintiffs' damages and rendered final judgment for the same, and defendants bring the cause to this court on appeal.

Messrs. SMALL & MOORE, for the appellants.

Messrs. DENT & BLACK, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Leave was asked by defendants before final judgment to amend their pleas. Under our statute, as construed by the former decisions of this court, the leave asked might, with great propriety, have been granted. *Humphrey* v. *Phillips*, 57 Ill. 132; *Drake* v. *Drake*, 83 Ill. 528. But it is a matter of no consequence, as the amendment proposed would not essentially aid defendants' pleas.

The decision of this case depends mainly on the construction that shall be given to that section of the statute that provides for obtaining service of process upon corporations. It is as follows: "An incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought. If he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal director, engineer, conductor, station agent or any agent of said company found in the county." Practice Act, sec. 5, Rev. Stat. 1874.

It was held in *Mineral Point Railroad Co.* v. *Keep,* 22 Ill. 9, the act of 1853 on this subject, which is, in substance, the same as the section cited, was not confined by its terms to domestic corporations, but was designed to procure service upon railroad companies having their offices and officers in foreign States, and yet do business and have their agents and their property in this State. Conceding the correctness of the rule stated, as we do, it has no application to the case in hand. Defendants had no agents in this State. It is alleged, and the demurrer, of course, admits the same to be true, that defendants are corporations "existing and doing business under and by virtue of the laws of the State of Nebraska, and not elsewhere," and that Converse, upon whom the summons was served, as superintendent of the defendant companies, was not at the time in Cook county upon any business of defendants, but was temporarily passing through the county of Cook "on his way to his home and residence in the State of Nebraska." There being no local agents of defendants in this State, there could be no one on whom service of process could be rightfully had. According to the pleas, defendants existed and were doing business in the State of Nebraska, and not elsewhere. That averment excludes the idea they were doing business in this State, and hence had no agents in the State within the jurisdiction of our courts. It was certainly never intended that service could be had on a foreign corporation by leaving a copy of the process with any officer or agent of the company that might chance to pass through the State on his private business. Had the legislature intended to so provide, it would certainly have used more apt words to express that intention. There is great justness in the construction heretofore given to this clause of the statute, that where foreign railroad companies do business in this State and have here local agents, service of process may be had on them in like manner as upon domestic companies. That is the broadest construction that can be given to this section of the statute, and it does not authorize service of process upon foreign cor-

porations by leaving a copy thereof with any officer or agent that might be passing through the State on his private business, and thus bring such companies within the jurisdiction of our courts.

As the pleas were not to the jurisdiction of the court over the subject matter of the suit, but only as to defendants, we do not understand it was necessary the pleader should allege what court had jurisdiction. It is enough, it appears the court did not have jurisdiction over defendants or either of them.

The judgment will be reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE WALKER: I am unable to concur in the decision in this case. I hold that the statute authorized the service, and that it was good, and the court thus acquired jurisdiction to try the case.

THE PROTECTION LIFE INSURANCE COMPANY

v.

AMELIA DILL *et al.*

1. EVIDENCE—*secondary.* Where a policy of insurance sued on is not in the possession of the plaintiff but of the defendant, and is mislaid so that it can not be produced, parol evidence on the part of the plaintiff is competent to establish the execution and contents of the policy, and if the evidence tends to prove such facts, there is no error in refusing a motion to exclude the same.

2. Where a policy of insurance is shown to have been lost, and parol evidence of its contents given to the jury by the plaintiff, it is error to refuse to allow the defendant to introduce in evidence a book of the company containing the date of the policy, amount of insurance, to whom payable, name of the assured, etc., which is shown to be a substantial copy of the policy made by an officer of the company, and taken from the policy before its delivery. Such book, with the testimony of the officer who made the entry from the policy, seems to be the best secondary evidence of the contents of the policy.

3. SAME—*books of private corporation.* The books of an insurance company organized on the mutual plan, whereby a party assured becomes a member, are competent evidence against the holder of a policy, though it might not be against a stranger.

4. INSTRUCTION—*as to evidence.* The court has no right to instruct the jury that there is no evidence to prove a certain fact where there is any evidence tending to prove such fact, and thus take such evidence from the consideration of the jury.

5. SAME—*singling out isolated fact.* An instruction is faulty and properly refused which singles out an isolated fact, and especially calls the attention of the jury to it.

6. SAME—*as to degree of evidence required.* There is no error in refusing an instruction in a civil suit which, in effect, tells the jury that certain facts must be established by satisfactory evidence and by a preponderance of the evidence, or the plaintiff can not recover. Such an instruction is calculated to mislead, as indicating that more than a bare preponderance is necessary to a recovery.

7. NEW TRIAL—*newly discovered evidence.* Where it appears, on a motion by the defendant for a new trial, that diligent search had been made for the instrument in writing sued upon, when the suit was brought, and could not be found before the trial, and recovery by the plaintiff, and that it had been subsequently found, and showed clearly that the plaintiff had no cause of action, as it was payable to another whose receipt was indorsed thereon, a new trial should be granted on the ground of such newly discovered evidence.

8. On a motion for a new trial on the ground of the discovery of new evidence since the trial, the question of the forgery of such evidence, if in writing, can not be tried, but it must be treated as genuine, for the purposes of the motion.

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

Mr. ARNOLD TRIPP, and Mr. E. B. SHERMAN, for the appellant.

Mr. HENRY B. MASON, for the appellees.

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

The policy declared upon was not in the possession of appellees, and was not introduced in evidence on the trial, but

parol evidence was offered and admitted to establish the execution of the policy and its contents. While the parol evidence introduced was not as satisfactory and conclusive as the policy itself, had it been produced, yet the evidence was competent, as tending to prove the existence and contents of the policy declared upon, and the court did not err in overruling the motion of appellant to exclude the proof from the jury.

The appellant, after making proof of the loss of the policy, offered in evidence a book of the company, known as the "policy register," which contained the date of the policy, amount of insurance, to whom payable, name of assured, etc. This proof the court excluded. The book contained a substantial copy of the policy. The entry was made by an officer of the company, in a book provided for that purpose, from the policy itself, before it left the office of the company and before it was delivered to the assured, and as the policy was lost, and its contents had to be established by secondary evidence, we are aware of no reason why the policy register was not competent evidence. Indeed, the book, in connection with the evidence of the officer of the company who made the entry therein from the policy, would seem to be the best secondary evidence of the contents of the policy. The company, as appears, was organized on the mutual plan. The assured, on receiving the policy, became a member of the corporation, and while the books of the company might not be competent evidence against a stranger, yet, under the decision in *Chase* v. *The Sycamore and Courtland R. R. Co.* 38 Ill. 215, the books would be evidence against a member and policyholder of the company, and we are of opinion the court erred in excluding this evidence.

The court refused instructions numbered three, four and seven, asked on behalf of appellant, and this decision is relied upon as error.

The third instruction tells the jury that there is no evidence before them to prove the execution of the policy. Had there been no evidence whatever before the jury bearing upon the

question, perhaps the instruction might have been proper; but there was evidence tending to prove the execution of the policy, and the court had no right to instruct in such a manner as would take that testimony from the consideration of the jury.

The fourth instruction was properly refused, if for no other reason, on the ground that an isolated fact was singled out and the attention of the jury specially called to that fact. Such instructions have often been condemned by this court; and upon this question we need but cite *Chittenden* v. *Evans*, 41 Ill. 251, which would seem to be conclusive upon the question.

The seventh instruction, in effect, told the jury that certain facts must be established by satisfactory evidence and by a preponderance of the evidence, or the plaintiff could not recover. An instruction of this character was liable to mislead the jury. A preponderance of evidence was sufficient to entitle the plaintiff to a verdict, but had this instruction been given, the jury would, no doubt, have concluded, from the language used, that something more was required.

As neither of the instructions was correct in principle, the court did right in refusing them.

After the verdict was rendered, appellant entered a motion for a new trial, on the ground of newly discovered evidence. The court overruled the motion, and this decision is assigned for error. From the affidavit filed in support of the motion, it appears that, before the trial, appellant had made search for the policy, in the office of the company, in all places where such documents were kept, but after careful and diligent search it could not be found. After the trial, the policy, upon a search for other papers, was found in the vault of the company,—not in the place where such papers were usually kept, but in a box in the vault marked "Proof of loss, December 1, 1875." It further appears, that the policy had been placed in that box of the vault by mistake,—that the contents of the box had been examined before the trial and the policy was

not found, because concealed in other papers. The policy was produced and made a part of the affidavit, and the loss appears to be payable to the husband of Anna Dill, and was assigned by him to Martin Miller, who received from the company the full amount of the loss, and receipted for the same upon the policy.

From the affidavit it clearly appears appellant was guilty of no negligence in failing to produce the policy on the trial. Diligent search was made in all places where such papers were kept, and it could not be found; nor can it be said this newly discovered evidence was cumulative, merely. The main controversy in the case was, whether the policy was payable to appellees or to the husband of the assured. The policy itself would be the most important proof upon that point. Indeed, if the policy which Anna Dill obtained from the company was payable to her husband, appellees could not recover. It is true, courts reluctantly grant new trials on newly discovered evidence, but in this case justice seems to demand it should be done. In *Wilday* v. *McConnell*, 63 Ill. 278, the finding of a lost or mislaid receipt subsequent to a verdict, was held to be sufficient ground for vacating a verdict and granting a new trial. The reason for a new trial here seems to be stronger than in the case cited. We are, therefore, of opinion, the court erred in denying the motion.

It is, however, suggested, that the newly discovered evidence is a forgery, the names of the payees being fraudulently altered. This question we can not try on affidavits or a motion for a new trial. It will properly arise on the trial of the cause upon its merits, where it can be investigated in a manner which the importance of the question demands.

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

Judgment reversed.

GEORGE W. ALDERMAN *et al.*

v.

THE SCHOOL DIRECTORS, etc.

1. SCHOOL DISTRICT—*legality of, how questioned.* The legality of the formation of a school district can not be inquired into in a collateral proceeding, but in such proceeding the district must be taken to have been rightfully formed. The only mode in which an alleged illegality can be inquired into and taken advantage of is by an information in the nature of a *quo warranto.*

2. In an action of trespass by school directors for breaking into a school-house in their possession, brought before a justice of the peace, under the plea of *nul tiel corporation* it is sufficient for the plaintiffs to show a *de facto* corporation or district, and they are not bound to show that the district was legally formed, to maintain the action.

3. TRESPASS—*school directors may maintain.* School directors in the actual occupancy of a school-house for school purposes, may maintain trespass for breaking and entering the same by an unauthorized person, although the legal title to the property may be vested in the trustees of schools,—and temporary occupation of the house by the defendants, through devices to obtain possession, will not take away the right of action in the directors.

APPEAL from the City Court of the City of Aurora; the Hon. FRANK M. ANNIS, Judge, presiding.

Messrs. BOTSFORD & BARRY, for the appellants.

Mr. N. F. NICHOLS, and Mr. A. J. HOPKINS, for the appellees.

Mr. JUSTICE BAKER delivered the opinion of the Court:

This is an action of trespass, commenced before a justice of the peace of DuPage county, by appellees, the school directors of district No. 5, township 37, ranges 10 and 11, in the counties of Will and DuPage, against appellants, for breaking and entering into a school house located in range 11 in DuPage county. The case, by appeal and subsequent change of venue, came into the City Court of Aurora, where, at the March term, 1877, a trial was had, resulting in a judgment for $50 against appellants.

The first and principal point made by appellants is, in substance, that a plea of *nul tiel corporation* is a plea in bar, and when interposed in bar, operates as a special traverse of the averment the plaintiff is a corporation and puts it upon proof of that fact, and even goes further and questions the right of the plaintiff to sue in the name in which it has sued, and that on the trial of a case appealed from a justice of the peace written pleadings are not required, and it was necessary, before the plaintiff could recover in this action, it should prove its legal corporate existence. And the conclusion is reached by counsel, from a consideration of the law and the evidence in the record, there was, and under the statute could be, no such legally formed and legally existing corporation as the appellee district.

In the view we take of this case it is not necessary or expedient for us to determine this issue. The evidence, at least, does show that for some thirty years, since 1846, the appellee district has claimed to be a legally organized union district. The people have continuously elected directors, some from the territory in the one county and some from the territory in the other county. These directors have levied and collected taxes for school purposes, have employed teachers and have carried on and governed the schools, and have sold and built school-houses, and in general have performed all the duties and have exercised the powers of a legally organized district. If not a *de jure* it was and is at least a *de facto* district.

It was held by this court in the case of *Trumbo* v. *The People*, 75 Ill. 562, that notwithstanding the fact a school district has been illegally formed, in violation of a statutory provision, yet, in a collateral proceeding, the legality of the formation of the district can not be inquired into, but it must be taken as having been rightfully formed, and that the only mode in which such illegality can be inquired into and taken advantage of, is by information in the nature of a *quo warranto*.

The only other point we deem it necessary to notice is, as to the possession of the *locus in quo*. The evidence shows the school-house was built by the predecessors in office of the appellee directors, and that these predecessors and their successors had maintained a school there, from year to year, continuously, down to the last of March, when the term closed; that at the time of the alleged trespass, about the middle or latter part of April, the appellee directors were occupying it with a school managed and controlled by them, and in charge of a teacher employed and paid by them. We intimated in the case of *Barber* v. *Trustees of Schools*, 51 Ill. 397, that school directors in the actual occupancy of a house by a school, when a trespass is committed, may maintain an action of trespass. By the statute the supervision and control of school-houses is expressly vested in the directors, and they may grant the temporary use of them, when not occupied by schools, for certain specified purposes, and the teachers and pupils are under their immediate control, and it is difficult to see how they could under any circumstances successfully perform the functions required of them, without they have the right to maintain such action. How, otherwise, could they hold possession than by a school under their control and the house yet be occupied for the purposes for which it was intended?

Between the time the winter school was closed and the trespass, there appear to have been various efforts on the part of appellants, by various devices, to get possession of the school-house, and counter moves on the part of appellees to regain possession. These several operations of removing and changing locks, and getting in at the windows, and temporary occupations, strike us as being of but little importance and of no signification whatever. The legal title of the property was in the trustees of schools, but we are wholly unable to perceive how such fact vested the legal title in appellants and thus clothed them with constructive possession. In fact the actual possession was, at the time, in appellees, and was adverse, at least to the claim of appellants.

We are of opinion the damages assessed by the jury are not, under the circumstances of this case, excessive.

The judgment of the court below is affirmed.

Judgment affirmed.

DOUGLAS D. LOWRY

v.

SYLVIA L. COSTER.

1. CHANGE OF VENUE—*from circuit to city court.* On granting a change of venue by the circuit court, the court may send the cause to some other court of record of competent jurisdiction, in the same or some other convenient county, to which there is no valid objection. A civil cause may be sent from the circuit court of Kendall county to the City Court of Aurora.

2. SAME—*right to object because fees not paid.* Where a defendant obtains an order for a change of venue to another court upon condition he pays the clerk the expenses attending the change within a specified time, and he fails to pay such charges, and the clerk nevertheless makes out the necessary record and transmits the same with the papers, the defendant can not take advantage of his own wrong or neglect to pay to defeat the change and have the cause remanded back.

3. ERROR—*when no ground of reversal.* Where the whole record shows that no evidence was admitted or excluded on the trial calculated to defeat the ends of justice or prevent a fair, impartial verdict, this court will not reverse for slight or technical errors in respect to the admission of evidence.

4. EVIDENCE—*parol, to prove marriage.* In a civil action, record evidence to prove a marriage is not necessary, but it may be shown by parol, or proved by reputation, declarations and conduct of the parties, and other circumstances usually accompanying that relation.

5. EXEMPLARY DAMAGES — *suit by wife for injury from intoxication of her husband.* In a suit by a wife against a party to recover for an injury in her means of support in consequence of the habitual intoxication of her husband from liquors sold him by the defendant, if actual damages are shown, then the jury may allow exemplary damages.

6. SAME—*as to character of exemplary damages—former decision.* There is no distinction between exemplary damages and damages allowed as a punishment. In so far as the case of *Meidel* v. *Anthis*, 71 Ill. 243, declares a different rule, it is overruled.

APPEAL from the Appellate Court of the Second District; the Hon. EDWIN S. LELAND, presiding Justice, and the Hon. JOSEPH SIBLEY, and the Hon. NATHANIEL J. PILLSBURY, Justices.

Mr. B. F. PARKS, and Mr. PAUL G. HAWLEY, for the appellant.

Mr. RANDALL CASSERN, for the appellee.

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

This was an action on the case, brought by Sylvia L. Coster, in the circuit court of Kendall county, against Douglas D. Lowry, under the Dram-shop act, to recover for injury in her means of support in consequence of the habitual intoxication of her husband, Philander C. Coster, from intoxicating liquors sold him by the defendant. On a trial of the cause in the City Court of Aurora, before a jury, to which the venue had been changed by the circuit court on the application of the defendant, the plaintiff recovered a judgment for $1000, which, upon appeal, was affirmed in the Appellate Court. The defendant, however, not being satisfied with the decision of the Appellate Court, has prosecuted an appeal to this court.

The first error relied upon is, that the circuit court had no right to change the venue of the cause to the City Court of Aurora. Section 191, Rev. Stat. 1874, page 345, provides that city courts shall have concurrent jurisdiction with the circuit courts within the city in which the court is located, in all civil cases, and in all criminal cases except treason and murder, and in appeals from justices of the peace in the city. Section 2 of the Venue act, Rev. Stat. 1874, page 1093, provides that when a change of venue is granted, it may be to some other court of record of competent jurisdiction, in the same or some other convenient county to which there is no valid objection. Under these provisions of the statute, we perceive no reason why the venue might not properly be

changed to the city court. It was a court of record of competent jurisdiction, which is all the statute requires.

Section 13 of the Venue act declares: "The order shall be void, unless the party obtaining a change of venue shall, within fifteen days, or such shorter time as the court or judge may prescribe, pay to the clerk the expenses attending the change." The expenses attending the change were not paid by the defendant. The clerk, however, made out the necessary record, and forwarded all the papers to the city court, where the defendant entered a motion to remand to the circuit court, because the costs had not been paid. The defendant could not take advantage of his own wrong. It was his duty to pay the costs. Perhaps the other side might have availed of his failure to do so, but the defendant could not. If the papers were transmitted to the city court, and the plaintiff made no objection on the ground the costs had not been paid, defendant had no right to make any objection.

Several objections are urged to the decisions of the court during the trial on the admission and exclusion of evidence. While it may be true that the technical rules of evidence may not have been strictly observed, yet, after a careful examination of the whole record, we fail to perceive that any evidence was admitted or excluded which would defeat the ends of justice, or prevent a fair, impartial verdict in the case. Under such circumstances, although slight error may have been committed, no ground for a reversal of the judgment exists.

It is insisted, that record proof of the marriage was required, and the court erred in permitting plaintiff to testify to the marriage. This was a civil action, and we do not understand that record evidence of the marriage was required. Greenleaf on Evidence, sec. 461, lays down the rule, that upon the trial of indictments for polygamy and adultery, and in actions for criminal conversation, direct evidence of marriage is required, but in all other cases any other satisfactory evidence is sufficient. In sec. 462 it is said, marriage may also be proved, in civil cases, by reputation, declarations and conduct

of the parties, and other circumstances usually accompanying that relation.

Two instructions (seven and eight), which were given for the plaintiff, are claimed to be erroneous. The seventh declares: "The jury are instructed, that by exemplary damages is meant, in law, such damages as will be an example or warning to others, and as a punishment to the defendant." Instruction number six, which precedes this one, directed the jury, that if they found, from the evidence, that plaintiff had sustained actual damages, then they might go further and allow exemplary damages, and it is contended by the plaintiff that nothing but actual damages can be recovered in a case of this character. It is a sufficient answer to the position of defendant, that the statute under which this action was brought, in express terms authorizes the recovery of exemplary damages, and in two cases, *Roth* v. *Eppy*, 80 Ill. 283, and *Hackett* v. *Smelsley*, 77 id. 109, where the statute was involved, it was held that exemplary damages could be recovered.

The point attempted to be raised by the counsel for defendant, that no person shall twice be punished for the same offense, does not arise on this record, as it does not appear that the defendant has ever been indicted, prosecuted or punished, under the statute, for a sale of liquor to the husband of the plaintiff. Should the damages in this case be recovered, and should the defendant then be prosecuted, the question attempted to be presented would then arise, and it will be ample time to decide the question when it is properly presented. It is sufficient for the purposes of this case that the statute authorizes exemplary damages, and the validity of the statute has been fully sustained in the cases cited. It is true, in *Meidel* v. *Anthis*, 71 Ill. 243, language is used from which it might be inferred there was a distinction between exemplary damages and damages allowed as a punishment, and that case is cited to condemn the instruction. There is, however, no distinction between exemplary damages and damages allowed as a punishment. Exemplary damages, punitive damages, or damages

recovered as a punishment, all mean the same thing. *Roth* v. *Eppy, supra.* And in so far as the case of *Meidel* v. *Anthis* declares a different rule, it must be overruled.

The criticism on the other instruction (number eight) has no foundation in fact. The jury were not directed that the encouragement of Coster to play billiards at his saloon was an element of damage to be considered, as is clearly shown by the concluding portion of the instruction.

The court, at the request of the defendant, gave eight instructions to the jury in his behalf, and refused eighteen instructions. The refusal to give these eighteen instructions is assigned for error. We have not the time to enter upon a discussion of these refused instructions, and it will be of no benefit to the parties to do so. It is sufficient that the law involved in the case was fully and fairly given to the jury by the instructions which were given. Some of the refused ones are a mere reiteration, in another form, of what was embraced in those given. Others, on the question of damages, have been disposed of by what has been heretofore said on that subject. Others required a stricter rule of proof than required by the law. As the jury was fully instructed as to the law of the case, although some of the refused instructions may contain correct propositions of law, we perceive no ground for a reversal of the judgment on account of the decision of the court on instructions.

It is also contended that the damages are excessive, but they are not so high as to authorize a reversal on that account.

We perceive no substantial error in the record, and the judgment will be affirmed.

Judgment affirmed.

ROSANNA M. MARSHALL

v.

F. W. PECK *et al.*

1. WITNESS—*competency—party against heirs.* On bill against the heirs of a deceased person to enforce an agreement claimed to have been made by the deceased in his lifetime with the complainant, the latter is not a competent witness in his own behalf.

2. SAME—*competency—husband for his wife.* On bill by a wife against the heirs of a deceased person to specifically enforce a verbal agreement of the deceased to convey a certain lot to a trustee for use of the complainant, made after the deceased had given a bond for a deed to her husband, and with the assent of the husband at the time, the latter is a competent witness for his wife to prove the agreement to convey to her. If, however, he had assigned his claim merely to render him competent, he would be incompetent by the terms of the seventh section of the act entitled "Evidence and Depositions."

3. SPECIFIC PERFORMANCE—*requires clear proof after great delay.* A decree for the specific performance of an alleged verbal agreement to convey land will not be granted where the bill is not filed until more than ten years after the alleged agreement and after the death of the other party, on slight evidence of the agreement, especially when the conduct and acts of the complainant for many years before are inconsistent with the existence of the right claimed, and such as to lead to the conviction that if the complainant ever had any claim to the relief sought, it must have been settled and adjusted long before.

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

Mr. B. S. MORRIS, and Mr. JAMES W. BEACH, for the appellant.

Messrs. HUNTER & PAGE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellant claims to be the equitable owner of lot 19 in Springs' subdivision of a quarter of land in Cook county. She alleges in her bill, and claims it to be proven by the evidence, that this lot was purchased under an arrangement by P. F. W. Peck and her husband, that they should purchase real

estate in and near Chicago, Peck furnishing the money, and Marshall making purchases and sales, the profits, after deducting expenses, to be divided; that this property was thus purchased and conveyed to Peck, and held from some time in 1853 till in 1856, and not having been sold, they agreed that Marshall should become the purchaser at $3000, with ten per cent interest, payable in three years. A written contract was executed by Peck for a conveyance on the payment of the money, which is claimed to have been destroyed by the fire in 1871.

It is also claimed, that soon after this arrangement was made the parties thereto, with appellant, further verbally agreed, that on payment of the purchase money, Peck should convey the lot to a trustee to hold for appellant. And to secure the purchase money, she and her husband executed a mortgage to Peck on another piece of ground, subject to several mortgages or trust deeds falling due at different times and aggregating about $4800; that subsequently the trustee named in the trust deed last falling due sold the property, and Peck became the purchaser subject to the prior incumbrances.

It is claimed that Peck purchased by agreement with Marshall to sell the lot, pay off the incumbrances, retain the price of lot 19, and pay any surplus that might remain to Marshall.

On receiving a deed from the trustee, Peck procured a release from Marshall for his equity of redemption, for which he, at the time, paid Marshall. Peck afterwards sold this property to one Valentine for $10,500. The sale was made in August, 1858. It was partly for cash and partly on time, the last payment maturing in 1864. It is claimed that all the incumbrances on this property, including the $3000 to Peck, did not exceed $8000, leaving in Peck's hands $2500 received from Valentine which belonged to Marshall.

It is claimed that appellant repeatedly demanded a conveyance from Peck to a trustee for appellant, and the payment of the surplus to her; that he acknowledged the obligation but postponed its fulfillment, making various excuses; that he also

acknowledged to other persons that he held the lot for her, but he died never having conveyed, and leaving appellees his heirs, nor did he pay her the $2500 surplus in his hands; that by his authority appellant took possession of the lot by placing a tenant thereon; that after his death she applied to his heirs for a conveyance and to pay her the $2500, which they refused; that the other heirs have conveyed the lot to F. W. Peck, and he had mortgaged it to the United States Mortgage Company.

The defendants do not deny that their father sold the lot to Marshall for $3000 on three years time, with ten per cent interest; they deny that appellant has any interest in the property; they insist the mortgage by Marshall and wife of the other property subject to incumbrances was to secure other and different indebtedness from Marshall to Peck growing out of other transactions; they deny that Peck ever agreed to convey lot 19 in trust for appellant; they admit that he purchased the other property at the trustee's sale, but they deny that it was under the agreement charged, or that he agreed to sell it and, after paying the incumbrances to pay the surplus to Marshall, or that Peck agreed to hold lot 19 in trust for appellant or to convey it to a trustee for her use; they admit the sale to Valentine, but insist he sold as absolute owner; deny that appellant ever took possession of lot 19 or expended money thereon or paid taxes. The United States Mortgage Company admit the mortgage and insist they made the loan without notice.

On a hearing in the court below the bill was dismissed, and complainant appeals.

This is a case of the character that it is not probable that we can learn the true character of the transaction. A large portion of the acts occurred over twenty years since. One of the parties to them is dead and his lips are sealed, and those succeeding to his rights do not, nor can they be expected to know much, if anything, of the transaction. After such a length of time the relation of the principal witness to com-

plainant operates to only fix in his memory facts tending to her benefit, whilst those opposed have faded out and renders his evidence of less value, however honest his purpose, than if he occupied a different relation to appellant.

Peck having died, appellant is not a competent witness. Being a party in interest, the second section of chapter 51, Rev. Stat. 1874, prohibits her from testifying. We can not, therefore, consider her testimony. Nor does she fall within the exceptions of other sections of the act.

It is urged that Marshall, the husband of appellant, has such an interest in the subject matter of the litigation as to prevent his testifying in the case. He swears the verbal agreement to convey lot 19 to his wife occurred soon after Peck gave the bond for a conveyance and long before Peck's death. Had it appeared that he only assigned the claim to render him competent, he could not have testified, as he would be precluded by the terms of the seventh section of the act. Under the first and second sections of the act he is competent. His relation of husband of complainant does not disqualify him as a witness. He is, by the fifth section, rendered competent, as the case is one in which the wife could have sued alone if she had been sole and unmarried. The relation he occupies to her only goes to his credibility, not to his competency.

The husband testifies fully to the transactions as set up in the bill, and with detail and some degree of precision. And he is corroborated in his testimony as to the bond, as Windett testified to having it in his possession and that it was destroyed by the fire of October, 1871. Smith corroborates his testimony as to Peck's agreement to convey to a trustee for the use of appellant, and Valentine swears that when he received a deed for lot one from Peck, he said he had arranged to obtain possession, as he was to convey to Mrs. Marshall a lot on Michigan avenue; but he fixes no other more definite locality. But with all this evidence we are not satisfied that there was not some other arrangement executed and carried out in the

lifetime of Peck which superseded all these contracts and agreements.

There has been great delay in bringing suit and in asking an enforcement of the claim, if any existed, against Peck in his lifetime. We regard it almost inconceivable that appellant, if there was any merits in her claim, should wait, under the most favorable theory of her case, ten years after she was entitled to a deed. And this is the more surprising when we reflect that she and her husband, a portion if not all of that time, were suffering for the want of the common necessaries of life. In 1864, in January, Marshall wrote Peck that he was "entirely destitute of means to get along with;" that the weather was extremely cold and he did not have three sticks of wood or any other fuel in his house; that his landlord was pressing for a month's rent which was due and he unable to pay; and asking for a loan of $100 to help to keep his family from distress.

If they had believed they had any well-founded claim to this property, or the surplus claimed on the sale of the homestead, why ask a loan? Why not propose to sell or otherwise dispose of that interest, if it existed, or press payment of the claim for the surplus? Nor did appellant refer to either when she wrote Peck that their furniture was distrained for rent, and she besought a loan. Persons driven to such dreadful straits would assuredly have rendered such claims available, even at a heavy sacrifice, to relieve such pressing distress, and yet neither of them refer, in the remotest degree, to either claim. According to appellant's theory, the surplus, under any contingency, was due, or nearly so, when this last letter was written. Why ask to borrow, rather than discount a portion of that claim, if it existed? We think this speaks volumes against the validity of such claims. That they should, for ten years, be pinched by biting poverty, with its terrible apprehensions, to say nothing of the distress it imposed, and hold these large claims, amounting in the aggregate almost to a fortune, seems almost incredible. That sane persons would

so act seems impossible. If such claims existed, why not assert and enforce them at once against Peck? Why wait until his death, when more than an abundance was within their reach? Men do not so act. Why press for and almost beseech loans, when Peck held $3000 worth of their real estate, and owed them $2500?

But, it may be said, Valentine's last note was not due, and the law then gave them no remedy until Peck was paid. Valentine swears he completed the payments on lot one in September, 1864, and we presume when Marshall wrote Peck on the 4th of the preceding January, Valentine could not have owed Peck $5500 on the purchase, although he did owe him a balance. It, singularly enough, nowhere appears when Valentine was to make payments. He seems not to have been asked that question. But if there was still $3000 due on that purchase, there would be in his hands the surplus, or if there was less than $3000 due on that purchase, his claim of $3000 and the prior incumbrances were paid, and he had in his hands a part of the surplus, and if the agreement was as claimed, there was no occasion to borrow money from Peck, as he would have been owing Marshall or his wife such portion of the balance as was in his hands.

We are, from all the circumstances attending the transaction, and the great delay in resorting to legal steps to enforce the claims now asserted, almost irresistibly impelled to the conviction that this old contract was, long before Peck's death, satisfactorily adjusted and canceled. The great commercial and financial revulsion of 1857, it will be remembered, greatly depressed the price of all real estate, as well in cities as in the country, and owing to this great depression, purchasers were not eager to pay up and enforce their purchases, but generally abandoned and canceled them, when they could. Men were more concerned in making a subsistence for themselves and families, than in the pursuit of fortunes by purchasing real estate, and thousands were unable to perform their contracts of purchases of real estate, and, from the evidence these letters

afford, we must conclude that Marshall was not an exception, and that he, in some manner, must have canceled this agreement.

Leaving the Statute of Frauds out of view, the loose and indefinite expressions proved to have been made to different disinterested persons do not prove such a contract as a court of equity can enforce. They neither fix price, terms, conditions, nor time of performance. These mere oral declarations, without further explanation, are too indefinite to warrant a decree for the relief sought.

In further confirmation of the theory that some arrangement had been made by which Peck had become the absolute owner, Marshall, in consideration of $200, released to Peck the homestead, after he had purchased it at the trustee's sale; and his letter to Peck, under date of March 15, 1858, in which he says to Peck that he is the owner of the property, and he supposes he will pay an interest coupon which had fallen due under one of the mortgages on the property. In this as in the other letters there is no reference to any claim complainant or her husband had on the property or its proceeds.

Again, we are unable to conceive it possible, if the arrangement claimed by appellant existed, that business men would have resorted to the mode of purchase and sale of any right Marshall may have held in lot one when he released it to Peck for the money he was paid therefor. If Peck was to sell, pay all incumbrances, including his own, and pay the surplus to Marshall, why advance money, not on the surplus that was expected, but to pay for the release? Any one would suppose that if Marshall believed he had an interest in the lot which would have depreciated the price, and prevented him from receiving a surplus, he would have been eager to release and enhance his chances of receiving a surplus, without selling such interest to Peck; nor can we understand why Peck should pay for the release, when he held, as is claimed, ample security for his lien and the prior incumbrances. He seems to have had no interest whatever in producing a surplus. That was

for Marshall's interest, and not for his. We must conclude, from this release made by Marshall for a consideration paid therefor, that it was on an arrangement by which Marshall had ceased to have any further interest, actual or prospective, in the lot. If not, it is strange the transaction took such a shape and no written memorandum of it was made.

If there was a valid claim for what is claimed as surplus, it is equally strange that no steps were taken to have it probated against the estate of Peck or that they never sued him for its recovery. It must be for the reason that the claim was without foundation, or it was considered barred by the statute. Even if its existence had been proved on the trial, we are aware of no principle or adjudged case that would bring it within the principles governing trust property. If Peck ever owed it, it could have been recovered in an action at law, as it was a debt, and no more than any other debt. If Peck received the money for the use of appellant, an action for money had and received could have been maintained by her until it was barred by the Statute of Limitations.

After much labor and pains in examining the evidence in the case, we are of opinion that the court below could not have rightfully rendered a different decree, and it must be affirmed.

Decree affirmed.

Mr. JUSTICE DICKEY: I do not concur in the conclusion of the court in this case.

THE ERIE AND WESTERN TRANSPORTATION COMPANY

v.

PHILIP W. DATER *et al.*

1. CARRIER—*limiting his liability.* A shipper of goods is not bound by a clause in a carrier's receipt or bill of lading given on the receipt of goods for transportation, limiting the common law liability of the carrier, unless the shipper assents to the same.

2. SAME—*assent to limitation not presumed.* The assent of a shipper to the conditions in a receipt or bill of lading limiting the carrier's liability will not be inferred from the mere fact of acceptance of the bill or receipt without objection,—and this without regard to the fact whether the bill of lading is used in trade wholly within this State, or in inter-State trade or in foreign commerce. Nor will it be conclusively inferred from the fact of the previous acceptance of a large number of similar bills of lading, not filled up by the shipper or held in his possession to be filled up.

3. SAME—*evidence of assent to limitation.* The acceptance of a bill of lading containing a restriction of the carrier's liability and the previous practice of giving and receiving similar bills of lading, are evidence tending to show that the limitation of liability therein was assented to by the shipper, but neither one nor both such facts would be conclusive evidence thereof.

APPEAL from the Circuit Court of Cook county; the Hon. W. K. MCALLISTER, Judge, presiding.

Mr. GEO. GARDNER, and Mr. GEO. B. HIBBARD, for the appellant.

Mr. MELVILLE W. FULLER, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On October 7, 1871, appellees delivered to appellant, at Chicago, two hundred barrels of flour for transportation to New York City, and received for the same a bill of lading. The flour was put into the warehouse in Chicago to await the loading of the vessel for which it was intended, and on the night of October 8 and 9, 1871, was destroyed by the great Chicago fire, without any negligence on the part of any one. This action on the case was brought by appellees against ap-

pellant, as a common carrier, for failing to carry and deliver the flour to the consignee. The general issue was pleaded, and the cause tried by the court without a jury, resulting in a finding for plaintiffs for the value of the flour and interest, and judgment, from which defendant appeals.

This same case was before this court at a former term, and is reported in 68 Ill. 369, when the judgment in favor of the plaintiffs below was reversed, on the ground of being against too many defendants, the opinion of this court on the merits being in favor of such plaintiffs.

The bill of lading delivered to the consignors contained a provision relieving the carrier from liability for loss by fire while the property is in transit, or while in depots, etc. This court has repeatedly held, that there must be the assent of the shipper in order to make binding upon him such a limitation of the carrier's common law liability, and that with such assent it is binding. As the bill of lading was the only evidence of the delivery of the flour to appellant, or of any contract for the transportation of the same, and as there was evidence that appellees had, before, accepted quite a number of bills of lading of a similar character in the course of their business with appellant, two points are made by appellant for the reversal of the judgment: 1st. That from the fact, alone, of the acceptance of the bill of lading, the assent of the shipper to its terms and conditions should be inferred. 2d. That appellees should be held to have assented to the contract expressed in the bill of lading from their receipt of the many similar bills of lading, running through the years 1870 and 1871, from the appellant without objection, or be estopped from setting up their ignorance of the contents of the instrument and consequent want of assent to its provisions, by such course of dealing with appellant.

It is insisted that the bill of lading, being the only contract between the parties, and relied upon by the appellees as such, must be taken as a whole, and all its provisions must be regarded as binding upon both parties. This same point was made and urged when the case was here before, it being then

said: "This bill of lading, appellants insist, was the contract of the parties, by which they are bound, and the provisions of which are plainly and easily understood by any business man, and the assent of the shipper to the terms contained in it should be presumed." And it was held that the assent of the shipper to its conditions was not to be inferred from the fact of acceptance alone. The same fact, too, appeared before, of the previous acceptance by these shippers of a large number of similar bills of lading in the course of their business with appellant; yet with these same facts there appearing, it was held that the finding of the court trying the case, in favor of the plaintiffs below, should not be disturbed by this court. We do not see that the case, as to the facts, is now presented any more favorably for appellant than before—the facts appear to be substantially the same. But we are asked by appellant's counsel to reconsider the subject of the qualification of the liability of carriers as contained in *bills of lading*, especially bills of lading used in inter-State trade (as the bill of lading in this case was) or in foreign commerce, and hold that the assent of the shipper to the terms of such a bill of lading will be presumed from its acceptance by him without objection. It is urged that such is the holding of other courts of highest authority, and that it is desirable there should be uniformity, as near as may be, in such a rule of commercial law.

The contrary rule to that contended for by appellant has been so well established by repeated and the uniform decisions of this court, that we must adhere to it as the settled doctrine of the court, although it may not be in harmony with the rule of other courts, and although there may result the supposed inconvenience of diversity in this regard. As already remarked, we have before held, in this very case, that the shipper's assent to the clause of limitation, here, of the carrier's common law liability was not to be presumed from the acceptance of the bill of lading alone,—that is, conclusively presumed. *Anchor Line et al.* v. *Dater et al.* 68 Ill. 369. And other like decisions are *Illinois Central Railroad Co.* v. *Frankenberg*, 54 id.

88, *Field* v. *Chicago and Rock Island Railroad Co.* 71 id. 458, *Merchants' Despatch Transportation Co.* v. *Theilbar*, 86 id. 71, *Merchants' Despatch Transportation Co.* v. *Jœsting et al.* 89 id. 152, *Merchants' Despatch Transportation Co.* v. *Leysor*, id. 43.

Nor do any of these decisions intimate that there should be any restriction of the rule, as is claimed there should be, to the case of other paper writings than a bill of lading proper, such as notices, receipts, tickets, etc., and they must be taken as not to acknowledge any such distinction.

Upon the second point made by appellant, we see no ground for holding appellees estopped from denying assent to this condition in the bill of lading, as arising out of the previous course of dealing between the parties in the giving and acceptance of like bills of lading, containing this same provision.

The proof in that respect was accompanied with the testimony of the appellees that they were unaware of the provision. There was nothing, here, of the kind which appeared in the cases of *Oppenheimer* v. *United States Express Co.* 69 Ill. 62, and *Field* v. *Chicago and Rock Island R. R. Co. supra*, where the receipts or bills of lading were in the previous possession of the consignors, and the blanks in them had been filled up by the consignors or their clerks, there having been a previous like practice in respect to shipments before, and where, although there was the testimony of the consignors that they had no knowledge of the stipulations limiting the responsibility of the carrier, and never assented to them, this court said, in the former case, that the consignors must be held to have had such knowledge, and in the latter, that it was impossible, in the very nature of things, that the contents of the bills of lading should not have been known and well understood by the consignor, and that the facts existing were sufficient to outweigh such contrary statements of the consignor and his clerk; and the finding of the court below that there was such knowledge and assent was sustained. But there was no such evidence, in the present case, of the consignors having the

bill of lading previously in their possession and filling it out, or of a practice, before, of doing so with respect to similar bills of lading, or of having any such in their possession for the purpose of filling out for use. There is nothing here inconsistent with what was said in *Mer. Despatch Trans. Co.* v. *Moore,* 88 Ill. 138, as the presumption there spoken of was indulged in the absence of evidence to the contrary. It was not intended to decide that the presumption was conclusive.

The facts relied on by appellant of the acceptance of the bill of lading, and of the previous practice in giving and receiving similar bills of lading, were evidence going to show that the limitation of liability contained therein was known and assented to by appellees, but they were not, either or both of them, conclusive evidence thereof. It was a question of fact, to be determined upon the whole evidence.

We can not say that the finding of the court, sitting as a jury, upon all the testimony in the case, should be set aside as against the evidence, and the judgment will be affirmed.

Judgment affirmed.

DAVID H. THORNTON *et al.*

v.

WILLIAM G. HOUTZE *et al.*

1. JUDICIAL SALE—*estoppel to question, by payment of proceeds to trustee.* On bill to set aside a sale of land by an administrator under a decree of court, on the ground the same was bought for the administrator, and for other relief against the administrator, a trustee of the heirs and devisees of the deceased was appointed, to whom the administrator, under the order of the court, paid over all the moneys found to be in his hands, including the purchase money of the land sold, such trustee being the attorney for a part of the heirs and devisees, and he paid several of the heirs and devisees a part of their distributive shares, but always kept in his hands more than each one's share of the purchase money of the land as to which the sale was sought to be set aside: *Held,* that the payment of the price of such land by the administrator to the trustee, under the order of the court, did not estop the heirs and devisees from

assigning for error, in this court, the decree of the court below refusing to set aside the sale made by the administrator.

2. ESTOPPEL—*to question decree under which money is paid.* Where money is paid to an attorney of some of the parties to a suit, under an order of court appointing him a trustee for those entitled to it, to be distributed under the direction of the court, such trustee will hold the same not as an attorney, but as an officer of the court, and such payment to him, if not ratified by those in interest, will not estop them from assigning error on the decree of the court dismissing the bill, so far as the bill seeks to avoid a sale out of which a part of the money was realized.

3. PRACTICE IN SUPREME COURT—*judgment on plea to assignment of errors.* Where a party pleads in bar to an assignment of errors a state of facts which estops the other party from making the assignment, and issues of fact are formed upon replications to such plea, which are found against the party so pleading in bar, the decree below, upon which the errors are assigned, must be reversed.

4. Such a plea amounts to a confession of error, and admits cause of reversal, unless the facts alleged in avoidance of the error are found in the pleader's favor, and if they are found against him, he can not urge, as an objection, that the bill in the case below was multifarious, or insist upon *laches* in the adverse party.

5. PRACTICE—*time for urging objection to bill for multifariousness.* The objection that a bill in chancery is multifarious, comes too late when urged in an amended answer for the first time, which is filed on the first day of the hearing.

6. PARTITION—*sufficiency of petition, collaterally.* A petition for partition against a brother of the former owner, such former having died, and the unknown heirs, etc., is defective, if it does not allege that the petitioner knows of no sister or brother of the deceased except the one named. But the defect does not go to the jurisdiction, as it might be cured by amendment, and therefore can not be taken advantage of in a collateral proceeding.

7. SAME—*jurisdiction of unknown parties.* To give the court jurisdiction over the persons of unknown parties, it is sufficient that it be made to appear there are unknown parties, and the notice required by the statute has been published as to them.

8. In a collateral proceeding, the court should indulge the presumption, until rebutted, that those named as parties are the only parties known to the petitioner. If other parties are known to the petitioner whose names are not included in the proceeding, this may furnish a reason why such parties should not be bound by the decree.

WRIT OF ERROR to the Circuit Court of La Salle county; the Hon. EDWIN S. LELAND, Judge, presiding.

Statement of the case.

David H. Thornton and others filed their amended bill in chancery in the court below against William G. Houtze, Admr., and Sarah W. Thornton, widow of Hiram Thornton, deceased, William Wenner, William F. Cook, Theodore Hochstatter, and certain other parties who are claimed to be heirs at law of Hiram Thornton, deceased, alleging that the complainants are of kin to Hiram Thornton, who died testate January 31, 1866, leaving a widow (Sarah W. Thornton) but no child or children, nor descendants of a child or children, nor parent or parents; that his will was probated February 5, 1866, in the proper court, and William G. Houtze appointed administrator, with the will annexed, who, upon the same day, filed his official bond, with William Wenner, his brother-in-law, as his surety, and thereupon entered upon the discharge of his duties. A copy of the will is made part of the bill, as an exhibit.

The bill further alleges, that the entire personal estate accounted for by Houtze amounts to about $15,000; that the chattel property was appraised at $478, and the widow's award at $1910, though she was the only member of the testator's family, and that she took all said chattel property and all the property devised to her by the will.

It is, also, further alleged in the bill, that besides three lots in Mendota, two lots and two parts of lots in Homer, and five acres in section 13, Hiram Thornton, at his death, owned in fee simple the west half south-west quarter section 5, township 35, range 1; the south-east quarter of section 6, township 35, range 1; the north half north-east quarter section 7, township 35, range 1; and that portion of the east half south-west quarter section 5, township 35, range 1, lying north of the Chicago, Burlington and Quincy railroad,—which said land constituted the farm of said Hiram Thornton, and was the only farm or farm land owned by him in "Troy Grove" at the time of his death, and is the farm designated by him in his will as "my farm in the town of Troy Grove;" and said farm is misdescribed in said will in part, the north half sec-

tion 8 and the east half south-west quarter section 5 (except five acres) never having been owned by said Hiram Thornton; that said Sarah W. Thornton, for the purpose of defrauding the devisees of Hiram Thornton, on April 5, 1867, filed her petition for partition in the circuit court of La Salle county against William G. Houtze, as administrator, etc., Jesse Q. Thornton, and the unknown heirs of Hiram Thornton, deceased, alleging that said west half south-west quarter section 5, and north half north-east quarter section 7, was intestate, and praying for partition thereof, which was subsequently decreed, and the west half south-west quarter section 5 assigned to her in fee simple, and the east twenty-one acres of the west half north-east quarter section 7 as dower; and that said Sarah W. Thornton conveyed said west half south-west quarter section 5, by warranty deed, to Almeron Nelson, who conveyed, by quitclaim deed, to William F. Cook, and Cook conveyed, by warranty deed, to Theodore Hochstatter, who now claims title to the same.

It is further alleged in the bill, that said land was testate, and devised to the brothers and sisters (or their heirs) of said Hiram Thornton; that said decree for partition was obtained by fraud and collusion between said Sarah W. Thornton and said William G. Houtze, who both knew the land was testate, and also knew the names and whereabouts of these complainants and other devisees of said Hiram Thornton; that some of the devisees were made parties as the unknown heirs of Hiram Thornton, deceased, for the purpose of preventing them from acquiring a knowledge of the pendency of said suit. Complainants David H. Thornton and Mary King Hunter allege that they are, the former a brother and the latter a sister of Hiram Thornton, deceased, and that they were not parties to that suit, and not within the jurisdiction of the court; that the court, in said proceeding, did not acquire jurisdiction of the person of any of the devisees of Hiram Thornton, deceased.

It is further alleged in the bill, that at the March term,

1866, of the county court of La Salle county, said William G. Houtze exhibited his bill of complaint against the unknown heirs and unknown devisees of Hiram Thornton, deceased, praying for power to sell certain real estate therein described, according to the directions in his will,—which proceedings are made a part of the bill, as an exhibit,—and it is thereby shown that the court, on the 9th of June, 1866, pursuant to the prayer of said bill, decreed that the said William G. Houtze be appointed trustee to sell and convey the real estate in the bill described; that he afterwards sold and conveyed said real estate to William Wenner, and the bill charges that said William Wenner is a brother-in-law of said Houtze; that he was simply a nominal purchaser; that the purchase was made for the benefit of said Houtze, and for a grossly inadequate price; that said Houtze claims to have paid $7100 to Jesse Q. Thornton, and the heirs of John Thornton, deceased, in the estate of Hiram Thornton, deceased, but that if such payment was so made it was made without the order of said county court, and that said Houtze refuses to account to the devisees of Hiram Thornton, deceased, for the money so paid; that he has endeavored to settle with the complainants and other legatees, and, as an inducement thereto, has represented that he had knowledge of assets and property belonging to said deceased in Iowa and Illinois, which he would disclose to them if they would settle with him on such terms as he desired; that complainants had been induced not to prosecute their claims under said will before the commencement of this suit, by the misrepresentations of said Houtze, and by his promises to aid them if they did not, and his threats to injure their interests if they did prosecute suit against him; that said Hiram Thornton had twelve brothers and sisters, whose names, and those of their descendants who are dead, are then given.

The prayer of the bill is, that the assets of the estate may be marshalled and distributed; that the sale of the south-east quarter of section 6, township 35, range 1, to William Wenner, may be set aside, and an account taken of the rents and

profits thereof; that said proceedings in partition may be declared null and void, and an account of the rents and profits taken, and all of said land constituting said farm in the town of "Troy Grove" sold; that said Houtze render an account of all his actings and doings, and that he be removed. Prayer, also, for general relief.

William Wenner answered, admitting death of Hiram Thornton testate, as charged; that he left the widow him surviving, and was seized and possessed of the property, as charged in the bill; also admitting the proceedings set out in the exhibit, and the purchase by himself of the land, as charged in the bill, but denying that he purchased in any other manner save as a fair and honorable purchaser, for himself; that he had any knowledge of any unfair or improper practices, and neither admitting nor denying that Thornton left surviving him the heirs at law charged in the bill; alleging and charging that the county court, in the proceedings set out in exhibit "C," had jurisdiction of the subject matter, and of the heirs and devisees of Hiram Thornton, deceased; that more than five years have elapsed since said proceedings, and no writ of error has been prosecuted, and craving leave to have the same benefit of lapse of time as if he had pleaded the same.

This answer was re-filed as an answer to the amended bill, with an addition in the nature of a demurrer, specifying as the ground thereof that the bill is multifarious; that if complainants are entitled to any relief, their remedy is full and adequate at law, and that complainants have been guilty of gross *laches* in prosecuting their bill.

Sarah W. Thornton, in her answer, admits the death of Hiram Thornton, January 31, 1866, leaving no children, etc., but leaving her as his widow; that he left a last will, etc., and that Wm. G. Houtze was appointed administrator; admits that she received all the money awarded to her by the appraisers, and that she did not renounce the benefits of the devises or bequests made her in said will; she admits that said Hiram Thornton died seized of the land mentioned in the complainants' bill in

secs. 5, 6 and 7, in township 35, range 1, and that said land constituted all of the prairie or farm land owned by said Hiram Thornton at the time of his decease; admits the filing of the petition for partition and the proceedings set out in the exhibit, but denies that there was any fraud or collusion; she denies that she, in any manner, assisted Jesse Q. Thornton to cheat the other devisees under the will, and she wholly denies the statements of the bill relative to the residuary legatees of Hiram Thornton; she alleges that the circuit court, in the proceedings set out in the exhibit, had jurisdiction of the subject matter and of all persons interested in the estate of Hiram Thornton, deceased; that no appeal or writ of error was prosecuted thereon, nor any bill of review filed, nor any proceedings instituted to have said decree set aside or reversed; and that more than five years elapsed before the commencement of this suit, and she craves leave to have the same benefit from the lapse of time as aforesaid as if she had pleaded the same. She concludes by a clause demurring to the bill for multifariousness.

The answers of William F. Cook and Theodore Hochstatter admit death of Thornton, probate of will and appointment of defendant, Houtze, as administrator, etc., as alleged in the bill; admit that Thornton died seized in fee simple, etc., of land; admit filing petition for partition and proceedings set out in exhibit B, but deny all fraud and insist that the proceedings were in conformity with the course and practice of this court and the laws of this State; allege they were purchasers of west half south-west quarter of section 5, township 35, range 1, in good faith and for a valuable consideration without notice; allege that the circuit court in the proceedings set out in exhibit C had jurisdiction of the subject matter and of all persons interested in the estate of Hiram Thornton, deceased; that no appeal had been taken or writ of error prosecuted, or bill of review filed, etc.; that more than five years had elapsed before the commencement of this suit; and they ask to have the same benefit from the lapse of time as if they had pleaded the same.

Statement of the case.

W. G. Houtze admits death of Thornton, probate of will, and his appointment as administrator; admits Thornton's seizin of the land and that said tracts constituted all the farm land owned by said Thornton at the time of his decease in the township of Troy Grove, but denies that it was occupied or improved as one farm or that the same was known or called "the farm of Hiram Thornton," etc., in his lifetime; admits proceedings set out in "exhibit B," but denies all fraud and collusion with respect thereto, and alleges entire good faith; denies that William Wenner was only a nominal purchaser, or that there was any fraud or unfair practices of any kind in said sale; sets forth the proceedings of the county court in the matter of the estate of Hiram Thornton, deceased, for final settlement, in which the court finds a balance of cash in his hands of $7101.89, and notes and mortgages on sale of land amounting to $3064, and makes order for distribution which is recited; alleges that Jesse Quinn Thornton came to him in October, 1868, representing himself to be the only survivor of the brothers and sisters of Hiram Thornton, deceased, and that he had powers of attorney from the children of John Thornton, deceased, who was the only one of the brothers and sisters of said Hiram Thornton, deceased, who left descendants; that he went before the county court with said Jesse Quinn Thornton; that the court ordered him to pay the money in his hands to Jesse Q. Thornton, taking his receipt therefor, which he did; that payment was made in the utmost good faith; that at the time of the commencement of the proceedings, etc., he did not know the names of any of the heirs of said Hiram Thornton, deceased, and that said Hiram Thornton had been in the habit of stating to persons that he had no relative in the world except a brother who resided in the State of Oregon; that the county court, at the time of making the report for final settlement, had exclusive jurisdiction of the settlement of estates, and claims benefit of the adjudication of the county court on final settlement; alleges want

of equity in complainants' bill, multifariousness and *laches*, and claims the benefit of the Statute of Limitations.

The cause was heard on bill, answers, etc., and proofs.

The court, thereupon, finds that the sale of the south-east quarter of section 6, and the five acre tract in the east half of south-west quarter of section 5, township 35, range 1, by Houtze to Wenner, was *bona fide*, and decrees that the bill be dismissed as to Wenner.

It also finds and sets out the names of those entitled as legatees, under the will of Hiram Thornton, deceased, to share in the distribution of his estate, and decrees payment of residuum to them, etc.

The decree directs that William G. Houtze pay to the trustee therein named the sum of $8410.26, being the amount of funds belonging to the estate found to be in his hands after deducting the distributive shares theretofore paid by him to Jesse Q. Thornton and the heirs at law of John Thornton, deceased. And Houtze is directed to take the trustee's receipt therefor, which receipt, it is decreed, shall "be and operate as a full discharge of said William G. Houtze from all further liability as administrator, with the will annexed, of the estate of Hiram Thornton, deceased, and also from all further liability as trustee for the sale of said before mentioned real estate by virtue of his appointment as such trustee," etc.

The decree appoints Hiram T. Gilbert trustee to receive said money from said William G. Houtze, and to receipt therefor, and distribute the same to the persons thereby adjudged to be entitled, and the decree invests the trustee "with full power and authority to receive and collect, by suit or otherwise, all money due and owing to said estate of Hiram Thornton, deceased." He is directed to sell the land unsold, pay all costs of this suit, and all expenses incurred by him, etc., and he is to have execution against Houtze for balance in his hands, etc.

The decree finds that the defendant, Sarah W. Thornton, obtained color of title to the west half south-west quarter section

5, township 35, range 1, by virtue of the partition proceedings in complainants' bill mentioned, brought by her against William G. Houtze, administrator with the will annexed of Hiram Thornton, deceased, Jesse Q. Thornton, and the unknown heirs of Hiram Thornton, deceased, and the decree rendered in that cause; that the court in said partition proceedings had jurisdiction of the persons of the parties thereto, and that however erroneous the finding and decree of the court therein may have been, the court can not in this proceeding disturb the same or grant relief therefrom. Wherefore it is decreed that the complainants' bill be dismissed without prejudice to the defendant, Sarah W. Thornton.

The decree also finds that William F. Cook acquired title to the west half south-west quarter section 5, township 35, range 1, in good faith and for a valuable consideration by *mesne* conveyances through said defendant Sarah W. Thornton, and that said defendant Theodore Hochstatter acquired title to said premises *bona fide* and for a valuable consideration, etc.; and it is therefore decreed that the bill be dismissed as to the defendants William F. Cook and Theodore Hochstatter.

The errors assigned are:

"1. The court erred in dismissing the bill as to the defendant William Wenner.

"2. The court erred in dismissing the bill as to the defendant Sarah W. Thornton.

"3. The court erred in dismissing the bill as to the defendants William F. Cook and Theodore Hochstatter.

"4. The court erred in denying the relief prayed for in the complainants' bill against said defendants William Wenner, Sarah W. Thornton, William F. Cook and Theodore Hochstatter."

And the defendants in error, claiming to be heirs at law of Hiram Thornton, deceased, assigned the following errors:

"1. The court below erred in decreeing that the sale of the south-east quarter section 6, township 35, range 1 east of

the third principal meridian, and that portion of the east half of the south-west quarter section 5, in the same township and range, lying north of the Chicago, Burlington and Quincy railroad, by William G. Houtze to William Wenner, was *bona fide*, and that said William Wenner now lawfully owns the same, and in not setting aside the said sale of said premises made by said William G. Houtze and ordering a re-sale of said premises.

"2. The court erred in decreeing that the defendant in error Theodore Hochstatter now lawfully owns the west half of the south-west quarter of section 5, in township 35, range 1 east of the third principal meridian.

"3. The court erred in marshalling the assets of said estate of Hiram Thornton, deceased, by not including therein the said south-east quarter of said section 6, township 35, range 1 east of the third principal meridian, and directing their conversion into money and the distribution thereof to the devisees of said Hiram Thornton, deceased."

Afterwards, on motion in this court, the writ of error was dismissed as to the defendant in error Houtze.

The defendant in error William Wenner filed the following plea in this court, to wit:

STATE OF ILLINOIS, } ss. Northern Grand Division, September Term, A. D. 1877.
Supreme Court, }

David H. Thornton et al. v. *William G. Houtze et al.*

And now comes William Wenner, one of the defendants in the above entitled cause, by E. F. Bull, his attorney, and defends, and as to the errors assigned by said David H. Thornton, and others, plaintiffs in error in said cause, and the said Louisa Stallard, and others, the defendants in error in said cause, assigning cross-errors, says that the said plaintiffs in error ought not to prosecute their said writ of error against him, and the said defendants in error ought not to assign their said errors against this defendant, because, he says, that the said plaintiffs in error and the above named defendants in

error are heirs at law and devisees of Hiram Thornton, late of La Salle county, in the State of Illinois, now deceased; that said Hiram Thornton departed this life leaving a last will and testament, as in the bill of complaint set out in the record herein is alleged; that this defendant's co-defendant, William G. Houtze, was, by the probate court of La Salle county, duly and legally appointed administrator of the estate of Hiram Thornton, deceased, with the will annexed; that said Houtze entered upon the discharge of his duties as such administrator in the manner set forth in the said bill of complaint, and under and by virtue of a decree of the county court of said La Salle county, rendered at the March term thereof, for the year A. D. 1866, the said Houtze sold to this defendant, on the first day of December, A. D. 1866, the south-east quarter of section number six (6), in township number thirty-five (35) north, range one (1) east of the third (3d) principal meridian, in the said county of La Salle, for the sum of four thousand five hundred and eighty-five (4585) dollars, which was duly paid by this defendant to said Houtze; that said sale was by said Houtze reported to the said county court and confirmed by said court on, to-wit: the first day of December, A. D. 1866, and before the said bill of complaint was exhibited in this cause; that the money thus paid by this defendant to said Houtze was accounted for by said Houtze to the probate court of La Salle county as assets belonging to the estate of said Hiram Thornton, deceased. This defendant further avers, that the money so paid by him, as aforesaid, to the said Houtze for the purchase of said premises was included in and constituted the larger portion of the money which the said Houtze was required by the decree in this case to pay over to the said plaintiffs in error and to the above named defendants in error, as devisees and heirs at law of Hiram Thornton, deceased.

This defendant further avers, that said defendant Houtze, since the rendition of the decree in this case in the court below, that is to say, on, to wit: the twenty-second (22d) day of March, A. D. 1877, in pursuance of the terms of the said

decree, paid to the said plaintiffs in error and the above named defendants in error, as heirs and devisees of Hiram Thornton, deceased, a large sum of money, to-wit: the sum of eight thousand four hundred and ten dollars and twenty-six cents, being the full amount of the money ordered by the decree rendered in this cause to be paid by said Houtze, and that said plaintiffs in error and the above named defendants in error received the money so paid by the said Houtze, on, to-wit: the day and year last aforesaid, and at the time of so receiving said money gave and executed to the said Houtze a release of all liability to them on account of any of said moneys, and also executed and delivered to him a release of all errors in said cause.

And this defendant further avers, that four thousand five hundred and eighty-five dollars of the money so paid by said Houtze to the said plaintiffs in error, and to the above named defendants in error, was derived by the said Houtze from this defendant for the purchase money of said premises, and was paid by this defendant to said Houtze in consideration of the conveyance of the premises above described by the said Houtze, as administrator as aforesaid, to this defendant under and in pursuance of the aforesaid decree of the county court of La Salle county, of all of which said plaintiffs in error and the above named defendants in error had notice, and that said plaintiffs in error and the above named defendants in error, with full knowledge of the facts herein above alleged and set forth, have received and accepted the money so paid as aforesaid by this defendant to said Houtze, and so as aforesaid by the said Houtze paid to the said plaintiffs in error and the above named defendants in error.

This defendant further avers, that the said plaintiffs in error and the above named defendants in error, by virtue of the premises, are estopped and barred from setting up or alleging any error in said sale to this defendant, or from setting up or alleging any error in the refusal of the circuit court of La Salle county to set aside or interfere with the sale so made, as aforesaid, to this defendant, and that they are, and ought to be,

barred from further prosecuting the said writ of error against this defendant.

This defendant further avers, that he has no interest in any of the matters or things set forth in the bill of complaint in this cause or in controversy in this suit, except as purchaser of the premises above described, and in the manner above set forth.

And all this the said defendant is ready to verify, wherefore he prays judgment of the said writ of error, and of the said cross-errors so assigned by the above named defendants in error, and that this suit as to him may be dismissed, etc.

The following are the 1st, 4th and 7th replications to this plea:

1st. And now comes the said plaintiffs in error, by Chas. Blanchard and C. H. Brush, their attorneys, and say that they ought not to be precluded from prosecuting their said writ of error against said defendant William Wenner, because they say that the said defendant Wenner never paid to said Wm. G. Houtze the said sum of $4585 upon the sale by said Wm. G. Houtze to him of the south-east quarter of section 6, in township 35 north, range 1 east of third principal meridian, in said county of La Salle, or any sum whatever, in manner and form as in the plea of said Wenner herein is alleged. Of this they put themselves upon the country, etc.

And defendant, etc., Wenner, doth the like.

4th. And for a further replication in this behalf (by leave, etc.,) the said plaintiffs in error say *precludi non*, because they say that the said Wm. G. Houtze did not, since the rendition of said decree, pay to the said plaintiffs in error and the said defendants in error the said sum of $8410.26, or any sum whatever, in satisfaction of said decree in manner and form as in said plea alleged, and of this they put themselves upon the country, etc.

And the said defendant, Wenner, doth the like, etc.

7th. And for a further replication in this behalf (by leave, etc.,) the said plaintiffs in error say *precludi non*, because they say they and said defendants in error never accepted and received the said sum of money, in said plea mentioned, from the said Wm. G. Houtze, to-wit: the said sum of $4585, in manner and form as in said plea alleged, and of this they put themselves upon the country.

And defendant Wenner doth the like.

The issues were referred to the circuit court of La Salle county for trial. Trial was there had on the 9th of March, 1868, and its finding, certified back to this court, is as follows:

"And now, at this day, comes the defendant in error William Wenner, by E. F. Bull, his attorney, and also come the plaintiffs in error, by Charles Blanchard, Charles H. Brush, and L. B. Crooker, their attorneys, and the defendants in error assigning errors, to-wit: Louisa Stallard, Sarah J. Keith, Elizabeth Hazen, Wesley C. Thornton, Sarah Hallowell, Sarah J. Vanata, R. C. Thornton, William Hawthorne, Elizabeth Hawthorne, Emma Boyd, Mary J. Crowell, Mary A. T. Rechor, Susan K. Allison, Hiram A. Kerr, Henrietta Brice, Magdalene C. Allison, Sarah H. Thomas, Nancy M. Almond, Amanda Kerr, and Mary M. Hand, by G. S. Eldridge, their attorney, and, by agreement of all the parties herein, a trial by jury of the issues herein arising upon the plea of the defendant in error William Wenner, by him filed in the Supreme Court of Illinois for the Northern Grand Division, and certified to this court by said Supreme Court for trial, is waived, and the said issues submitted to the court for trial. And the court, having heard the evidence and the arguments of counsel, and being fully advised in the premises, doth find the issue joined upon the first replication of the said plaintiffs in error to the plea of the said defendant in error William Wenner, and the issue joined upon the first replication of the said defendants in error assigning errors to the plea of said defendant in error William Wenner in favor of the said defendant in error William Wenner, and the issues joined upon the

fourth and seventh replications of the said plaintiffs in error to the plea of said defendant in error William Wenner, in favor of the said plaintiffs in error, and the issues joined upon the fourth and seventh replications of the said defendants in error assigning errors to the plea of said defendant in error William Wenner, in favor of said defendants in error assigning errors.

"It is, therefore, ordered by the court, that the clerk of this court certify and transmit to the clerk of the Supreme Court in the Northern Grand Division, a transcript of the record of the finding herein, together with a transcript of the certificate of the evidence introduced and the exceptions taken by the respective parties upon the trial of said issues."

Both parties reserved the right to except in this court to the rulings and findings of the court below upon these issues, and Wenner has formally assigned error on the findings on the fourth and seventh replications.

Mr. CHARLES BLANCHARD, Mr. CHARLES H. BRUSH, and Mr. L. B. CROOKER, for the plaintiffs in error.

Mr. G. S. ELDRIDGE, Mr. FRANK J. CRAWFORD, and Mr. D. A. COOK, for the defendants in error.

Mr. E. F. BULL, for defendant in error Wm. Wenner.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The first question to be determined is, does the evidence sustain the findings of the court below, upon the issues submitted to it, by this court, for trial?

We have more doubt in regard to the finding upon the issue presented by the first replication to Wenner's plea than as to either of the other issues. Although Houtze and Wenner both swear that Wenner paid Houtze $4585 upon the sale by Houtze to him of the land described in the plea, there are several circumstances disclosed by the evidence tending to impair the

effect of their testimony and to cause it to be regarded with suspicion; still, we are not prepared to say that we are clearly satisfied the finding upon this issue should be reversed.

As to the findings upon the issues presented by the 4th and 7th replications, the evidence shows that the court below, on the original hearing of the cause, decreed that Hiram T. Gilbert be appointed a trustee to receive the money found to be due from Houtze and distribute the same to those found to be entitled, to sell certain real estate, pay costs, etc., and also that the trustee's receipt to Houtze should "constitute, be and operate as a full discharge of said William G. Houtze from all further liability as administrator with the will annexed of Hiram Thornton, deceased, and, also, from all further liability as trustee for the sale of the real estate." William G. Houtze, pursuant to this decree, paid to the trustee, Gilbert, $8416.26, and took from him this receipt:

"Received of William G. Houtze, administrator of the estate of Hiram Thornton, deceased, the sum of eight thousand four hundred and ten and twenty-six hundredths dollars in full settlement and discharge of his liability as administrator of the estate of Hiram Thornton, deceased, or as trustee under the appointment of the county court of said county for the sale of real estate, this receipt to be filed, or a duplicate thereof, in the probate court, and an order entered for his final discharge as such administrator and for a release of his securities upon his administrator's bonds. This money is received by me by virtue of my appointment as trustee in said cause, and upon the express understanding by me, as such trustee, and as attorney for the complainants in said cause, that the payment of said sum is a final discharge of all liability of said Houtze by reason of his administration of said estate, the said Houtze to be protected from liability, if any he has, for the succession tax to the United States government.

Dated, Ottawa, March 22, 1877.

HIRAM T. GILBERT,
Trustee of the estate of Hiram Thornton, deceased."

Gilbert had been acting as attorney for some of the heirs at law of Hiram Thornton, deceased, but not for all. For some of the defendants who have assigned errors he was attorney. He has paid out a portion of the money he received from Houtze, but has, at all times, retained and still retains in his hands more than the amount paid by Wenner to Houtze. He did not distribute what he paid out, *pro rata*. He did not pay any of the parties so much of their distributive shares of that fund but what there was remaining more of their shares than their *pro rata* amount of the Wenner purchase money, if distributed, would amount to. The payments he has made have been made only to a portion, not to all, of the parties claiming as heirs at law of Hiram Thornton, deceased,—and, as such, here complaining or defending. Gilbert, in his testimony, says, and is in that regard uncontradicted, "There has been money enough in my hands all the time, and more than enough, to amount to the whole consideration of the Wenner farm. I have not paid out, as trustee, any portion of the consideration of the Wenner farm. I have reserved in my possession all the time sufficient to amount to that consideration." There is no other evidence in respect to payment to and acceptance by the heirs of Thornton of this money. Hence, it is very clear that the findings below on the issues presented by the 4th and 7th replications are correct, unless it can be held that the payment to and acceptance of the money by Gilbert, amounts, in legal contemplation, to a payment to and acceptance by the heirs.

There is no authority for saying that Gilbert is the *agent* of the parties here complaining of the decree under which he was appointed. They were not present asking his appointment, and they have since done no act by which they should be estopped to question his right to act for them. As trustee, he was the mere custodian of the fund, under the order of the court, holding it for the benefit of those to whom the court might decree it to belong. There is nothing in the record to show that the parties here complaining are responsible for the

money paid by Wenner being put in his hands any more than Wenner is responsible for it being placed there. As attorney at law, he had no authority to act for but a portion of these parties, so it could not be held, on that hypothesis, the payment to him was a payment to them. But no part of the money was paid to him as attorney at law. It was paid to him under the order of the court and to be held and distributed under its direction. The essential elements of an *estoppel in pais* are entirely wanting. We see no cause to disagree with the findings on these issues.

The result is, the plea is not sustained, and not being sustained the decree must be reversed as to the party pleading. *Austin et al.* v. *Bainter*, 40 Ill. 82; *Clapp et al.* v. *Reid et al.* id. 121; *Ruckman* v. *Alwood et al.* 44 id. 184.

It yet remains to consider the error assigned on that part of the decree which dismisses the bill as to Sarah W. Thornton, Cook and Hochstatter.

This part of the bill, it will be remembered, complains of a decree that was rendered in a proceeding for partition in the circuit court of LaSalle county, wherein Sarah W. Thornton was petitioner and Jesse Q. Thornton and the unknown heirs of Hiram Thornton, deceased, were defendants.

Two objections are urged against this decree: First, it is objected that the circuit court had no jurisdiction of the persons of the devisees of Hiram Thornton, deceased. Second, it is objected that the decree was fraudulently obtained.

The notice published is not claimed to be objectionable in form. It professes to have been published in a case wherein Sarah W. Thornton is complainant, and William G. Houtze, administrator, with the will annexed, of the estate of Hiram Thornton, deceased, Jesse Q. Thornton and *the unknown heirs of Hiram Thornton, deceased, are defendants.* It recites that the unknown heirs of Hiram Thornton, deceased, are not residents of the State, and notifies them of the pendency of the suit. Appended to the notice is a certificate of the pub-

lisher of the paper in which it was published, showing that publication was made for the proper length of time.

The only objection attempted to be pointed out is that there was not a sufficient preliminary affidavit to authorize the publication.

The statute in relation to "Partitions," (Gross' Statutes 1869, p. 473,) provides:

"§ 4. In cases where one or more of such parties shall be unknown, * * * so that such parties can not be named, the same shall be so stated in the petition."

"§ 5. All persons interested in the premises of which partition is sought to be made according to the provisions of this chapter, whose names are unknown, may be made parties to such petition by the name and description of unknown owners or proprietors of the premises, or as the unknown heirs of any person who may have been interested in the same."

And in § 6, that "when the names of persons having any such interest in such premises are unknown, and when parties whose names are known do not reside in this State or can not be found, they shall have further notice by advertisement, as provided in §§ 8, 41 and 42 of chap. 21, and after such advertisement, the court shall proceed to act in the premises as though the parties had been duly served with summons, or had been notified by their proper names."

The petition here makes William G. Houtze, as administrator, with the will annexed, of the estate of Hiram Thornton, deceased, Jesse Q. Thornton, and the unknown heirs of Hiram Thornton, deceased, defendants. It alleges that "Hiram Thornton died testate January 31, 1866, disposing of other of his estate, but leaving intestate the north half of south-west quarter section 5, township 35, range 1, and the north half of north-east quarter section 7, township 35, range 1; that he left the petitioner, his widow, him surviving, but no child or children, nor descendants of a child or children, whereby the petitioner became seized in fee simple of the undivided

one-half of said land, and entitled to dower in the other undivided half thereof."

It further alleges that "Jesse Q. Thornton is a brother of said Hiram Thornton, deceased; that the petitioner has heard that there are descendants of deceased brothers and sisters of the said Hiram Thornton, deceased, but the names of any such descendants or their or any of their places of residence are and is unknown to the petitioner."

The petition is sworn to by Sarah W. Thornton, the petitioner; and the following affidavit is also annexed:

"STATE OF ILLINOIS, } ss.
La Salle County. }

Sarah W. Thornton, on her oath, says that Jesse Q. Thornton and the unknown heirs of Hiram Thornton, deceased, do not reside in the State of Illinois, according to the best of her knowledge, information and belief.

SARAH W. THORNTON."

Subscribed and sworn to, etc., etc.

That the petition was defective in not alleging that the petitioner knew of no sister of Hiram Thornton, deceased, and of no brother, except Jesse Q. Thornton, may be conceded. But this is a defect that could have been cured by amendment of the petition, and to have availed anything to the defendants should have been taken advantage of in some direct proceeding. We do not conceive that it goes to the jurisdiction of the court.

To give the court jurisdiction over the person of unknown parties, all, as we think, that is necessary is, it shall be made to appear there are unknown parties and the notice required by the statute shall be published as to them.

It does here appear there are unknown parties, and the notice published is broad enough to include them all. Indeed, it is not pretended that in any contingency would the unknown parties, as such, have been entitled to other or different notice from that published.

We think, in a collateral proceeding like the present, the court should indulge the presumption, until rebutted, that those named as parties are the only parties known to the petitioner. If other parties are known to the petitioner whose names are not included in the proceeding, this might furnish a reason why such parties should not be bound by the decree, but no claim of this kind is made here.

The objection that the decree was fraudulently obtained is based on the alleged fact that the petitioner withheld from the court full knowledge of the facts on which her claim of title or dower rested. She alleged in her petition, as has been shown, that Hiram Thornton died testate, disposing of other of his estate, but leaving intestate the land in controversy. This was a material allegation requiring proof, and the court should have required the production of the will. The cause was referred to a master in chancery to take and report proofs, and his report shows that a copy of the will was given in evidence.

However erroneous the ruling of the court may have been in regard to the rights of the petitioner, we are clear in the opinion, the record discloses no such facts as will impeach its jurisdiction on the ground of fraud, and that they can not be inquired into in this proceeding.

Wenner can not now rely on the objection of multifariousness in the bill. His plea amounts to a confession of error, for which, as to him, the decree must be reversed, unless the facts alleged in avoidance of that error shall be found in his favor. But those facts have been found against him. Besides this, the objection of multifariousness was not urged by him until long after he had answered the bill, and until he filed his amended answer on the first day of the hearing. This was too late. *Oliver* v. *Piatt*, 3 How. 412; *Nelson* v. *Hill*, 5 id. 127; *Gaines* v. *Chew*, 2 id. 619.

What is first above said in regard to the objection by Wenner of multifariousness in the bill, will apply with equal force in regard to his objection of *laches* in the filing of the bill.

Apart from this, also, facts are proved sufficiently explaining and excusing the delay.

The decree as to the defendant in error Wenner is reversed, and the cause remanded; but in all other respects it is affirmed.

Decree reversed in part, and in part affirmed.

MARIA E. YOUNG *et al.*

v.

SAMUEL STEARNS *et al.*

1. APPEAL—*right to bring to Supreme Court.* There are only four classes of cases in which there is a constitutional right of appeal or writ of error to this court, viz: criminal cases, and cases in which either a franchise or freehold or the validity of a statute is involved, and even in these cases the right of appeal is not direct from the trial court, but such appeal or writ of error may be through the intermediary of the Appellate Court, as the legislature may determine.

2. SAME—*chancery cases, etc.* Under the present legislation, in all criminal cases and cases in which a franchise or freehold or the validity of a statute is involved, an appeal or writ of error may be taken directly to this court in case the party appealing or prosecuting such writ of error shall so elect, except in cases in chancery, which must be taken to the Appellate Court in the first place, even though the suit appealed from may involve a franchise, a freehold or the validity of a statute.

3. STATUTES—*construction of two together.* The Appellate Court act, establishing such courts and conferring jurisdiction, and the amendments and additions to the Practice act, passed at the same session, being *in pari materia*, are to be construed together, so that every part of both may stand together and harmonize, and the provisions of each have a sensible and intelligent effect.

APPEAL from the Circuit Court of Will county.

Mr. GEO. S. HOUSE, for the appellees.

Per CURIAM: This is a suit in chancery, involving a freehold, in which the final decree was rendered by the circuit court after the first day of July, 1877. An appeal was taken to this court, and a motion is now entered by appellees to dismiss such appeal for want of jurisdiction.

There are only four classes of cases in which there is a constitutional right of appeal or writ of error to this court. These four classes are, criminal cases, and cases in which either a franchise, a freehold, or the validity of a statute is involved. Even in these cases such constitutional right of appeal or writ of error to this court is not the right of a direct appeal from or writ of error to the trial court, but such appeal or writ of error may be through the intermediary of the Appellate Court. It is for the legislature to determine as to whether in all, or some, or any of these cases, the appeal shall be direct to this court, or otherwise.

The Appellate Court act of 1877, and the amended and additional sections of the Practice act, were approved on the same day, and went into effect on the same day. They are *in pari materia*, and are to be construed together. Every part of both statutes should be viewed in connection with the combined whole of the two statutes, so as to make all the parts of the two statutes harmonize, if practicable, and give a sensible and intelligent effect to all the provisions of each.

Section 8 of the Appellate Court act, considered alone, would seem to prohibit an appeal to or writ of error from the Appellate Court in a chancery suit involving a franchise, a freehold, or the validity of a statute, and to allow such appeal or writ of error to be taken to this court. But section 67 of the Practice act, as amended, expressly provides that appeals and writs of error "may be taken to the Appellate courts from all final judgments, orders and decrees, except as hereinafter stated," and it is thereinafter provided, in the additional section 88 of the Practice act, that in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, the appeal or writ of error may be taken directly to the Supreme Court, in case the party appealing or prosecuting such writ of error shall so elect, "excepting in cases of chancery." This exception should not be disregarded, for it is not to be presumed that the legislature intended any part of the statute to be with-

out meaning. If such exception is regarded, then no direct appeal lies in chancery cases from the circuit courts to this court.

The Appellate Court act is the original act establishing such courts and conferring jurisdiction. The amendments and additions to the Practice act seem to recognize the Appellate courts as existing courts, or, rather, to proceed upon the assumption that the act creating such courts will become a law, and take effect on the first day of July following, and their evident intention was to harmonize the practice and jurisdictions of the several courts of the State, including the proposed Appellate courts, and form a consistent whole. In interpreting the Appellate Court act, and for the purpose stated, these amendments and additions are rather to be regarded in the light of subsequent legislation, and as conferring by said sections 67 and 88, taken and considered together, an additional jurisdiction upon the Appellate courts,—that is, jurisdiction in cases of appeals or writs of error from final decrees in chancery suits involving a franchise, a freehold, or the validity of a statute, and as depriving this court, by said exception to section 88, especially when considered in the light of the other sections enacted concurrently therewith, of all direct appellate jurisdiction in chancery causes.

The appeal in this case will be dismissed, with costs, and leave will be given to withdraw the record from the files.

Appeal dismissed.

ALEXANDER GUILD *et al.*

v.

OBED E. HALL.

1. PLACITA—*construed as to when court convened.* Where the placita of a record shows that the court convened on the third Monday of April, 1877, being the day fixed by law for the court to meet, which is stated parenthetically to be on the 28th day of that month, the latter date, not being required to be stated, will be treated as surplusage or as a mere formal misprision.

2. APPEAL *from justice—amount of judgment.* Where a justice of the peace has jurisdiction of the amount due upon a note, and an appeal is taken to the circuit court, judgment may be rendered in that court for a sum above the justice's jurisdiction, if such excess is for interest accruing since the judgment below.

3. JUDGMENT—*certainty as to amount on remittitur.* A judgment that the plaintiff have and recover of the defendants $205.79, his damages assessed by the jury, less the sum of $5.79, remitted as aforesaid by the plaintiff, is substantially a judgment for $200, and is not erroneous for uncertainty.

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

Mr. RUFUS KING, for the appellants.

Mr. R. S. WILLIAMSON, and Mr. F. SACKETT, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a suit brought before a justice of the peace of Cook county, on a promissory note. Plaintiff recovered judgment before the justice, and defendants appealed to the circuit court of that county. A trial was there had, resulting in a verdict in favor of plaintiff for $205.79. A motion for a new trial was entered and plaintiff remitted $5.79, and the motion was overruled and this judgment was entered:

"This day came the said plaintiff, by his attorney, and remits, of the verdict of the jury aforesaid, the sum of five dollars and seventy-nine cents; and, thereupon, came on to be heard the motion of said defendants to set aside said verdict and for a new trial of said cause, and was argued by counsel; and the court, being fully advised in the premises, doth overrule said motion. Wherefore, it is ordered, and considered by the court, that said Obed E. Hall, plaintiff, recover of said Alexander E. Guild and Henry Guild, defendants, two hundred and five dollars and seventy-nine cents, his damages, so as aforesaid by the jury assessed; less the sum of five dollars and seventy-nine cents, remitted as aforesaid, by the plaintiff,

together with his costs in this behalf expended, to be taxed, and have execution therefor."

From which defendants appeal and urge a reversal.

A number of errors are assigned, but two only are urged in argument. The first is that the record shows the court convened on a day not authorized by law. On turning to the record we find the *placita* states the court convened on the third Monday of April, 1877. It is true the clerk states parenthetically that it was on the 28th day of that month. The law fixes the third Monday as the time for the court to meet, and this convening order states it did meet on that Monday. This is all the law required, and the mere misprision of the clerk, from inadvertence in adding an unnecessary date, can not affect the validity of all the proceedings of the term. His statement of an impossible date where the law requires no date to be given, must be rejected as surplusage, or considered as amended under the second section of chapter entitled "Amendments and Jeofails," as it is at most but a formal misprision. There is no force in this objection.

It is next urged that the judgment is for $205.79, an amount beyond that claimed by the indorsement on the summons and above the jurisdiction of the justice of the peace. If the position of appellant was true, that the judgment was rendered for $205.79, as he contends, we must presume the question is not seriously urged, as we suppose counsel must know of the decisions in the cases of *Tindall* v. *Meeker*, 1 Scam. 137, and *Mitcheltree* v. *Sparks*, id. 198. These cases are conclusive of this objection.

It is also claimed, the judgment is so uncertain that it must, for that reason, be reversed. We fail to perceive any uncertainty as to the amount. We apprehend that no person on reading it would say it was uncertain, but all would say it was for $200 and costs. The language can bear no other reasonable construction. It would have to be tortured from its plain and obvious meaning to hold it was for more than $200. It says it is for $205.79 less the sum of $5.79 remitted as afore-

said, which is a statement that it is for $200. The judgment has only to be read to be so seen and understood. No particular form of words is necessary to be employed in rendering a judgment. If the order is sufficient in substance, that is all the law requires. There can be no question of the sufficiency of this judgment in its material and substantial parts.

But it is urged, that the case of *McCausland* v. *Wonderly*, 56 Ill. 410, must control this case. This we regard as a misconception of the facts of the two cases. In that case the plaintiff expressed a willingness to remit $600 of the verdict, but a *remittitur* was not entered. In this case the *remittitur* was entered of record, and the judgment order so states. It was not there said that the judgment for $1250 less $600 to be remitted was informal because it was not rendered in terms for $650. It was informal because it stated that the $600 was "to be remitted." A judgment for $1250 less $600 is as certain as one for $650. The words are not the same, but the meaning is precisely the same. Perhaps a majority of persons would have, in entering up the judgment, used this language: Wherefore it is ordered and considered by the court, that the said plaintiff recover of the defendant $650, the amount of the verdict remaining after deducting $600 remitted as aforesaid, as his damages aforesaid, assessed by the jury, etc. Yet the judgment as entered expresses the same thing. The broad difference in the two cases must be obvious to all persons. So that case can not be held to govern this.

The case of *Rothgerber* v. *Wonderly*, 66 Ill. 390, is referred to as authority on this question. It was an action on the appeal bond in the case of *McCausland* v. *Wonderly*, *supra*, and it was there held, that the judgment in that case was for $1250, although the order stated that it was less $600 "to be remitted." That case, like the former, does not hold that the judgment was uncertain because it was for $1250 less $600, but that as no *remittitur* appeared to have been entered it was for the former sum. Hence that case has no bearing on this.

The case of *Farr* v. *Johnson*, 25 Ill. 522, is also referred to by appellant. In that case a written *remittitur* was filed, but the judgment was rendered for the full amount of the verdict, "subject to the aforesaid remittance." The record in that case shows, that the plaintiff filed a *remittitur* in writing of $2375.05, but the judgment order did not find that any *remittitur* had been entered and allowed. Nor does it appear, from any other part of the record, that it was allowed, except in the recital in parenthesis in the judgment order. Thus it will be seen that the language of that judgment and the one under consideration is different. Had that judgment stated that the plaintiff recovered $4750.10 subject to a *remittitur* heretofore filed of $2375.05, then that judgment and this would have been almost similar in substance. There, the amount of the judgment was not specifically stated in the order, but on its inspection a person was referred to a *remittitur*, not appearing in any order or entry of the court, but to be found on a paper filed in the cause and which was not a part of the record. And it is apparent, that in such a case, the amount that the judgment was for was not specified and certain in itself, but depended upon a paper among the files. On the loss of the paper there would have been no means of ascertaining the amount of recovery without the aid of proof as to the execution of the written instrument making the *remittitur*, and its contents. Such judgments are too loose and uncertain. We think there is a well founded distinction between these cases. But if there is not, we would be inclined to modify that decision.

In the case last referred to it was said that the judgment order should have recited the finding of the jury, the amount remitted, and then have proceeded to render judgment for the remainder. In the case at bar the order recites the amount found by the jury, the sum remitted, and then proceeds to render judgment for the sum remaining after deducting the amount remitted, and, we think, literally conforms to what was said in *Farr* v. *Johnson*, *supra*.

We are unable to see that *Linder* v. *Monroe's Exrs.* 33 Ill. 388, has any bearing on the question. In that case the damages were assessed at $393.79, and the plaintiff remitted $150.22 and judgment was rendered for $272.59, instead of $243.57 the true amount, being an excess of $29.02 above the true amount, after deducting the sum remitted. This case in none of its features is like that under consideration, and can have no bearing on it.

On the petition for a rehearing we have thought proper to consider these cases, as they are earnestly urged upon our attention. But we are unable to see that they require a reversal.

The judgment must be affirmed.

Judgment affirmed.

CORNELIUS O'CALLAGHAN

v.

MARGARET O'CALLAGHAN.

JUDICIAL SALE—*inadequacy of price.* Inadequacy of price alone will not be sufficient ground for setting aside a judicial sale. Where a house and lot worth $4000 were sold for $10 the court refused to set the sale aside.

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

Messrs. VAN ARMAN & GORDON, Mr. W. E. LEFFINGWELL, and Mr. D. W. C. CASTLE, for the appellant.

Mr. THOMAS G. WINDES, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in chancery filed by the appellant, Cornelius O'Callaghan, in the circuit court of Cook county, to set aside the sale of a lot and dwelling house in Chicago.

The bill alleges, in substance, that the complainant having

been divorced from his wife, the appellee, Margaret O'Callaghan, the court decreeing the divorce made an order in the cause for the payment of alimony by the complainant, from which decree the complainant appealed to this court, and the decree of the court below being affirmed, a fee bill and execution against the complainant were issued from this court, by virtue whereof the house and lot in question were levied on by the sheriff of Cook county, and sold on the 9th day of April, 1874, to the solicitor of said Margaret O'Callaghan, who subsequently made a quitclaim deed of his title to her for the consideration, as expressed in the deed, of one dollar. That the fee-bill and execution were for the sum in the aggregate of $16.90, and the property was sold for the sum of $10, it being worth the sum of $6000. That no notice was ever given to complainant of the issuing of said fee bill and execution and no demand or request made on him for their payment, and that he never knew or heard of the levy or sale so made as aforesaid until about a week before the filing of the bill, which was long after the expiration of the right of redemption from such sale. That the said Margaret O'Callaghan and her agents fraudulently kept from the knowledge of the complainant the issuing of said fee bill and execution and all the proceedings thereunder, with intent to obtain a title to said premises without consideration and for the purpose of cheating and defrauding the complainant out of his property.

The answer admits, substantially, the statements of the bill except as to the alleged fraudulent conduct, intent and purpose, and the alleged ignorance of the complainant of the issuing of the fee bill and execution and of the levy and sale under the same, all which latter it alleges were known to the complainant, and payment of the fee bill and execution demanded of him. Upon final hearing on pleadings and proofs the bill was dismissed, and the complainant appealed.

The testimony of the appellant sustains the allegations of the bill to the extent of his entire ignorance of the issuing of the fee bill and execution or of the levy and sale there-

under, until after the time for redemption had expired, and until just before the filing of the bill. It does not go to show anything of fraudulent or wrongful conduct on the part of appellee or any one else further than the want of demand or request of payment, and non-communication to appellant of the facts of the proceeding.

Appellee's attorney in the divorce suit testified, that upon receipt of the fee bill and execution, he informed appellant thereof and requested payment, which being refused, he afterward, with notice to appellant, placed the fee bill and execution in the sheriff's hands; that after the sale appellant was informed thereof and of his right of redemption, and he remarked that he would take his chances of redeeming. Appellee in some particulars confirms this testimony. The property appears to have been of the value of about $4000. It was sold for a very small sum, $10. But that alone can not be held ground to set aside the sale; and that would seem to be all the ground the case shows.

We do not well see how upon the proofs the court below could do otherwise than it did, to dismiss the bill.

The decree must be affirmed.

Decree affirmed.

THE BATAVIA MANUFACTURING COMPANY

v.

THE NEWTON WAGON COMPANY.

1. DEED—*construction.* If the intention of the parties to a deed for land with right to the use of certain water power can be ascertained as well from the attendant circumstances, the situation of the parties, and the state of the thing granted, as from the language employed in the deed, effect must be given to it.

2. SAME—*construed as to right to water power.* Where a party, by deed, conveys all of his land west of the center of a river over which he has a dam erected, and one-half of the water power afforded by the dam to be drawn or taken from any point west of the center of the river, covenanting to keep the

dam up to the same height, it will be considered that it is the right to the use of the momentum of water in its passage, and not a given quantity of water, that is the subject of the grant aside from the land conveyed, and the right to the other half of the water afforded by the dam will be restricted in its exercise to the east center of the main channel of the stream, the right to draw or use the water at any point west of the center of the stream by the grantee necessarily excluding the grantor from the exercise of the same right.

3. WATER POWER—*grantor of not interested in its use after it passes below him.* The grantee of one-half of the water power afforded by a dam, after the water has passed from the upper pond through a sluiceway into a lower pond, created by a lower dam across a slough, will have the undisputed control of the use of the water in such lower pond, and the grantor or his assigns can only object that, by enlargement of the sluice, more water is drawn into the lower pond than the original grant authorized, but in what manner the water, when there, shall be distributed as motive power, will not concern the original grantor.

4. SAME — *grant of part of water power construed.* A deed for certain land abutting upon a mill pond granted the right to use through a raceway from the pond the following described amount of water, the grantor first reserving and setting apart as preferred water power, for his own use or the use of his assigns, 600 square inches of water, to be drawn under the full head that could or might be obtained, and one-sixth part of the residue, or of whatever water the grantor might have for use for water power, over and above the said 600 inches, the said grantor conveyed to the party of the second part: *Held*, that after the reservation of 600 inches of preferred water, the grant passed one-sixth of the *whole* of the residue of the water power, and not of the *half* merely, and this, too, not simply of the water power *then* obtained, but of the *full head that could or might be obtained.*

5. SAME—*right to use under contract.* Where the owner of a water power on a river grants, by deed, one-half of the water of the stream, with the right to draw or use the same from the pond of the grantor, created by a dam, to be taken at any point west of the center of the stream, the grantee, and those claiming under him, can not claim, as against the grantor and his assigns, the right to draw more than one-half of the water of the river into a lower mill pond, but this is subject to the implied condition that the grantor or his assigns are in a condition to make an application of the other half as motive power, for the grantor has no property in the water itself, and is not entitled to detain or control it except for the propelling of machinery by its momentum.

6. This does not deny in the grantor or his assigns the power to enter into valid contracts to abridge the use of one-half or any less quantity of water in propelling machinery, so as to allow a greater quantity to flow into the lower pond; but since such a contract can not be a sale of the water of the river, or its momentum, which they can only use on their own soil, it can but amount to an estoppel of their right to use the momentum of so much water,

leaving the water, after passing into the lower pond, to be used in accordance with the rights of those entitled to share in such power.

7. The owner of one-half of the water power of a river to be taken from the west half of the stream, acquiring subsequently to a grant of a portion of such motive power to others, six hundred square inches of preferred water from the east side of the stream, occupies precisely the same position as to his grantees as if he had increased the flow of water into his mill pond on the west side by turning a creek conveying a like quantity of water into the same, which before had emptied into the river below it. In either case he would not be legally entitled to a preference as to such additional supply as against other owners of water power in such stream, nor can he enforce contribution from such other owners for the expenses incurred in obtaining the additional supply, if the act was purely voluntary, and uninfluenced by any express or implied promises of contribution.

8. SAME—*under contract for separate uses of water power, use must be reasonable.* Although a party owning a mill pond affording water power for the propelling of machinery, in granting a portion of the same to another, may have reserved 600 square inches of preferred water from the pond for his own use, he will be restricted to a reasonable use of the same, and will not be permitted to use the same in an unreasonable manner to the prejudice or injury of his grantee, and the reasonableness of such use is not to be measured alone by the necessities of the business of the grantor, but also by the circumstances of the condition or stage of water and the rights of the grantor and other owners of water power on the same pond, and the manner of the reasonable and proper use of the water of the stream by upper riparian proprietors.

9. SAME—*party having preferred right to a given amount can not use the same to injury of party having an interest in the surplus.* Where the owner of a mill pond, after reserving for his own use 600 square inches of water for motive power, grants to another one-sixth of the residue, retaining the other five-sixths, he may use the whole of the preferred water if it can be done without injury to his grantee, but not in such a manner as to destroy or injure his grantee's right to the use of his one-sixth part of the residue.

10. In such case where it is the custom of mill owners above to run their mills by day and shut down their gates by night to accumulate a head of water, if the grantor runs his mill and machinery by night, so as to draw off the water in the pond, leaving no head from which the grantee can take his portion during the daytime, he can not maintain any action against his grantee for taking and using of the water in the pond an amount of water he would be entitled to by a proper and reasonable use on the part of the grantor.

11. The question of what is a reasonable use of the water of a mill pond by parties having common interests in the same, is one of fact to be determined by the jury.

Syllabus.

12. SAME—*rights of grantee of a part against party bound to keep up dam.* Where the owner of a mill dam across a river conveyed land from the center of the river and below the dam with one-half of the water power to be drawn from the mill pond above, and covenanted for himself, his heirs and assigns to keep up the dam at its then height, and the grantee conveyed the land, with the water power, and the benefits and rights he held, to have the dam kept up and in repair, and the second grantee conveyed a part of the same land and a portion of his water power after first reserving a certain number of square inches as preferred water for his own use, it was *held*, that it was the duty of the last grantor to keep in repair the dam so as to prevent leakage to an unreasonable degree for the protection of his grantee or assigns, and that if he did not, the latter was not bound to suffer the loss, but might rightfully use his proportion of the surplus water that he would have had if the dam had been kept in reasonable repair.

13. Where a party whose duty it is by law to keep a dam in proper repair so as to preserve the water for his own use and that of another claiming under him and entitled to a proportionate share in its use for propelling machinery, permits the water to escape through the dam, which by the use of reasonable care he could have detained for use, the loss must fall upon him and not upon the party claiming under him.

14. COVENANT—*when it runs with the land.* Where a party conveys land upon a stream of water with the use of half of the water to be drawn from a pond created by his dam, and covenants to keep such dam up and in repair, the right to have the dam kept up and in repair will pass by conveyance by deed granting the same, and may be enforced; but a remote grantee of a part of the premises to whom no right is conferred to enter upon the dam and make repairs, can not do so.

15. EVIDENCE—*no error to exclude evidence of what is admitted.* Where the title of a party through a certain deed is admitted by the stipulation of the parties, there is no error in not admitting such deed in evidence.

WRIT OF ERROR to the Circuit Court of Kane county; the Hon. H. H. CODY, Judge, presiding.

Mr. J. F. FARNSWORTH, Mr. B. F. PARKS, and Mr. T. C. MOORE, for the plaintiff in error.

Mr. CHARLES WHEATON, and Mr. EUGENE CANFIELD, for the defendant in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was an action on the case, by the Batavia Manufacturing Company against the Newton Wagon Company, for a diversion of water power used in propelling machinery.

On trial in the court below, the jury returned a verdict for the defendant. The court, after overruling a motion for a new trial, gave judgment upon the verdict, and the case comes here upon the plaintiff's appeal.

The first question to be passed upon arises upon the giving and refusing of instructions in regard to the construction of deeds under which the respective parties claim, upon the question of the quantity of water to which the plaintiff is entitled to a preference over the defendant.

The plaintiff claims a preference of 1200 square inches, while the defendant contends that it is entitled to but 600 square inches.

The ruling was in favor of the contention of the defendant.

The facts material to this question are as follows: In 1837, John Van Nortwick, Lester House and Alanson Barker claimed the lands on both sides of Fox river at the village of Batavia, in Kane county, and subsequently obtained the government title therefor. There was an island in the river, at this point, formed by the main channel of the river on the east and a slough, through which the preponderance of the evidence shows a channel ran—(very small in the dry season of the year but enlarging with the increase of the flow of the water in the river,) on the west. In the year above named, a dam was built at or near the head of the island across the main branch of the river on the east, and a small dike of stones and sticks was constructed from the head of the island across the slough on the west. In 1844, Barker & House and Van Nortwick made a division of the land and water power, and, on the 2d of August of that year, Barker & House conveyed to Van Nortwick the land west of the center of Fox river, as it then ran, and

the following described water power, viz: "One-half the water of said Fox river, with the right to draw or use the same from the present pond or otherwise at any point west of the center of said river as it now runs." And the deed also contains this covenant: "And the said parties of the first part, for themselves, their heirs and assigns, do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, to ever maintain and keep in repair a dam across said river on the *stile* [site] of the present dam at Batavia, and at the same height, and in case they shall neglect to do so, then the said party of the second part, his heirs and assigns, after due notice being given, may repair or build said dam—the cost of which shall be paid by the said party of the first part, their heirs or assigns." Immediately after the execution of this deed, Van Nortwick made an embankment across the slough at the head of the island and opened a race through it to let in water, thus forming a mill pond of the slough on the west of the island; and, at the same time, he also erected an embankment, bulkhead or dam across the slough, at the south end of the island, and built a saw mill supplied by water from this pond by means of a gate. This mill continued to be operated by Van Nortwick and those claiming under him until long after the rights of the defendant had accrued in the water power in controversy. On the 1st of April, 1857, Van Nortwick conveyed to a then existing corporation called "The Batavia Manufacturing Company"—(not the plaintiff)—certain lands, which embrace the island and land under the mill pond west of it, including said saw mill, embankments, bulkheads and fixtures, and also all his right and interest in the water power, etc. This deed contains, also, this grant: "The said first party also conveying to said second party the benefits and rights accruing to him or his assigns from the obligations of other owners of water power on the east side of the river to keep up and maintain the dam across said river, the said second party being obligated to keep up and maintain the racks connected therewith on the

west side of said river." On the same day, the Batavia Manufacturing Company conveyed to Levi Newton a part of the island abutting upon what is now called Wilson street, and also abutting upon the mill pond on the west and the river on the east, and this conveyance contains this further grant: "The right to keep open and use the raceway now opened across said lands and street from said pond to Fox river, and to use, through the same, the following described amount of water—the said company, party of the first part, first reserves and sets apart as preferred water power for its own use, or the use of its assigns, 600 square inches of water, to be drawn under the full head that can or may be obtained, and one-sixth part of the residue, or of whatever water said company may have for use for water power over and above the said 600 inches, said company hereby conveys to said party of the second part." And this covenant then follows: "And the said party of the second part covenants and agrees to bridge said raceway across Mechanic street and keep said bridge in good repair, and he further covenants and agrees to pay one-twelfth part of all the costs and expenses to which the company may be liable or may incur from time to time in improving or elevating or repairing the dam over Fox river or the embankment at the south end of the pond, as may be by them deemed expedient and necessary in securing and maintaining the water power." It appears that the contracts for purchase of the land and water rights conveyed by these deeds were made, respectively, between Van Nortwick and the Batavia Manufacturing Company and Levi Newton and the Batavia Manufacturing Company, in June, 1854, and at that time the Batavia Manufacturing Company entered into the possession of the property purchased by it, with the exception of that portion sold to Newton, and that Newton entered into possession of that and shortly thereafter erected buildings thereon for a wagon shop, and the same fall commenced to dig his race, which he completed the following spring or summer: so that, when the deed was executed Newton's buildings had been completed, the

raceway dug across the land and the whole in use by him for some time. The Batavia Manufacturing Company had also erected a large stone building at the south end of the mill pond for a car shop, put in two water wheels of 300 inches each, and was carrying on its business of manufacturing, for some time, before the execution of its deed.

It does not appear that, at the time of the execution of the deed, the Batavia Manufacturing Company had ever used more than 600 square inches of water, or made claim of the right to use more than that amount as preferred water.

February 25, 1860, the Batavia Manufacturing Company conveyed to the Fox River Manufacturing Company all the property, including the water rights conveyed to it by Van Nortwick, except such as had been conveyed to Newton. April 16, 1861, the Fox River Manufacturing Company conveyed certain parts of the land conveyed to it, as above, to Samuel D. Lockwood, and the following described water power, viz: "The water power purchased of John Van Nortwick by the Batavia Manufacturing Company was thus subdivided: 600 inches is reserved as preferred water power, to be used at said car shops, and the remainder is divided into six equal parts, and two of these parts (or one-sixth of the water power after reserving, as above, 600 inches,) are hereby conveyed to said party of the second part, to be used at the race of said saw mill." May 12, 1862, the Fox River Manufacturing Company conveyed other portions of its land to Levi Newton, and on the second day of May, 1862, it executed a deed to certain persons, designated in argument as Howland & Co., for the remainder of its land conveyed to it as above, with the following grant of water power, viz: "All of the water rights and privileges conveyed by John Van Nortwick to the Batavia Manufacturing Company, * * * excepting therefrom one-half of whatever water or water power which shall remain after reserving as preferred water power 600 square inches of water, to be drawn under the full head that can or may be obtained;" and the conveyance was made subject to

this proviso: "*Provided*, that nothing in this conveyance shall interfere with the rights to water or water power of other parties,"—said parties being Levi Newton and Samuel D. Lockwood, holding under conveyances from either the Batavia Manufacturing Company or the Fox River Manufacturing Company.

May 10, 1862, McKee & Moss, who had obtained the same by deed from Barker & House, conveyed to Howland & Co. the following described water power, viz: "600 square inches of preferred water from their undivided east half of Fox river, to be drawn from said McKee & Moss' mill pond, and used by said party of the second part in propelling machinery on the premises recently purchased by them from the Fox River Manufacturing Company,—meaning by said 600 square inches the amount of water that will pass through an aperture of that size, under the full head that may be obtained on their premises when the pond is full."

Howland & Co., on the 17th day of February, 1865, conveyed the land and water power which they owned to the Batavia Paper Mill Company, and, after describing the water power which they had derived from the Fox River Manufacturing Company, and lands connected therewith, the deed has this proviso: "*Provided*, that nothing in this conveyance shall interfere with the right to water or water power of other parties,"—said parties being Levi Newton and Samuel D. Lockwood, holding under conveyances from either the Batavia Manufacturing Company or the Fox River Manufacturing Company. The same property and water rights were conveyed by the Batavia Paper Mill Company to the Chicago Fibre and Paper Company, on February 1, 1867, subject to the same proviso, and on the 17th of August, 1870, the assignee in bankruptcy of the last named company conveyed the same property and water rights, subject to the same proviso, to the plaintiff.

The property and water rights of Levi Newton were con-

veyed to the defendant long prior to the existence of the present claimed cause of action.

What was the intention of the parties in using the language with reference to water power, found in the deed of the Batavia Manufacturing Company to Levi Newton? For if that intention can be ascertained, as well from the attendant circumstances,—the situation of the parties and the state of the thing granted,—as from the language employed in the deed, effect must be given to it. *Hadden* v. *Shoutz*, 15 Ill. 581.

It is very true, as insisted by counsel for plaintiff, that the deed of Barker & House to Van Nortwick, and, therefore, necessarily, the deed of Van Nortwick to the Batavia Manufacturing Company, only conveyed one-half of the water power afforded by the dam, and that the other half must have remained in them, and have passed to the present plaintiff as their remote grantee. But it is to be considered it was water power,—that is to say, the right to the use of the momentum of water in its passage,—and not a given quantity of water, that was or could have been the subject of the grant; and to Van Nortwick was granted all the land, including the slough, west of the center of the main channel of the river, on which the grantors had any right to erect works and make the necessary improvements whereby the water power could be controlled and used for profit; and it was, moreover, expressly stipulated, that he was to have the right to draw or use the water from the pond then existing, or otherwise, at any point west of the center of said river as it then run, which, of itself, necessarily excludes the grantors from the exercise of the same right. It can hardly admit, therefore, of rational controversy, that while there still remained in Barker & House the right to one-half the water power afforded by the dam, it was restricted in its exercise to the east of the center of the main channel of the river, and this is the only right, as against Newton, that could be transferred to the grantees of Barker & House.

The Batavia Manufacturing Company, as owner of the island

and of the slough which was converted into a mill pond by the erection of the lower dam and the opening of sluice ways through the dike at the head of the island, had the undisputed control of the water power at this point. When the water had reached this pond, it had passed beyond any point where it could be used as motive power east of the center of the main channel of Fox river. Moss & McKee could, at most, but object that, by the enlargement of the sluice ways, more water was drawn into this pond than the grant of Barker & House to Van Nortwick authorized; but in what manner the water, when there, should be distributed as motive power, could not concern them in the least.

The language employed shows, that the water, when drawn into the pond at the west of the island, was considered by the parties as for the exclusive use of the owner of that pond, and the grant to Newton is, after the reservation of the 600 inches of preferred water, one-sixth of the *whole* of the residue of the water power, and not of the *half*, merely, and this, too, not simply of the water power *then* obtained, but of *the full head that can or may be obtained;* and the conveyances under which plaintiff claims expressly recognize the rights thus granted, to the extent imported by its terms. So, also, the deed of the Fox River Manufacturing Company to Levi Newton, although probably not to be considered as an enlargement of Newton's water right, is fairly entitled to be considered as a subsequent recognition and confirmation of the grant to him by the Batavia Manufacturing Company, according to the import of the terms in which that grant is made.

Van Nortwick, and those claiming under him, undoubtedly could not claim, as against Barker & House, and those claiming under them, the right to draw more than one-half of the water of Fox river into this pond, but this, however, is subject to the implied provision that Barker & House were in a condition to make an application of the other half as motive power, for it is not pretended they had a property in the water itself, or were otherwise entitled to detain or control it than for the

propelling of machinery by its momentum, and so they could have no title or interest in the water not actually and properly appropriated in propelling their machinery. *Tyler* v. *Wilkinson*, 4 Mason, 397. This, it is true, does not deny in Barker & House, or their grantees, the power to enter into valid contracts to abridge their use to one-half or any less quantity of water in propelling their machinery so as to allow a greater amount to flow into the lower pond; but, since such a contract could not be a sale of the water of the river, or of its momentum, (which they could only own the right to use on their own soil,) it could but amount to an estoppel of their right to use the momentum of so much water, leaving the water, after passing into the lower pond, to be used as motive power in accordance with the rights of those there entitled to share in such power. Hence the grantee of the 600 inches of preferred water from the east side of the river occupies precisely the same position that it would, had it increased the flow of water into the pond west of the island by turning a creek conveying a like amount of water into the pond, which had before emptied into the river below it. In such case, it may be conceded, there would be a strong natural equity in its favor against other owners of water power on the pond, for contribution on account of the expense it had so incurred, but there would not be the slightest pretence for saying that it was legally entitled to a preference to the amount of water thus added; nor could it enforce contribution for the expenses it had incurred, under any known rule of law—assuming, of course, that its act had been purely voluntary and uninfluenced by express or implied promises of contribution.

Here, moreover, we have the express stipulation that Levi Newton and his grantees shall have the benefit of *any head that can or may be obtained.* Levi Newton was neither party nor privy to the arrangement by which the 600 inches of water from the east side of the river was endeavored to be secured, and can not, therefore, be assumed to have consented that it should be transferred as preferred water to the pond west of

the island. As to him, the case is as if that contract had not been made. We see no objection, in any respect, to the ruling upon this point.

The question next presented arises upon the instructions in reference to the manner in which the respective parties were entitled to use the water.

The court declined to instruct the jury, as asked by the defendant, that "the question of reasonable use of the water by the plaintiff, as between the plaintiff and defendant, and as affecting the rights of the defendant, does not arise in this case as to the 600 inches of preferred water power on the east half of the river, but only as to the use of the plaintiff's water over and above the 600 square inches on the west half of said river;" but gave the following, as asked by the plaintiff:

"As to the question of reasonable use of the water by the plaintiff, the jury have the right to consider the character and value of the plaintiff's mill and machinery, and the necessity, if there was such, that it should be run continually, and all the circumstances connected with the same."

And the court, on the request of the defendant, gave these instructions:

"The jury are instructed, that while, under the reservation in the deed of April 1, 1857, from the Batavia Manufacturing Company to Levi Newton, there was reserved to said company the right to 600 inches of preferred water from said mill pond, which right the plaintiff now claims; yet the plaintiff, in the exercise of such right, is restricted to a reasonable use of such water, and the plaintiff would not be permitted to use the same in an unreasonable manner, and the reasonableness of such use is not to be measured alone by the necessities of the business of the plaintiff, but also by the circumstances of the condition or stage of water and the rights of the plaintiff and other owners of water power on said pond and the manner of the reasonable and proper use of the water of said stream

by riparian proprietors above the said works at Batavia, so far as circumstances, rights and reasonable and proper use are shown by the evidence, and by all the evidence in the case showing the reasonableness or the unreasonableness of such use.

"If, therefore, the jury believe, from the evidence, that the plaintiff, during the dry season and scarcity of water in the summer of 1874, in the night time, when the mills on the river above Batavia were shut down so no water could run from above into the west mill pond at Batavia, run their establishment, using water from the mill pond, and thereby drew down said pond, so that in the morning following there was little, if any, water in said pond, and so that thereby the defendant was deprived of using any water from said pond that he was entitled to use, and that such use on the part of the plaintiff was an unreasonable one, under the principle laid down in the foregoing instructions, then the plaintiff had no right to complain if the defendant, as the water in the pond came in during the day, drew from the same through its race, provided the defendant used no more water thereby than it was then rightfully entitled to under the deed of April 1, 1857, from the Batavia Manufacturing Company to Levi Newton and the deed of April 12, 1862, from Fox River Manufacturing Company to Levi Newton."

Plaintiff contends that these last instructions are not pertinent; that if it had the right to preferred water, it could use it at all times of day and night, and that it was not required to hold it, even for a short time, until there would be a surplus above its preferred water to distribute with the defendant.

We can not assent to this position. If the use of the preferred water could not, under any circumstances, injure the rights of the defendant in the one-sixth of the surplus, there could be no objection to the plaintiff taking and using it without paying any regard to the defendant. But, unfortunately, the preferred and the surplus water compose a single

and entire body of water, unsevered and undistinguishable by mere observation. The preferred water can not be separated from the surplus, except when it is applied to use as motive power by the plaintiff, and since plaintiff is entitled to five-sixths of the surplus, *pro rata* with the defendant, as well as the preferred water, it is not required to nor does it appear that it was accustomed to distinguish accurately and constantly between that to which it was entitled as preferred, and that to which it was entitled as its *pro rata* part of the surplus.

It is manifest, therefore, in the very nature of things, that plaintiff, in taking its own, by improvidence or carelessness might materially injure the rights of the defendant. To maintain plaintiff's position requires the false assumption that the taking of a given quantity from a body of water, and applying it as motive power, involves no other or greater risk to the residue of the water, as motive power, than the taking of a given number of sticks of wood from a pile involves to that which is left. Water in a barrel or tank, designed to be consumed, might, undoubtedly, be thus divided; but it is to be observed, in this connection, as under the first point considered, that the rights of the parties here are not in the water itself, as an article of property, but only in its use as motive power, in the control and application of its momentum, as it flows.

Applying the doctrine of *Hadden* v. *Shoutz, supra,* it was proper that the court should take into consideration the evidence showing the location of the mill of plaintiff's grantor, below Newton's race, at the lower end of the pond, the custom of mill owners on that stream to shut down their gates at certain times to collect heads of water, and the compliance of appellant's grantor with that custom, at and before the contract with Newton. In the absence of express stipulations to the contrary, these circumstances are to be considered as having been assumed and accepted as regulating the time and manner of dividing and using the water; and if plaintiff's rights are thus limited, it is obvious that a failure to shut

down its gates during the usual times would give to it more water than that to which it is entitled, and injure the rights of the defendant by denying to it a portion of that to which it is entitled. The defendant is entitled to draw from the heads of water, which all the circumstances show must have been within the contemplation of the parties when Newton's contract was made.

The fact that plaintiff's right is, that it shall have 600 inches of water, whether there is a residue or not, and that the defendant is entitled to only one-sixth of the water beyond that amount, upon no principle of law places it above the ordinary obligations of property-owners whose interests are equal. It gives plaintiff no right to control, abridge, or in any manner infringe upon defendant's one-sixth in the residue. It has a prior right in quantity, but, obviously, that must be enjoyed with reference to the posterior rights of others. The difference, so far as affects the present question, is simply that between the owners of large and small interests in a common property. Their rights are defined by the extent of their interests, but in the enjoyment of those rights they are entitled to an equal protection.

It is said in Washburne on Easements, page 266, § 26: "The mode and extent to which one mill owner may use and apply the waters of a stream, as between him and another mill owner, is not what would be reasonable for his particular business, but what is reasonable, having reference to the rights of the other proprietors on the stream, without, by such use, materially diminishing it in quantity or corrupting its quality. If one requires more than this, he can not claim it as a natural right. The necessity of one man's business is not to be made the standard of another man's rights."

This doctrine is in accordance with the clearest conceptions of right, and abundantly sustained by adjudicated cases. *Davis* v. *Getchel*, 50 Maine, 602; *Merritt* v. *Brinkerhoff*, 17 Johns. 306; *Elliott* v. *Fitchburg R. R. Co.* 10 Cush. 195;

Heeney v. *Union Manf. Co.* 39 Conn. 576; *Wheatley* v. *Chrisman*, 24 Penn. St. 298.

This has reference, it is true, more immediately to cases where no superior rights are acquired by prescription or contract, but it is clear that in such cases the same principle must apply, except in so far as by prescription or contract superior rights are obtained, for the principle applies until thus modified or changed, and the change or modification must be limited to the prescription or contract. This is recognized in *Brace* v. *Yale*, 10 Allen, 441, where the plaintiff had a prescriptive right to the prior use of water.

Here, the contract declares that plaintiff is entitled to the use of a certain amount of preferred water. It does not specify how that use shall be enjoyed with reference to the rights of others. Had the parties stipulated that it might be enjoyed by a constant withdrawal of the water from the pond, or otherwise, the stipulation would control; but in the absence of such stipulation, the general principle that it must be a reasonable use, with reference to the rights of other parties interested in the use of the water, without regard to the special necessities of the plaintiff, is left to control. The question of what is a reasonable use of the water, is a question of fact, to be determined by the jury from the evidence. *Thomas* v. *Brackney*, 17 Barbour, 654; *Parker* v. *Hotchkiss*, 25 Conn. 321; *Wheatley* v. *Baugh*, 25 Penn. St. 535; *Davis* v. *Getchel*, *supra.*

A question is also raised upon the eighth instruction given at the instance of the defendant, which is as follows:

"The jury are instructed, that by and under the various deeds in evidence through which the plaintiff claims title from the original owners of the land and water power on the west side of Fox river at Batavia, and the deed from the Batavia Manufacturing Company to Levi Newton in evidence, it was the duty of the plaintiff to keep in repair the dam and other erections creating said water power so as to prevent

leakage to an unreasonable degree, as between the plaintiff and the defendant. If, therefore, the jury believe, from the evidence, that at the time when the plaintiff complains of the defendant in this case there was a material reduction in the quantity of water that would otherwise have been available at the mills in question by reason of material and unreasonable leaks in the dam or other erections creating said water power, then the amount of such material reduction, if any, as it existed from time to time, the jury are instructed, should not be deducted from the amount of water to which the defendant was otherwise entitled, according to the other instructions given by the court to the jury in this case. And the jury are further instructed that the defendant can not be held liable in this case for drawing, from time to time, the amount of water they would lawfully have enjoyed if the volume of available water had not been reduced by such material and unreasonable leakage, if any such material and unreasonable leakage is shown by the evidence to have existed."

It will be remembered that the deed of House & Barker to Van Nortwick contains this covenant:

"And the said party of the first part, for themselves, their heirs and assigns, do hereby covenant, promise and agree to and with the said party of the second part, his heirs and assigns, to ever maintain and keep in repair a dam across said river, on the stile of the present dam at Batavia, and at the same height, and in case they should neglect to do so, then the said party of the second part, his heirs and assigns, after due notice being given, may repair or build said dam, the cost of which shall be paid by the said party of the second part, their heirs or assigns."

And the deed of Van Nortwick to the Batavia Manufacturing Company contains this grant:

"The said first party also conveying to said second party the benefits and rights accruing to him or his assigns from the obligations of other owners of water power on the east side of

the river to keep up and maintain the dam across said river, the said second party being obligated to keep up and maintain the racks connected therewith on the west side of said river."

And these rights passed by the successive grants to the plaintiff.

The covenant of House & Barker to keep the dam in repair is one running with the land, and an action may, therefore, be maintained thereon by the plaintiff. *Woodruff* v. *Trenton Water Power Co.* 2 Stockton's Ch. 489; *Sharp* v. *Waterhouse*, 7 Ellis & Blackburn, 816; *Thompson* v. *Shattuck*, 2 Metc. 615; Angell on Watercourses (6 ed.) sec. 258; and the plaintiff is also authorized, by the alternative clause in the covenant, to enter upon and make the repairs itself.

The grant to Newton is to draw through his raceway one-sixth of the water, above the 600 inches preferred, that can or may be obtained, and his covenant binds him "to pay one-twelfth part of all the costs and expenses to which the company may be liable or may incur from time to time in improving or elevating or repairing the dam over Fox river or the embankment at the south end of the pond, as may be by them deemed expedient and necessary in securing and maintaining the water."

The proper conclusion is, it was intended the dam was to be kept in such state of repair as was reasonably necessary to secure the water power, and the burden of doing this was upon the Batavia Manufacturing Company and has passed to the plaintiff,—Levi Newton and his grantee being bound to contribute one-twelfth of the expense therefor. No right is conveyed to Levi Newton to enter upon the dam, or upon the premises of the Batavia Manufacturing Company for the purpose of making repairs, and without such a right he could not make the repairs. The Batavia Manufacturing Company and its grantees have that right, and the reasonable implication from the grant of a surplus is, that the grantor shall preserve a surplus or make reasonable efforts to that end, upon which the grant can take effect.

We agree with the court below that if the plaintiff permitted water to escape through the dam, which, by the exercise of reasonable care, it could have detained for use, the loss must fall upon it, and can not be charged against the defendant; and we see no substantial objection to the instructions in that respect.

The objection that the court refused to allow the plaintiff to read in evidence the deed of Levi Newton to the defendant, is frivolous. Defendant's title, traced through that deed, was admitted by stipulation of the parties. There was no controversy about it. The deed itself could prove no fact that was not already proved. Its terms in nowise change or affect the construction we place upon the instruments which fix the extent and character of the rights of the respective parties.

The only remaining point is, does the evidence sustain the verdict. Upon this we do not deem it important to spend much time. The only period during which it is claimed there was a diversion of water, was during the months of July, August and September of the year A. D. 1874. The season was unusually dry, and, during the greater portion, if not all of this period, the quantity of water in Fox river was inadequate to the entire demands of the manufacturing interests dependent upon it.

There are dams on this river at Geneva, two and a half miles above, and at St. Charles, five miles above Batavia, at which the mill owners were accustomed to shut down their gates, during this period, at any early hour in the evening, and keep them down through the night, and thus cut off all flow of water from above except that which escaped by leakage, and this seems to have been in conformity with a well established custom. This necessitated a like practice at Batavia to secure full heads of water for operations during the day. The evidence strongly tends to show that this custom was observed by the defendant, but disregarded by the plaintiff, and that by running of nights when the gates of other mills were shut down, it not only frequently drew the water to

which it was entitled, but also drew off much of that in the use of which defendant was entitled to participate. There is, also, evidence tending to show that plaintiff, through failure in keeping the dam in a proper state of repair, suffered a large quantity of water to escape by leakage, and thus also diminished that in the use of which defendant was entitled to participate.

There was evidence, on behalf of plaintiff, showing that defendant had, during this period, deepened its race, in order to draw more water than it would have drawn through its race as constructed by Newton. This, however, we think, was fairly answered and overborne by evidence of defendant showing that what plaintiff's witnesses supposed was a deepening of the race, was, in truth, only a removing of sediment deposited at the head of the race by the flow of the water, and that it was not deepened, if, indeed, it had the same depth it had when the grant was made to Newton. The evidence tended to show that plaintiff, by the location of its mill and the construction of its race, had two feet in the advantage of the flow of water over the defendant, and that by running of nights and the improper leakage it suffered in the dam, it deprived defendant of participation in water to an equal or greater amount than that of the preferred water to which plaintiff was entitled.

The conflicting questions of fact were proper questions for the consideration of the jury. Plaintiff was only entitled to a recovery for a diversion by the defendant prejudicial to its right to a reasonable use of the water, in view of the rights of all others having interests in its use, and must itself bear all losses chargeable to its own unreasonable use of the water under the existing condition of things; and we do not feel authorized to say the preponderance of the evidence clearly and palpably is with the plaintiff on the issues before the jury.

The judgment is affirmed.

Judgment affirmed.

The Chicago and Northwestern Railway Company

v.

The People *ex rel.* The City of Elgin.

1. Limitation—*possession must be adverse during requisite period.* Under the twenty years limitation law, in order to constitute a bar, the possession of land must be held adversely during the full period of twenty years. If adverse in its inception, but before the expiration of such term the possession is held under an agreement with the owner permitting the use of the land, the statute will not apply and no bar will be created.

2. Estoppel in pais—*applies to municipal corporations.* Where the authorities of a city acquiesced for nineteen years in the use of a public street by a railroad company, in maintaining an arch over the street, and then made an agreement in writing whereby the right to so use the street was continued until it should be necessary to rebuild the arch, it was *held*, that the city, by these acts of recognition and acquiescence, was estopped from compelling the company to remove the arch and obstruction, until it should become necessary to rebuild the same.

3. Streets—*city may allow their use for railroad.* A city has the power to allow the construction of a railroad upon or over its streets, and the public will be bound by whatever may be lawfully done in regard to the streets by the city.

Appeal from the Court of Common Pleas of the City of Elgin.

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

Mr. Eugene Clifford, and Mr. E. C. Lovell, for the appellee.

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

This was a petition for a writ of *mandamus*, brought in the Court of Common Pleas of the city of Elgin against the Chicago and Northwestern Railway Company, to compel the company to remove a certain stone arch out of Galena street in the city of Elgin which was built by the company as a part of its road bed when the road was constructed in 1851 or 1852.

The street appears to be 66 feet wide, and the stone arch, upon which the road bed is constructed, where the road crosses the street, occupies about forty feet of the street, leaving but twenty feet for the use of the public in passing along the street under the arch.

It appears, from the evidence, that the street upon which the stone arch stands has been occupied and used by the railroad company as a part of its right of way through the city of Elgin from the time the road was constructed until the present time; that the railroad company has paid all taxes assessed upon the right of way, for State, county and municipal purposes, each year since the road was built.

On behalf of the defendant, it is contended that twenty years uninterrupted possession of the street by the railroad company, under the claim of ownership, and the right to use and occupy the same, constitutes a bar to a recovery in behalf of petitioners, under the Limitation law of 1827. Whether the railroad company has the right to invoke the aid of the Statute of Limitations as against the public or the municipal authorities of Elgin, is a question which does not properly arise upon this record, and will not be considered. In order to avail of the provisions of the Statute of Limitations, the possession, to constitute a bar, must be held adversely for a period of twenty years. Such was not, however, the case here.

From the time the street was taken possession of in 1851 until 1870, the occupation of the railroad company might be regarded as adverse, but on the 5th day of May, 1870, a contract was made between the railroad company and the city of Elgin, as follows:

This agreement, made this 5th day of May, 1870, between the Chicago and Northwestern Railway Company, a corporation of the States of Illinois, Wisconsin and Michigan, party of the first part, and the city of Elgin, Illinois, party of the second part,

Witnesseth, that whereas the said party of the first part is now in possession of Bridge and Galena streets on the west

side of Fox river, in said city of Elgin, and occupies the same by its embankment and bridges, and whereas, the common council of the said city of Elgin, on the 27th day of February, A. D. 1869, passed an ordinance vacating a portion of North street on the east side of Fox river, and a portion of South street, on the west side of Fox river, in said city of Elgin, conditional that said ordinances should not be so construed as to affect the rights of the city in relation of said Galena and Bridge streets;

Now, therefore, in consideration of the sum of $1, and the further consideration of the vacating of said North and South streets, the said Chicago and Northwestern Railway Company, its successors and assigns, do hereby agree that whenever the bridges now built and standing in said Galena and Bridge streets shall be rebuilt, the same shall be so constructed as to leave the entire width of said streets free to the public under said railway.

In witness whereof the said Chicago and Northwestern Railway Company has caused this agreement to be signed by its vice-president and countersigned by its assistant secretary, and corporate seal thereof to be affixed the day and year first above written.

[L. S.] The Chicago and Northwestern Ry. Co.

By R. H. Pierson, V. P.

Attest: J. B. Redfield, Asst. Sec'y C. & N. W. Ry. Co.

After the execution of this agreement by the railroad company, its possession and occupation of the street could no longer be regarded as adverse to the public or the city of Elgin, and the possession, however long continued, would not ripen into a bar, for the obvious reason that the possession, under the contract, could not be regarded as an adverse holding, but rather a possession and use of the property under the permission of the city of Elgin, according to the terms and conditions of the written contract, which should be held obligatory upon the city of Elgin and the railroad company, as was doubtless

the intention of each of the parties when the contract was executed.

But, while the railroad company can not in this case defeat a recovery on the ground the Statute of Limitations has run, yet there is a defence of a kindred nature, which is a complete bar to a recovery. The long acts of recognition by the city of Elgin, of the right claimed by the railroad company to the use of the street as a part of its right of way, the acquiescence in the exercise of the right in connection with the contract which the city made with the railroad company in 1870, must be regarded an *estoppel in pais* against the city.

What contract was made between the city of Elgin and the railroad company, at the time the road was built through the city in 1851, in regard to the use of the street for the right of way, does not appear in the evidence. Doubtless some arrangement was made which was satisfactory to the parties. If this had not been the case, it is unreasonable to believe the railroad company would have been permitted to occupy the streets so long without a murmur or a word of objection from the city. That the city had the power to allow the streets to be used by the railroad company, is not denied, nor is it an open question that a street or highway may be legitimately used by a railroad company in the construction of a railroad. *Murphy* v. *City of Chicago*, 29 Ill. 279.

The stone arch which occupies a part of Galena street, and which the writ in this case is invoked to remove, has remained in the street from 1851, as a part of the road bed of the company, and so far as appears, no objection was made by the city to the use of the street in the manner it was used, until in 1870, when the city expressly agreed that the arch should remain until such time as it became necessary for the company to rebuild, when it should be so constructed as to leave the entire width of the street free to the public. In addition to these plain and unequivocal acts of recognition of the use of the street, the revenues of the city of Elgin have been from year to year replenished by the assessment of the right of way of

the railroad company, including the property in controversy, for taxation. From these various acts, should the city be estopped now from claiming the right to compel the railroad company at a heavy expense to remove the arch from the street? That the doctrine of *estoppel in pais* should be applied in a case of this character, we think is fully recognized by the authorities.

Dillon on Municipal Corporations, section 533, after discussing the doctrine of pleading the Statute of Limitations against a municipal corporation, in a case of this character, concludes as follows: "But there is no danger in recognizing the principle of an *estoppel in pais* to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require." In *Chicago, Rock Island and Pacific Railroad Co.* v. *City of Joliet*, 79 Ill. 25, which was a bill in chancery to restrain the operation of the railroad over certain streets in the city and the public square, the doctrine of *estoppel in pais* was applied, and it was said: "From all these positive acts of recognition on the part of the city of Joliet, of the right claimed by the railroad company, and long acquiescence in its exercise, there must be held to be an *estoppel in pais* against the city, if that principle be applicable at all to municipal corporations as respects public rights." What was said in the case cited applies with much force to the case under consideration.

The city of Elgin not only acquiesced in the right of the railroad company to occupy Galena street in the manner it did, for nineteen years, but at the end of that time made a solemn written contract which continued the right until it should be necessary to rebuild the arch.

The fact that the proceedings are in the name of the people does not affect the question here involved. The fee of the streets rested in the city of Elgin in trust for the public, and the public will be bound by whatever may have been lawfully done in regard to the streets by the city. Our conclusion is,

that the railroad company has the right to occupy Galena street, as heretofore, until it becomes necessary to rebuild the arch,—then the arch will have to be so constructed as to leave the entire width of the street free and clear from obstruction.

The judgment will be reversed and the cause remanded.

Judgment reversed.

NEAL RUGGLES

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. RAILROADS—*powers and privileges of consolidated companies.* A consolidated railroad company, formed under legislative sanction, succeeds to all the rights conferred upon the several companies thus united, by their respective charters, but it is not invested with any greater or other rights than were possessed by the constituent companies forming the consolidated organization.

2. SAME—*charters are contracts protected by the Federal constitution.* The charter of a railway corporation is a contract between it and the State, that it may exercise the rights and privileges conferred until the expiration of the charter, unless, by some act violative of the obligations assumed, it shall forfeit its privileges and franchises, and, under the Federal constitution, the obligation of such contract can not be impaired by subsequent legislation.

3. SAME—*extent of grant of right to fix tolls, etc.* An express grant of power in a charter of a railway company to fix the rates of tolls to be charged, and to alter and change the same, does not confer unlimited power, but only the right to charge reasonable rates, and what is a reasonable maximum rate may be fixed by statute.

4. CONSTITUTIONAL LAW—*legislative power.* The legislature of a State may exercise all power not conferred on the general government, or which is not prohibited by constitutional limitation.

5. SAME—*corporation subject to police power of State.* It has been repeatedly held by this court, that corporations created within the State are amenable to the police power of the State to the same extent as are natural persons, but to no greater extent. The legislature may require of these bodies the performance of any and all acts, which they are capable of performing, that it may require of natural persons.

6. SAME—*legislative control over corporations to protect public.* The legislature of this State has the power, under the constitution, to fix a maximum rate

of charges by individuals as common carriers, warehousemen, or others exercising a calling or business public in its character, or in which the public have an interest to be protected against extortion or oppression, and it has the same rightful power in respect to corporations exercising the same business, and such regulation does not impair the obligation of the contract in their charters.

7. The act of the General Assembly entitled "An act to establish a reasonable maximum rate of charges for the transportation of passengers on railroads in this State," approved April 17, 1871, is not unconstitutional, but is a valid law.

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

It was agreed in the court below that the following statement of facts are and shall be taken as true:

"It is stipulated and agreed by and between the parties to this suit, that the same shall be tried by the court, without the intervention of a jury, upon the following facts, and the law governing the same, to-wit: On the seventh day of March, A. D. 1873, Morgan A. Lewis, the complaining witness in this cause, got on board the regular mail passenger train of the Chicago, Burlington and Quincy railroad, at Buda, in the county of Bureau, to go to Neponset, a station on the line of said railroad six miles west of Buda; that said train started, and defendant, Neal Ruggles, who was the regular conductor of said train, demanded of Lewis a ticket, or his regular fare in cash, as established by said railroad company; that said Lewis had no ticket, but immediately tendered to defendant, as such conductor, the sum of eighteen (18) cents, (being three (3) cents per mile from said Buda to Neponset,) which the defendant refused to accept, but demanded of said Lewis the sum of twenty (20) cents, which was the regular fare charged by said railroad between said points, and which had been fixed by the board of directors and officers of said railroad company several years prior thereto, and which said sum of twenty (20) cents was charged to and paid by all passengers traveling between said places on said railroad. Lewis refused to pay more than eighteen (18) cents; thereupon the defendant stopped his

train before it had left the station at Buda, and requested said Lewis to leave the train, which he refused to do, claiming that, under the law of the State of Illinois entitled 'An act to establish a reasonable maximum rate of charges for the transportation of passengers on railroads in this State,' approved April 15, 1871, he had a right to go and be carried from Buda to Neponset for said sum of eighteen (18) cents, when defendant, denying such right, attempted to remove said Lewis from the cars, and took hold of him for that purpose, and attempted to force and expel him therefrom (but used no unnecessary force in said attempt), but failed; thereupon said Lewis, after his arrival at Neponset, caused said defendant to be arrested for assault and battery in attempting to remove him (the said Lewis) from the cars, and on the 20th day of March, A. D. 1873, the defendant was tried before Thomas Rhodes, Esq., a justice of the peace at Neponset, in said Bureau county, and fined $10 and costs, from which judgment the defendant took an appeal to this court.

"It is further admitted and agreed, that the said Chicago, Burlington and Quincy Railroad Company is a corporation situated in and created by the laws of the State of Illinois, and owns and operates a railroad between Chicago, on Lake Michigan, in said State, and East Burlington and Quincy, on the Mississippi river, and that it is composed of the Aurora Branch railroad, the Central Military Tract railroad, the Peoria and Oquawka railroad, and the Northern Cross railroad, duly consolidated by virtue of an act of the General Assembly of the State of Illinois entitled 'An act to enable railroad and plank-road companies to consolidate their stock,' approved February 28, 1854, and that a copy of these said articles of consolidation was duly filed in the office of the Secretary of State of the State of Illinois in the year 1856, in full compliance with said law.

"And it is further admitted and agreed, that said Chicago, Burlington and Quincy railroad is in and belongs to 'Class B,' of the said act entitled 'An act to establish a reasonable maxi-

mum rate of charges for the transportation of passengers on railroads in this State,' approved April 15, 1871, and in force July 1, 1871; and it is further admitted, that the ticket office at Buda was not open so that Lewis could purchase a ticket thereat, and that the said Lewis was an adult person, aged about forty years.

"Now, if the court shall find and be of opinion that the act last aforesaid was a valid and constitutional law in the matter of fixing, limiting or controlling the rates of fare to be charged by said railroad, and that said Chicago, Burlington and Quincy Railroad Company was bound to obey the same, notwithstanding the provisions of its charter, the judgment of the justice of the peace shall be affirmed, with costs; but if said court shall find and be of opinion that, as to said Chicago, Burlington and Quincy railroad, in the said matter of fixing, limiting or controlling its rate of passenger fare, the said act is invalid and unconstitutional, then the defendant shall be acquitted and discharged.

"It is further agreed, that if, upon the foregoing facts, the court shall adjudge the defendant to be guilty of said assault and battery, then this agreement shall stand in lieu of, and shall be taken and regarded as, a bill of exceptions in this case, and as embodying all of the evidence herein, and a motion for a new trial shall be regarded as having been made by the defendant and formally overruled by the court, and the defendant shall have leave to appeal said cause to the Supreme Court of Illinois, by filing a bond in the office of the clerk of this court, in the penal sum of $200, with Hiram Bigelow as surety, within twenty days after the rendition of the judgment of the court."

On this agreed state of facts the court below found in favor of the people, and rendered final judgment against defendant for a fine of $10. An appeal was allowed, and a bond, with Bigelow as surety, in the penal sum of $200, was filed, according to the terms of the stipulation. The record is brought to this court, and a reversal is urged on the ground that the act

of the General Assembly fixing the rate of fare to be paid by persons traveling on the road is unconstitutional and void.

Mr. O. H. BROWNING, Mr. B. C. COOK, and Mr. H. BIGELOW, for the appellant.

Mr. JAS. K. EDSALL, Attorney General, for the People.

Mr. JUSTICE WALKER delivered the opinion of the Court:

By the agreed facts in this case, the question is presented whether the act of the General Assembly entitled "An act to establish a reasonable maximum rate of charges for the transportation of passengers on railroads in this State," approved April 15, 1871, and in force July 1, 1871, is unconstitutional.

Appellant claims, and it may be conceded, that the charters of the several railroads which consolidated, under laws authorizing the same, to form the Chicago, Burlington and Quincy Railroad Company, formed contracts between those companies and the State. We apprehend this proposition will not be contested; but the nature and extent of those contracts is the subject of this dispute. We may safely assume that the present consolidated railroad succeeded to all the rights conferred by charters on the several roads thus consolidated, but it became invested with no greater or other rights than were possessed by the constituent companies forming the consolidated organization. Under those charters these companies were organized, constructed their roads, and were empowered to use and operate the same in transporting persons and property over their roads, and to fix fares and charges for the same. The charters became a contract between them and the State, that they might exercise their charter rights till the expiration of the term for which their charters were granted, unless, by some act violative of the obligations assumed by their organization, they should forfeit these privileges and their franchises; and under the constitution of the United States, the General Assembly has no power to impair the obligation of these con-

tracts, and the company formed by consolidation succeeded to these rights and privileges by that act.

But, conceding this to be true, in its fullest extent, still, the question arises whether the corporation may not be controlled in exercising its powers, by reasonable legislation, to the full extent the legislature may thus control natural persons exercising the same calling or business. The General Assembly may exercise all power not conferred on the general government, or which it is not prohibited from exercising by constitutional limitations. This being true, has the General Assembly the power to control natural persons and corporations in their business, to protect the community from oppressive, unjust and wrongful impositions in transacting their business or in performing their duties to the public?

When the General Assembly brings into existence an artificial person or corporation, it may, at pleasure, endow it with such faculties or powers as it may deem proper and for the benefit of the corporators and the public. It may grant or withhold powers at pleasure; but it is believed that body is powerless to confer greater or more unlimited powers than are possessed by natural persons. The power, however, may, no doubt, be conferred to that extent when necessary to accomplish the end sought; but it would be contrary to the very object of the creation of government, to create bodies or artificial persons beyond the power of control by the government. To create bodies in its limits beyond the governing power of the State, bodies that are only controlled by their own will, independent of law and beyond its control, would be beyond the purpose of establishing government. It has been repeatedly held by this court, that where a corporation is thus created, it becomes amenable to the police power of the State to the full extent that natural persons are subject to its control.

This doctrine was fully recognized and announced in the cases of *Ohio and Mississippi Railroad Co.* v. *McClelland*, 25 Ill. 140, *Galena and Chicago Railroad Co.* v. *Loomis*, 13 id.

548, *Galena and Chicago Railroad Co.* v. *Dill*, 22 id. 204, and has been announced in numerous subsequent cases, as applicable to the police power of the State, and is the settled doctrine of this court, and it is referable to the maxim, *salus populi suprema est lex.* It is for the protection, safety and best interests of the people that governments are instituted and maintained.

In this class of cases, as in that relating to the exercise of the police power of the State, corporate bodies are under the control of the State to the same, but to no greater extent, than individuals. The General Assembly may require of these bodies the performance of any and all acts which they are capable of performing, which they may require of individuals. If the General Assembly may fix maximum charges beyond which individuals may not go in performing services for the general public, and require them to conform to such requirements, then there can be no just reason why the General Assembly may not require the same of corporate bodies. That body may, undoubtedly, for the same reason and to accomplish the same ends, limit the power of each.

If, then, the General Assembly may fix a maximum rate of charges by individuals as common carriers, warehousemen or others exercising a calling or business public in its character or in which the public has an interest to be protected against extortion or oppression, that body may do the same thing and fix the maximum charges of corporations exercising the same business. Of this there can, we apprehend, be no doubt.

In the case of *Munn* v. *The People*, 69 Ill. 80, this court held that it was competent for the General Assembly to fix the maximum charges by individuals keeping public warehouses for storing, handling and shipping grain. And this, too, when such persons had derived no special privileges from the State, but were, as citizens of the State, exercising the business of storing and handling grain for individuals. This case was taken to the Supreme Court of the United States, and the doctrine was affirmed. See *Munn* v. *Illinois*, 94 U. S. 113.

So it may be assumed that the doctrine is fully established, that the General Assembly has such power over private persons.

That court further held, in *Chicago, Burlington and Quincy Railroad Co.* v. *Iowa*, id. 155, and *Winona and St. Paul Railroad Co.* v. *Blake*, id. 180, that the Legislature has the same control over railroad corporations. And in these cases there does not seem to have been any reservation of such power in their charters, in the constitution of the State, or in any general law. But the doctrine is placed on the general or necessary power of the State. And it was held not to violate any constitutional limitation, either State or Federal.

In the case of *Winona and St. Paul Railroad Co.* v. *Blake*, *supra*, there does not seem to have been any statutory or constitutional power reserved to thus regulate the charges of the company. And the original charter of the company, we infer, like that of this company, authorized that company to fix its own rate of charges. The court say that the constitutional provision that "all corporations being common carriers * * * shall be bound to carry mineral, agricultural and other productions or manufactures on equal and reasonable terms," or the act of the General Assembly of the 28th of February, 1866, providing that the "company shall be bound to carry freight and passengers upon reasonable terms," do not add anything to or take from the provisions of the original charter.

In the case of the *Chicago, Burlington and Quincy Railroad Co.* v. *Iowa, supra*, it was urged that by its charter it had the right to fix the rates of compensation for the transportation of persons and property over its road; that it could not be controlled or taken away by the Legislature of Iowa fixing a maximum rate of charges for the road. But the court held the law valid and binding, and say: "This company, in the transaction of its business, has the same rights and is subject to the same control as private individuals under the same circumstances. It may carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the

absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But where the Legislature steps in and provides a maximum of charges, it operates upon this corporation the same that it does upon individuals engaged in a similar business. It was within the power of the company to call upon the Legislature to fix permanently this limit, and make it a part of the charter, and if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done the charter might have presented a contract against future legislative interference, but it was not, and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation." This case can not be distinguished, in its principles and material facts, from the one under consideration.

Both cases involve the construction of a provision of the constitution of the United States, and that court having decided it, we must be governed by and give force to it. It is, therefore, unnecessary to further discuss the question.

There being no error in the record, the judgment of the court below is affirmed.

Judgment affirmed.

Afterward, upon a petition for rehearing, the following additional opinion was filed:

Per CURIAM: On a petition for a rehearing, it is claimed that the case of *Chicago, Burlington and Quincy R. R. Co.* v. *Iowa*, 94 U. S. 155, recognizes a distinction between a charter which is entirely silent as to the power to fix the rate of tolls, and one that authorizes the directors to fix such rate; that in the Iowa charter there was nothing contained in reference to the rates of tolls that might be charged, but it was silent on the subject. The court holds, in such a case, as we have seen, that the road could carry when called upon to do so, and could charge only

a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for the corporation as they do for private individuals, when controversies arise, what is reasonable. But when the Legislature steps in and prescribes a maximum of charges, it operates upon this corporation the same as it does upon individuals engaged in a similar business.

Here, the court holds, if the charter is as contended, that the corporation had the implied power to fix charges for services rendered, but it was also held, that in fixing such rates of charges they must be reasonable, and their reasonableness might, like those made by individuals, be inquired into and determined by the courts. It was also held, that in such cases, these companies, as to such charges, were under the same legislative control as individuals engaged in a similar business. And they at the same term held, that the charges of natural persons engaged as warehousemen in handling and storing grain for the public, may be regulated by legislative action.

It is, however, claimed, that in this case, the General Assembly expressly conferred the power on the directors of the company to fix the rates of toll to be charged, and to alter and change the same. In this, the two cases differ. But does this express grant change the power of control, or does it confer unlimited power, or is the grant made with an implied limitation that in fixing their rates of toll they shall be reasonable? The fact that the grant and acceptance of the charter constitute a contract does not solve the question. Like any other contract it is subject to construction.

In the case of *Shields* v. *Ohio*, 95 U. S. 319, a case in its facts very similar to this, the court gave construction to a clause in the constitution of Ohio. It was this: "No special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly." Under this provision of the constitution, the General Assembly passed a law prohibiting the railroad company, of which plaintiff in error was a conductor, from charging more than three cents

a mile for carrying passengers over their road, and the company required him to charge three and a half cents. He endeavored to collect the latter sum, but the passenger refused to pay more than three cents and the conductor forcibly expelled him from the train. He was prosecuted, convicted and fined for an assault and battery, in the State courts, and the conviction was affirmed on error in the Supreme Court of the United States in that case. But in discussing the questions presented the court used this language: "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions, and are as inviolable as in other cases."

Now if, in this broad and comprehensive reserved power to "alter, revoke or repeal," there is an implied limitation, such as this opinion holds, for the protection of the property and rights of these corporate bodies, why should not there be a similar limitation on the grant of power to fix the rate of tolls. If there be such an implied limitation on the constitutional reservation to protect corporate bodies, why not a similar limitation on the grant to the corporation for the protection of commerce, trade, business, and the rights of the people? If any possible reason can be urged for the distinction, we have been wholly unable to perceive it. In the administration of justice there can be no well founded reason for such a distinction. The same rules must apply to corporate bodies, in this regard, and to the people precisely alike. The General Assembly surely could not have intended, in granting such charters, to clothe these bodies with unlimited and uncontrolled power. Had it been so expressed in the bills for these charters, it can not be supposed they would have ever been enacted into laws. That department of government could not

have intended to grant power to oppress and wrong the community without limit or control. It is but a reasonable construction to hold that there is an implied restriction that this corporation in fixing the rates of toll shall make them reasonable. And if so, the General Assembly must have the same power to say what are reasonable maximum charges, as to do the same thing with individuals engaged in similar business or in a calling of a public character.

Rehearing refused.

Mr. JUSTICE DICKEY, dissenting:

The constitution of the United States provides, that no State shall pass any law impairing the obligation of contracts. Were this an open question I would hold that an express provision in the charter of a railroad company, that such corporation may fix its charges for freight and passengers, merely confers upon the corporation the function with which natural persons, acting as common carriers, are endowed without the aid of a statute; and that such provision ought not to be construed as an agreement on the part of the State, that the State will not interfere with the exercise of that function by passing acts on that subject such as it may pass and render operative upon natural persons. My view would be, that, notwithstanding such express provision in the charter, the corporation, like the natural person, is subject to the passage of all such reasonable laws as may be passed to define and punish extortion.

This, however, is a question upon which the rulings of the Supreme Court of the United States are binding authority. I understand the rulings of that court to be, that in case of such express provision in the charter, the State has contracted not to interfere by legislation with the fixing of such charges. To that authority I feel it my duty to submit.

Statement of the case.

THE MICHIGAN CENTRAL RAILROAD COMPANY

v.

ABNER C. BOYD *et al.*

1. CARRIER—*lex loci governs as to contract.* The law of the State in which the contract is made for the transportation of goods must control as to its nature, interpretation and effect.

2. SAME — *limitation of liability by laws of Massachusetts.* By the law of Massachusetts, in order to limit the carrier's common law liability by a clause in the bill of lading or receipt, the bill of lading must be taken by the consignor, without dissent, *at the time of the delivery* of the property for transportation. When given a few days after the delivery of the goods, and while they are in transit, such a clause therein, not assented to by the consignee and owner, will not be binding on the latter. The consignor can not bind the consignee after the goods have passed beyond the control of the former, and his agency has ceased.

APPEAL from the Circuit Court of Cook county; the Hon. W. K. MCALLISTER, Judge, presiding.

This suit was brought by appellees against appellant in the court below, to recover for certain goods delivered to the latter to be carried for the former, and which were destroyed by the great fire in Chicago, October 9, 1871.

By stipulation of parties, the following are the facts: That on October 2, 1871, defendant was a common carrier of goods for hire between Detroit, Mich., and Chicago, Ill., and ever since has been and still is; that on said second day of October, 1871, the plaintiffs were the owners of certain goods described in the declaration herein, to-wit: two cases of merchandise, of the value of $578.40; that on the last named day Messrs. Wellington Bros., of Boston, Mass., from whom said goods were purchased by plaintiffs, delivered the said goods to the Boston and Albany Railroad Company for transportation, by "Blue Line," marked "Boyd & Paisley, Lincoln, Ill., via Chicago;" that the agent of said Boston and Albany Railroad Company who received said goods at Boston, delivered to the drayman who brought the same from said Wellington Bros.,

what is known as a dray receipt; that within a few days thereafter, and after said goods were on their way, upon the presentation by said consignors, Wellington Bros., of said dray receipt, and at their request, said Boston and Albany Railroad Company delivered to said consignors a receipt or bill of lading, which is hereto attached and made a part hereof, marked "Exhibit A;" that on the 6th day of October, 1871, the said goods were delivered to said defendant, at its eastern terminus, at Detroit, in the State of Michigan, and were by said defendant transported to the city of Chicago, where they arrived on Sunday, the 8th day of October, A. D. 1871, at 1:20 P. M., and were on the same day unloaded from the cars into the warehouse of defendant, at Chicago, in due course of business; that said warehouse was a safe and substantial structure, built of stone, brick and iron; that the said warehouse and its contents, including the goods in controversy, were destroyed in the great fire at Chicago, between 1 and 9 o'clock on the morning of the ninth day of October, A. D. 1871, without the fault of the defendant, and it was impossible for defendant to have delivered said goods to the connecting carrier after 6 o'clock A. M. of said October 9, because of such fire; that prior to said second day of October, A. D. 1871, said consignors, Wellington Bros., had been in the habit of shipping goods in the same manner as the goods in controversy were shipped, and of receiving for all such shipments bills of lading similar in import to the one hereto attached, without their attention having been particularly directed to the conditions or restrictions of said bills of lading pertaining thereto, and that said plaintiffs had, at several times before the shipment of the goods in controversy, received goods at Lincoln, Ill., aforesaid, at said several times, from the same consignors, and over the same line of road, and under bills of lading similar to the one hereto attached, without their attention having been called to the particular terms of said bills of lading.

It is further understood by and between the parties to the above stipulation, that the term "Blue Line" therein used

shall not be taken to and does not indicate a partnership or corporation, but simply the route over which plaintiffs' goods were to be transported.

"Exhibit A" to the stipulation contains, among other things, the following:

"Great Central Route, 'Blue Line,' from the Atlantic to the Mississippi without change of cars, by arrangement between the following railroad companies, viz: (naming them, and including the Boston and Albany and Michigan Central Railroad Companies.)

Boston Office, 69 Washington St. P. K. Randall, New England Ag't.
Boston, Oct. 2, 1871.

Said to be marked Boyd & Paisley, Lincoln, Ill., via Chicago. Charges advanced in Boston, $.....	Received of Wellington Bros. & Co.—B. and A. R. R. Receipt for Weight subject to correction. Two (2) cases mdse. No. 54—399 lbs. 9,674—345 "
Bill of Lading, Boston to Chicago Depot.	

"The above described package (contents and value unknown), consigned as marked and numbered in the margin, to be transported over this line and delivered to the consignee, or to the next company or carriers (if the same is to be forwarded beyond), for them to deliver to the place of destination of said goods or package, it being distinctly understood that the responsibility of this line as common carriers shall cease at the station where delivered to such consignee or carriers.

"The rate of freight for the transportation of said package from Boston to Chicago, guaranteed as per rate entered in the margin, and charges advanced by these companies, *upon the following conditions,* * * *

"Freight carried by these companies must be removed from the station, during business hours, on the day of its arrival, or it will be stored at the owner's risk and expense; and in the event of its destruction or damage, from any cause, while in the depot of any company, it is agreed that the company shall not be liable to pay any damages therefor. * * *

"It is agreed, and is a part of the consideration of the contract, that the companies will not be responsible for * * * loss or damage to goods occasioned by Providential causes, or by fire from any cause whatever while in transit or at stations. * * *

(Signed,) P. K. RANDALL, *Ag't.*"

And, also, upon the statement of the law of the State of Massachusetts, as laid down in the case of *Grace* v. *Adams*, in the 100th Massachusetts Report, and in the case of *Hoadly* v. *Northern Transportation Co.*, in the 115th Massachusetts Report.

The finding and judgment of the court was in favor of appellees. The error assigned questions this finding and judgment of the court.

Mr. WIRT DEXTER, for the appellant.

Mr. C. A. MORAN, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The contract for the carriage of the goods having been made in Massachusetts, the law of that State must control as to its nature, interpretation and effect. *Pennsylvania Co.* v. *Fairchild*, 69 Ill. 261; *Milwaukee and St. Paul Railroad Co.* v. *Smith*, 74 id. 197.

The law of Massachusetts is, by the stipulation, to be accepted as stated in the opinions of the Supreme Court of that State in *Grace* v. *Adams*, 100 Mass. 505, and *Hoadly* v. *Northern Trans. Co.* 115 id. 304. It is: "A bill of lading, or shipping receipt, taken by a consignor without dissent, at the time of the delivery of the property for transportation, by the terms of which the carrier stipulates against such liability, (*i. e.*, the liability of a carrier, in the absence of a special contract, under the common law,) would exempt the carrier when the loss was not caused by his own negligence, on the ground that such

acceptance would authorize him to infer assent, and amount to evidence of the contract between the parties."

It will be observed this requires that the bill of lading or shipping receipt shall be taken by the consignor without dissent *at the time of the delivery of the property for transportation.* But the bill of lading here relied on, as showing an exemption, was not accepted by the consignor *at the time of the delivery of the property for transportation.* The stipulation is, that within a few days after the goods were delivered for transportation, "and after said goods were on their way," upon the presentation of the dray receipt for the goods, and at the request of the consignors, the bill of lading was delivered. This we can not regard as the equivalent of a delivery of a bill of lading at the time of the delivery of the property for transportation. It does not appear, when this bill of lading was delivered, the consignors had any authority to bind the consignees by any contract in regard to the goods. The goods had then passed entirely beyond their control; and, inasmuch as it is the act of accepting the bill of lading without dissent which creates the presumption of assent to its terms, it follows that the consignor must, at the time, have been acting as the agent of the consignee, to bind him. An agent, after the termination of his agency, can do no act which can relate back to and become evidence of a contract made by him whilst he was agent.

We are furnished with no authority that, under the law of Massachusetts, the evidence of prior shipments and the acceptance of like bills of lading by the same consignors, qualified as it is by the fact that their attention was never called to the exemptions and restrictions in the bill of lading, is sufficient to raise the presumption that the parties intended these goods were to be carried subject to the exemptions and restrictions of this bill of lading, and, in our opinion, such presumption should not follow.

The judgment is affirmed.

Judgment affirmed.

Statement of the case.

ANTONIO COARI

v.

SAMUEL OLSEN.

1. ERROR—*reversal of decree on finding of facts.* Where the witnesses in a chancery suit are all examined orally on the hearing, so that the chancellor has the same facilities for judging of their credibility as a jury in a trial at law, the error in the finding as to fact must be clear and palpable to authorize a reversal.

2. ESTOPPEL—*by declarations obtained by cunning and falsehood.* It seems doubtful whether a party shall be estopped from asserting his title to real estate on account of declarations in regard to the title obtained from him by cunning and falsehood.

3. NOTICE—*how far possession is, of title.* The actual occupancy of premises is notice equal to the record of the deed or other instrument under which the occupant claims, and a subsequent purchaser takes subject to whatever right, title or interest such occupant may have. And, so far at least as the facts of this case are concerned, the rule of the common law is adhered to, that when a tenant changes his character by agreeing to purchase, his possession amounts to notice of his equitable title as purchaser.

4. FRAUDULENT DEED—*decree on setting aside.* Where a bill is filed by a prior purchaser of real estate to avoid a subsequent conveyance of his vendor made in fraud of his rights, the proper decree is to declare the title of the subsequent purchaser void. It is not proper in such case to require him to convey his title to the complainant, who must look to his vendor alone for a conveyance.

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

Bill was filed by Samuel Olsen, in the court below, against Antonio Coari, Ebenezer Wakeley and Angelo Crescio, for the cancellation of a deed executed by Wakeley to Coari and a mortgage executed by Coari to Crescio, and for conveyance of title to Olsen.

It is alleged, in substance, that complainant purchased the premises, a lot in the city of Chicago, in 1849, and in 1850 erected thereon a house, in which he lived until about the 15th of August, 1874, when he was induced by one Peter

Nelson to emigrate to Dakota; that he left his son-in-law, Heinz, in charge of the house whilst he was in Dakota, Heinz occupying one story as a tenant, and the other two stories being let to other tenants. There are charges of misrepresentation and fraud against Peter Nelson, unimportant to be here further noticed than that complainant, while in Dakota, being much distressed for money, was induced to execute a deed of the property to Nelson, and Nelson agreed to go to Chicago, sell the property, pay off an incumbrance thereon, amounting to $500 and accruing interest, and, after deducting moneys advanced by Nelson, pay to the complainant the residue. The deed to Nelson was imperfect by reason of the absence of seals.

It is further alleged that, upon receiving a letter from Heinz which gave him information of unsatisfactory conduct on the part of Nelson in endeavoring to sell the property, complainant returned to Chicago, arriving there October 27, 1874; that upon such arrival, he was informed that Nelson had sold the property on the 23d of October, to Ebenezer Wakeley, for a nominal consideration of $3000, and executed and delivered to Wakeley a bond for a deed, conditioned that Nelson would convey the premises to Wakeley in fee simple, the bond reciting that $1600 had been paid, $100 of which was cash, and the balance the value of some lands in Missouri, which Wakeley conveyed to Nelson, and that, upon the payment of the remaining sum of $1400, the deed would be executed and delivered; that Nelson refusing to account to him, and knowing that he had been contriving to cheat and defraud him, complainant applied to Wakeley to ascertain whether he could not, in some way, save for him the proceeds of the sale; that Wakeley professed to be able to assist complainant, and complainant, under the stress of the circumstances, agreed to and did, on the 4th of November, 1874, execute a warranty deed of the premises to Wakeley, and received from Wakeley his two promissory notes, bearing that date, one for $400, payable six months after date, with interest at the rate of six per cent per annum, and the other for $465, payable one year after

date, with interest at the rate of eight per cent per annum, which notes were secured by mortgage on the premises, and Wakeley also assumed the payment of a prior mortgage on the premises for $500, to one Andrew Nelson, the sum which Wakeley agreed to pay to complainant, and the amount of the Andrew Nelson mortgage, being equal to the amount which Wakeley pretended he still owed Peter Nelson.

It is also further alleged, that complainant, who was then residing in the house on the premises, being desirous of receiving back the legal title of the premises, applied to Wakeley for a reconveyance of the same; that thereupon, on the 28th of November, 1874, Wakeley, under his hand and seal, contracted to reconvey to complainant the premises upon the payment of $1665, on these terms—$865, the receipt of which was therein acknowledged, and complainant was to pay, upon receiving a warranty deed, $265, and assume the incumbrance then on the premises, or assume an incumbrance of $800, as Wakeley should elect; and, by the terms of said contract, possession of the premises was then surrendered to complainant; that said contract was executed and delivered by Wakeley to complainant on the 28th day of November, 1874, while complainant was in the actual possession of the premises, residing thereon with his family, and he has since continually resided thereon; that complainant, upon the execution of that contract, executed and delivered to Wakeley a release of his mortgage for $875.

It is further alleged, that afterwards, Wakeley, confederating with Antonio Coari to cheat, etc., him out of the premises, on the 2d day of January, 1875, pretended to convey said premises to him by a warranty deed, and charges that Coari, at the time, knew of complainant's rights in the premises and was, also, bound in law to take notice of them; that, at the time that deed was executed, complainant was in the open, notorious and exclusive possession of the premises and every portion thereof, whereby Coari had full notice, etc., of all the rights and equities of the complainant in the premises, etc.;

that on the same day that Wakeley pretended to convey the premises to Coari, Coari and wife executed and delivered to Angelo Crescio a mortgage upon the premises to secure the pretended sum of $800, and it is charged that Crescio had full notice of complainant's rights at the time, etc.

Wakeley made no answer to the bill.

Coari answered, at length, requiring full proof to be made as to all matters alleged not explicitly denied, and denying that Wakeley executed a written contract under seal on the 28th of November, 1874, for the reconveyance of the premises to complainant, alleging that he (Coari) was a purchaser of the premises for a full valuable consideration, without notice, either actual or constructive, of any rights claimed by complainant in the premises; that before purchasing complainant informed him that he was a tenant of the premises under Wakeley and referred him to Wakeley as owner thereof; that complainant was, in fact, but a tenant of one room of the house under Wakeley, when he purchased, and that the contract purporting to have been made on the 28th day of November, 1874, whereby Wakeley purported to bind himself to reconvey the premises to complainant, was, in fact, executed after Wakeley had sold and conveyed the property to Coari and on the 11th of January, 1875, and was executed and antedated, at that time, pursuant to a fraudulent conspiracy between Wakeley and complainant to defraud Coari.

Crescio also answered, denying knowledge of complainant's rights, when the mortgage was executed, and claiming that it was made in good faith to secure money loaned at the time of its execution, etc.

Cross-bill was also filed by Coari against Olsen, setting up the facts alleged in the answer, praying that the pretended contract between Wakeley and Olsen be canceled; that Olsen surrender possession of the premises and account for rents and profits.

The cause was heard on the issues presented, the witnesses being examined orally in open court. The court found the

equities with Olsen, subject to the lien of the mortgage executed by Coari to Crescio, and, with that exception, decreed in conformity with the prayer of Olsen's bill.

This appeal is prosecuted by Coari only.

Messrs. E. H. & E. N. GARY, for the appellant.

Messrs. MCDAID & KNIGHT, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The most important questions presented by this record are of fact. They are, *first*, was the contract between Wakeley and Olsen, for the reconveyance of the property, actually made, as it purports to have been, on the 28th of November, 1874, or was it made subsequent to the conveyance by Wakeley to Coari, and ante-dated. *Second*, if that contract was, in fact, made on the 28th of November, 1874, is Olsen estopped from claiming under it, as against Coari.

The evidence is somewhat voluminous, and, on most points, directly contradictory; and, since it can subserve no useful purpose to reproduce it here, in detail, we shall only state our conclusions thereon,—premising that the witnesses were here examined orally, before the chancellor, and that he had, hence, the same facilities for forming an opinion of the relative merit and weight of the testimony given by the several witnesses, as has a jury in trials at law; and that there is, therefore, the same necessity that exists on a trial by jury, that the error in finding as to fact shall be clear and palpable to authorize a reversal.

We are not clearly satisfied, then, that the finding of the court upon either question of fact was palpably unauthorized by the evidence.

The evidence of Wakeley, for reasons sufficiently disclosed by the record, might well be regarded as shedding no reliable light upon the transaction, and, throwing it out of the case, there is but little to impeach the *bona fides* of the date (Nov.

28, 1874,) as the actual date of the contract for reconveyance. The date of the receipt for rent given by Olsen to Wakeley, read in the light of Olsen's explanation, (that it was signed by him in ignorance of its contents, and without any design to evidence a state of facts inconsistent with his repurchase of the property on the 28th of November, 1874,) is of no significance as a contradiction of the date of the contract of reconveyance.

With regard to the circumstances urged as estopping Olsen from claiming, as against Coari, under the contract of the 28th of November, 1874, we deem it sufficient to say, that we are not clearly satisfied the court below ought to have disbelieved Olsen and his witnesses, and have given implicit credence to the testimony to the contrary, on behalf of Coari. If Olsen speaks the truth, he made no assertion and did no act which should have misled Coari, before his purchase, as to the ownership of the property. Coari's admission that when speaking to Olsen in regard to the property, he withheld from him all knowledge that he desired information with a view to becoming a purchaser of the property, and falsely represented that he desired to rent it, might well be regarded as strongly tending to support Olsen. It would, to say the least, be verging upon doubtful ground to say that a party shall be estopped from asserting his title to real estate because of declarations in regard to the title, obtained from him by cunning and falsehood. Aside from this, however, the circumstance that Coari admits that he did not openly and frankly inquire in regard to the property as one seeking a knowledge of the property and its title with a view to purchase, tends to confirm Olsen that the ownership of the property was not made the subject of consideration,—at least in such a way that he should have anticipated importance could be attached to his remarks.

The testimony of Longnetti and Costa, contradicted as it is by Olsen and his son, can not be regarded as of controlling importance, in any aspect of the case. Their mission seems to have been chiefly to hear something to testify to that would

make in favor of Coari and against Olsen. Olsen was under no obligation to explain to them, with legal accuracy, the nature of his title, and, as they were of different nationalities, it is quite probable that either through his inability to express himself with sufficient clearness, or their inability to precisely comprehend his language had he attempted an explanation of his title, it would not have been attended with success. The only thing that may be said to be entirely free from doubt in regard to the interview between these witnesses and Olsen is, they gave him a paper notifying him to quit the premises, which he refused to touch, and that he claimed the right to remain in possession. There is no pretense for basing an estoppel upon anything that then occurred, and what was said by Olsen is not free enough from doubt to make it of much weight as a contradiction of the date of the contract for reconveyance.

The only question of law is (the contract for reconveyance not being placed upon record), was Olsen's possession, at the date of Coari's purchase, sufficient notice to put Coari upon inquiry as to Olsen's rights.

Olsen was in possession of the third floor of the house, as tenant to Wakeley, when the contract for reconveyance was made, on the 28th of November, 1874. The second floor was then vacant, and the first floor was occupied by a tenant to Wakeley, whose term did not expire until after Coari purchased.

We think it may be regarded as a reasonable conclusion, from the evidence, that immediately after the contract for reconveyance (at all events before Coari purchased), Olsen was in the possession of the second and third floors of the house, claiming as owner, his own family occupying the third floor, and that of his son-in-law, Heinz, who claimed under him as landlord, the second floor. It does not appear that there was any change in the first floor, but, as Coari makes no claim to having acted upon the faith of the declarations or possession of that tenant, we do not regard this of any moment.

Appellant makes the point, upon these facts, that the possession of Olsen, after the contract of reconveyance was made, was no notice that he thereafter claimed rights as purchaser, but that the public were still to regard it as under his former tenancy,—in other words, that his possession was simply notice of the title or claim under which he first entered or held possession.

This position, if tenable, could hardly help appellant, since Olsen's possession of the third floor first commenced while he was the unquestioned owner of the property, and was continued when he conveyed to Wakeley, and until after the contract was made by Wakeley for reconveyance; and the only change, at any time, was by contract recognizing Wakeley as owner, just as it was, afterwards, by contract recognizing Olsen as owner.

But, although other courts have held the doctrine of notice by possession as subject to being materially modified by circumstances, this court has uniformly held that actual occupancy is equal to the record of the deed or other instrument under which the occupant claims, and a purchaser is bound to inquire by what right or title he holds. The purchaser takes the premises subject to that title or interest, whatever it may be. *Dyer* v. *Martin*, 4 Scam. 147; *Brown* v. *Gaffney*, 28 Ill. 150; *Doyle* v. *Teas*, 4 Scam. 202; *Williams* v. *Brown et al.* 14 Ill. 201; *Davis* v. *Hopkins*, 15 id. 519; *Prettyman* v. *Wilkey*, 19 id. 241; *Truesdale* v. *Ford*, 37 id. 210; *Lumbard* v. *Abbey*, 73 id. 178; *Whittaker* v. *Miller*, 83 id. 386; *Strong et al.* v. *Shea*, id. 575.

So far, at least, as the facts of the present case are concerned, we adhere to the common law rule, that where a tenant changes his character by agreeing to purchase, his possession amounts to notice of his equitable title as purchaser. 2 Sugden on Vendors, (8th Am. ed.) 343, § 24; *Daniels* v. *Davidson*, 16 Vesey, (1st Am. ed.) 249; *Chesterman* v. *Gardner*, 5 Johns. Ch. 32.

The seeming contradiction in the decree sustaining Crescio's mortgage, whilst denying a title in Coari that would seem essential to the making of that mortgage, is not complained of. The court based that part of its decree solely upon the clause in the agreement of reconveyance by which Wakeley reserved the right, at his election, to place an incumbrance of $800 on the property, treating the Crescio mortgage as such an incumbrance, so Olsen, in discharging it, will be but paying that much of what his contract of reconveyance requires him to pay.

On the whole, although not so clearly satisfied with the conclusions of the court below as to the facts as we could wish to be, we can not perceive any satisfactory reasons for reversing the decree on its merits.

There is, however, a technical error in the decree in requiring Coari to convey to Olsen. All that Olsen is entitled to, as respects Coari, is to have his title declared void. Olsen must rely on the title to be derived through Wakeley, pursuant to his contract. The decree directs Wakeley to execute and deliver to Olsen "a good and sufficient deed of conveyance," subject to the mortgage, etc., and that in lieu thereof the master in chancery execute and deliver such deed. This is all that is necessary to complete his title, as disclosed by this record.

The decree will, therefore, be modified in this court by striking out so much thereof as directs Coari to convey to Olsen. We do not, however, regard this modification as important enough to affect the question of costs. The decree will, in all other respects, be affirmed, and the costs will be taxed against the appellant.

Decree modified, and affirmed.

HERMAN LIEB *et al.*

v.

CHARLES M. HENDERSON *et al.*

1. COUNTY CLERK—*delivery of tax books.* It is the duty of the county clerk to deliver the tax book and warrant to a town collector only when the latter has given bond and taken the oath of office. If this has not been done the book and warrant should not be given to him.

2. PRESUMPTION—*that officers will not violate their duty.* No presumption can be indulged that a public officer will do that which the law forbids him to do.

3. ANSWER—*evidence to overcome.* The sworn answer or disclaimer of a county clerk to a bill for an injunction, clearly showing he does not intend to deliver the tax book of a certain town to the collector until such collector should give bond and take the oath of office, is not overcome by the testimony of four witnesses testifying to a single conversation of the clerk as to his intention in the matter.

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

Messrs. FULLER & SMITH, and Messrs. GOUDY, CHANDLER & SKINNER, for the appellants.

Mr. JOHN J. HERRICK, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Elaborate arguments have been made on every phase of this case, but on mature consideration a view has been taken that is conclusive of the whole case, that may be shortly stated, and will require the discussion of no principles not well understood.

The bill is for an injunction, and was filed on the 19th day of December, 1876, by a number of tax-payers of the town of South Chicago, against Herman Lieb, county clerk of Cook county, and Michael Evans, collector of taxes for the town of South Chicago, to restrain the former from delivering to the latter the tax collector's books for the year 1876, until the latter shall have executed a bond as such collector in the form prescribed by law, with two or more securities, to be ap-

proved by the supervisor and town clerk, in double the amount of taxes to be collected by him, and conditioned for the faithful performance of his duties as collector of taxes.

Complainants' allege they are tax-payers of the town of South Chicago, and then set forth in their bill the duties of the county clerk in preparing the collector's books; the labor and expense involved in their preparation, and their value; the duty of the town collector to give the required bond before entering upon the duties of his office, and of the county clerk to retain the custody of the books and not deliver them to the collector until such bond is given.

As one ground of relief, it was sought to make it appear defendant Evans was ineligible to the office of town collector by reason of the fact he had been collector of the same town the preceding year, and, as such collector, received taxes in large sums which he had failed to pay over, and that the town had brought suit against him for the alleged deficit, but as it is not insisted upon in argument, we may understand it is abandoned by counsel and may be dismissed without further remark.

Of most importance is the allegation that the collector's books will be ready for delivery to the collector on the 20th day of December, and the county clerk threatens, and intends, and has declared his intention to recognize defendant Evans as collector, and deliver to him the collector's books for the current year, 1876, before he shall have given bond in the amount and conditioned as required by law, with securities approved by the supervisor and town clerk, and has declared his intention to deliver the books to Evans on that day whether he shall have given bond approved by the supervisor and town clerk or not.

It will be observed the bill was filed before the tax collector's books were ready to be delivered to him by the county clerk. Under the statute the collector had eight days after notice the books were ready, in which to present his bond as such collector. No notice had then been given by the county clerk,

and it could not then be known whether he could give such bond as is required by law, to the satisfaction of the supervisor and town clerk. But Evans made his answer to the bill on the 20th of December, in which he emphatically disclaimed any intention to apply for the collector's books until he had given bond as required by the statutes of the State, and alleged his ability and intention at the proper time to furnish such bond, and present it with sufficient securities to the supervisor and town clerk for approval, but if they or either of them "unlawfully and without reasonable excuse refused to approve such bond, he intends to present the same to the county clerk or board of county commissioners for such action as they may think proper and lawful." On the 13th day of February, defendant Lieb made his answer to the bill, in which he, with great positiveness, disclaims knowing of any intention on the part of Evans to enter upon the collection of taxes in the town of South Chicago without giving bond as required by law, and denies all charges as to threats or intention on his part to deliver the collector's books to Evans before he had given bond in the amount and conditioned as the law requires. With the exception of some minor allegations, on which no evidence was offered on the trial by either party, what is stated is the substance of the bill and answers. Replications were filed to the answers, and on the 10th of March, 1877, the case was heard on the pleadings and proofs, and the injunction made perpetual.

But little testimony was given on the final hearing of the cause. By consent complainant read in evidence the affidavits of four persons, which had been read to the court on the motion to dissolve the injunction. In substance these affidavits are all the same, and are to the effect that at an interview with Lieb in his office on the 15th of December, with others present, Lieb stated that the books for the collector of the town of South Chicago would be ready for delivery about the 20th day of that month, and that it was his intention to deliver the books on that day to Evans, and that if Evans should

not be able to give bond as collector, with sureties that would be approved by the supervisor and town clerk, he would not insist on his giving bond so approved before delivering the books, but would deliver them to him upon his giving bond with sureties approved by the county board.

Complainants also read a statement made by Anderson, which, by agreement, was to be considered as a deposition, showing the number of the collector's books for that town, the expense incurred in preparing the same, and the great difficulty that would be experienced in restoring the same should the books be lost or destroyed.

It was admitted complainants were residents and tax-payers of the town of South Chicago. On the part of defendants there was read in evidence the affidavit of Lieb, which had been read to the court on the motion to dissolve the injunction and which it was agreed might be treated as a deposition. In that affidavit Lieb says he did not make the remarks attributed to him in the affidavits of Field and Peck, that he would deliver the collector's warrant and books to Evans if his bond was approved by the county board; that he never so stated and must have been misunderstood, but that what he did say was, if one officer refused to perform a certain duty, that would not debar another officer from performing his own, and that if the supervisor should refuse to approve the bond of the collector, there would be some other authority found that would. This was all the evidence offered by either party on the final hearing.

Waiving any question as to the jurisdiction of a court of equity in the premises, the decision may be placed on the sole ground it is not proved by any satisfactory evidence sufficient to overcome the absolute denial of defendant, that as an officer of the county he contemplated or ever had even the remotest intention to do anything in regard to delivering the tax collector's books that was not his duty to do as defined by law. What Evans may have intended to do is a matter of no consequence, for, if the county clerk did his duty, he could not get

the collector's books and warrant until he had given bond and taken the oath of office as prescribed by the statutes of the State. There is absolutely no evidence the clerk intended Evans should have the books and warrant without first complying with the law by giving the requisite bond, nor until the same had been approved by the proper authority, whatever that might be, whether it was the supervisor and town clerk or the county board. As we have seen, the time had not then arrived for the collector to give his bond, as the tax books were not ready to be delivered, and at that time it could not be known or anticipated the supervisor would refuse to approve such bond as should thereafter be presented to him. The utmost that is attributed to the county clerk in regard to the performance of his official duty in this matter is, that in discussing the subject he expressed an opinion he would receive the collector's bond if approved by the county board, and deliver the tax books and warrant. That was only his understanding of the meaning of that clause of the statute that provides for approving of the collector's bond, that it may be done by the "county board or supervisor and town clerk of said town, as the case may require," in which he may have been mistaken. But he denies making the remarks attributed to him. There is much good sense in the suggestion that if the supervisor should refuse to approve the collector's bond, if it was amply sufficient, some authority could be found to approve it. It would be strange indeed if, by an inferior officer unreasonably refusing to approve the bond of a collector, the collection of the public revenue could be absolutely stopped unless collected by a person of his own selection. But be that as it may, there was no satisfactory evidence given on the hearing of the cause that shows the county clerk, as an officer of the county whose duties are defined by law, contemplated doing anything with the collector's books and warrant by which complainants could be injured in any way. Nor will any presumptions be indulged a public officer will do that which the law forbids him to do. All the testimony in the

case on the part of complainants is that of the four witnesses that heard the same conversation, and surely the disclaimer of defendant under the sanction of an oath ought to outweigh what he may have said as to his intentions as to his official duties in a mere conversation about the matter.

By far the greater portion of the evidence found in this record is that heard by the court on the motion to dissolve the injunction that had been awarded when the bill was filed, but as it relates to issues not raised by the pleadings, it can not be considered. It was addressed to the court to aid its discretion in passing on the motion to dissolve the injunction. At most, it only bears upon a question collateral to the one made by the pleadings and was not introduced on the hearing of the cause.

The final hearing of the case was not had until long after the time had elapsed for giving bond by the collector and for delivering the tax books and warrant, yet no amendment was made to the bill showing such bond had not been given, nor was there any evidence on the hearing as to any bond which it was proposed to give or which was given. So far as the record before us can be considered, it leaves the court free to indulge the presumption that when the proper time for action arrived, the several town and county officers did their duty as defined by law.

Our conclusion is, the temporary injunction was improvidently awarded, and it was error to make it perpetual.

The decree will be reversed, and the cause remanded with directions to the court below to dismiss the bill.

Decree reversed.

Syllabus.

WILLIAM K. REED *et al.*

v.

GEORGIE H. PETERSON.

1. ESTOPPEL—*by party's acts.* Where certain moneys of a testator in his guardian's hands at the time of his death was inventoried as personalty, and as such received from the executor by a purchaser from the sole legatee of the personal property, on a purchase consummated by fraud and deception practiced upon the legatee, and for a grossly inadequate price, it was *held*, that the purchaser from the legatee, on bill filed by the latter to set aside the sale for the fraud, was estopped from averring that the money was not personalty, but real estate, and thus defeat the relief sought, especially when the heirs of the testator made no claim for the same as realty.

2. FRAUD—*inadequacy of price paid as evidence of fraud.* Although mere inadequacy of price is not, *per se*, ground for setting aside a transfer of property, yet it may be so gross and palpable as to amount, in itself, to proof of fraud, and this, in connection with proof of imposition and misrepresentation on the part of the purchaser and his agents, will be sufficient to characterize the transaction as fraudulent in a court of equity.

3. SAME—*dealings by one in fiduciary relation.* The principles which govern the dealings of one standing in a fiduciary relation, apply to the case of persons who clothe themselves with a character which brings them within the range of the principle.

4. SALE—*when set aside for fraud.* A sale of a sole legatee's entire interest under a will, worth $4300 in cash, after the payment of all costs, charges and expenses, for the sum of $250 and some few articles of property, made upon representations of the attorney of the executor (while acting, also, as the attorney of the purchaser,) that extensive litigation was likely to follow in respect to the validity of the will and the property devised to her, and who suppressed and concealed material information as to the extent of the property devised and the certainty of its recovery, and threw out innuendoes calculated to influence the legatee, who resided many hundred miles from the place of the testator's death, and had no means of information except what the attorney gave her, and who relied upon what he said, when it also appeared that the attorney pressed her to a speedy decision by working upon her fears of losing all, it was *held*, that, owing to the fraud practiced and the means employed by one apparently in a fiduciary character, and in whom trust and confidence were reposed, the sale was properly set aside, and the purchaser and his agent required to account to the legatee for the value of the property obtained under such sale.

5. FRAUD BY AN AGENT—*of his liability personally.* On bill filed to set aside a sale and transfer of a legatee's interest under a will, against a company

which became the purchaser, and its cashier and principal manager, for fraud practiced upon the legatee, where it appears that such principal manager actively participated in consummating the purchase, all the transfers being made directly to him, and that he had, at the time, a large amount of stock in the company, and received pecuniary profits by the purchase, there is no error in rendering a decree against the company and the cashier, personally, for the sum required to be paid to the complainant. A court of equity will not attempt to make a contribution between the perpetrators of a tort, in decreeing relief against them.

6. In an action at law for damages, the fact that a defendant acted throughout in the capacity of agent, in a fraud perpetrated by him, will afford him no excuse.

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

Mr. GEORGE SCOVILLE, for the appellants.

Messrs. PAGE & PLUM, for the appellee.

Mr. JUSTICE BAKER delivered the opinion of the Court:

This suit in chancery grows out of one of a series of transactions extending over a period of some twenty-five years, all having some reference to the same subject matter. Various of these have, from time to time, been before this court for investigation, and several of their developments are still pending for solution. We will seek to avoid all reference to these former controversies, and to all matters not involved in the present proceeding, and even to those matters involved therein which did not form the basis of any of the relief granted by the circuit court in the decree herein appealed from. This will free the case from complications not now necessary to discuss, and eliminate from the record questions passed upon by the court below, that may now be regarded as *res judicata.*

The present bill was filed by Georgie H. Peterson, the appellee, against appellants, the Illinois Land and Loan Company and William K. Reed, to set aside a sale and recover the value of certain personal property, bequeathed to her by her stepson, Percy W. Bonner, deceased, on account of the alleged

fraud of appellants, and for gross inadequacy of consideration.

In the fall of 1869, the testator, a mulatto boy nineteen years of age, was the owner of an undivided half of a valuable property, situate on the corner of La Salle and Monroe streets, in the city of Chicago. He was consumptive, and had started to go south for his health, and stopped, temporarily, at Kankakee. The appellant corporation, which held certain tax claims against the property, thereupon dispatched Mr. Scoville, its solicitor, the appellant Reed, who was its cashier and general manager, and a third person, to Kankakee, and they induced the boy to return to Chicago. Shortly thereafter, through the endeavors of these same persons, the old guardian of the boy was removed from his office, and one P. W. Gates was appointed in his place. Gates had been the client of Mr. Scoville for some twenty years, and he states, in his testimony, he consented to take the guardianship, but that Mr. Scoville agreed to do the work. Mr. Scoville states, on cross-examination, it was understood between Mr. Gates and himself that he should act as Gates' attorney, and render all the assistance he could, if Gates was appointed guardian. And it impresses us, from an examination of the evidence in the record, that in all the subsequent transactions the attorney and not the client was, for all practical purposes, though not nominally, the guardian of the boy.

Soon after the appointment of the new guardian, he borrowed $8000 for his ward, and executed a mortgage upon the real estate to secure the same. The loan was effected through the appellant Reed. The petition to the court, the order of court, and the mortgage, were all drawn up by Mr. Scoville.

On the 20th day of January, following, 1870, Percy W. Bonner made a conveyance of his interest in said land to said Land and Loan Company, but this conveyance was not placed upon record until the day of his death. There was also a contract executed by the boy and the company, on the day of the date of the deed, in which the real consideration of the deed

was stated. It is only necessary, here, to refer to these two instruments for the purpose of showing the *status* of affairs at the time of Percy's decease. The question of the validity of the deed was passed upon by this court in *Illinois Land and Loan Co.* v. *Bonner,* 75 Ill. 315; and the claim of appellee, based upon the concurrent contract, was not allowed by the court below, and a discussion of its provisions is now unnecessary.

Percy W. Bonner died on the 26th day of July, 1870. Prior to his death he made a will, in which he gave and bequeathed to appellee all his personal property and estate, of every kind, whether in possession, suit or expectancy, consisting, in part, of a gold watch and chain and of a claim for money pending against Daniels and others, and in part of certain city bonds of Chicago, in the hands of C. A. Gregory, and to recover which legal proceedings had been had and were to be prosecuted,—and in which will he constituted said P. W. Gates his executor.

The amount of cash that came to the hands of Gates, as executor, after the payment by the guardian of all funeral expenses, costs of court, guardian's commissions and attorney's fees, was $3702.29. This money was the remainder of the $8000 raised, by mortgage, for the support of the minor and for the payment of taxes and costs of litigation. There is no merit in the claim, now made by appellants, that it was a part of the realty, and went to the heirs, and not to the legatee under the will. The heirs have never claimed it as such. It was paid to the executor as a part of the personal estate, and was inventoried by him as such, and appellants received it from him as such, on the written order of appellee, and under a sale from her, and they are now, in equity and good conscience, estopped from averring that it was not personalty.

There was, also, in the hands of one Gregory a city bond of Chicago, of the value, with accumulated interest, of about $1600, that he, Gregory, had received and held as the attorney of young Bonner. It is true, the delivery of this bond

to the guardian had been, for years, enjoined; but it clearly appears that this injunction had been dissolved, and the suit in which it issued dismissed, months before the decease of Bonner, through the endeavors of Mr. Scoville. There is no claim Gregory was not perfectly responsible, pecuniarily. The demand was inventoried by the executor as a good and valid claim, and we are wholly unable to appreciate the position assumed, that this bond and accrued interest was not a part of the personal estate of the deceased.

Disregarding various other claims of property from which appellants seem to have derived benefit, but for which no relief was granted appellee, we have here a personal estate of the cash value of over $5300, and it appears the total indebtedness of the estate, including executor's commissions, costs of county court, and attorney's fees paid, amounted to only $1039.72, leaving a net value to said estate of over $4300.

The condition and value of the property bequeathed to appellee were fully known to Mr. Scoville. He had managed the affairs of the estate, and attended to all its litigation, for nearly a year past, and had received from the guardian therefor fees, for himself and firm, amounting to over $1500. And appellants were equally well advised. Mr. Scoville had been the attorney for each of them for many years, and only became connected with the matter of this Bonner estate in furtherance of their interests, and it is evident, from the circumstances and details in proof, that whatever knowledge the attorney had material to the interests of the clients, was also known to them, and that Scoville and appellants were acting in concert in the whole transaction we are now considering.

At the time of her step-son's death, appellee, who is a mulatto woman, was head chambermaid on a steamer running on Long Island Sound. On hearing of his death, she wrote to Mr. Gates, his guardian, requesting that one or two articles belonging to her, that had been in the possession of the step-son, should be forwarded to her. She states, in her testimony, this letter was responded to by Mr. Scoville in person, repre-

senting Mr. Gates, a few weeks after Percy's death. She testifies, in substance, that he informed her that the will, a copy of which was shown her, was not a legal document, on account of Percy being under age, but that his guardian was anxious his wishes should be carried out; that the estate was very much involved; that Gregory had obtained possession of the bonds mentioned in the will years ago, and refused to give them up, and it would be impossible to obtain them, by suit or otherwise; that it was utterly impossible she could ever get any benefit from the suit against Seth Daniels; that Percy had left a trunk, and very nice clothing and jewelry, and watch and chain, and guitar and case; that he said nothing about the money borrowed, or any other assets of Percy's estate, but said the repudiation of the agreement and deed by the heirs would have the effect of throwing her out altogether. She further testifies, he offered her, on behalf of the appellant company, $250, and the trunk, clothes, watch, chain and guitar, and warned her of threatened chancery litigation, and of possible loss of all benefit under the will, and urged that Percy's guardian was anxious to have the matter settled forthwith, and pressed her for an immediate decision. And further, that by transferring the suits and claims under the will, it would strengthen the company in its controversies with the heirs and Gregory, who were claiming interests in the real estate.

Some of these statements are denied in the deposition of Mr. Scoville, and others are sought to be explained away; but we regard the testimony of appellee as corroborated, in most of its substantial points, by the letters written by Mr. Scoville, and dated August 15, August 16, and August 23, 1870, and by the surrounding circumstances of the case. And then, we do not understand, from his own showing, that he gave her correctly to understand the real condition of affairs, that he informed her the injunction had been dissolved, and there was nothing to prevent the devisee under the will from recovering the city bond and interest, and that there was

a large residue of cash in the hands of the guardian, but a small part of which would probably be required to pay debts and expenses. By his own showing, he prominently held before her the suggestions that there was a doubt as to whether the balance in the hands of the guardian would be considered personal property which he could bequeath by will, that the heirs would probably claim it, and try to set aside the will, and that the debts would have to be paid first, and, if necessary, all the personal property would have to be sold for such purpose. He closes one of his letters by saying: "You will see the necessity of doing at once whatever is done, before the personal property is disposed of by the executor."

In this case there was such a gross disproportion between the insignificant sum of $250 paid appellee and the real value of the property transferred by her, over $4300, as is of itself enough to raise a strong presumption of fraud. While mere inadequacy of price is not, *per se*, ground to set aside a transfer of property, yet it may be so gross and palpable as to amount in itself to proof of fraud. "And," as is said by Mr. Justice STORY in his Equity Jurisprudence, "where there are other ingredients in the case of a suspicious nature, or peculiar relation existing between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."

Here, we have numerous other ingredients that tend to show fraud and imposition. This uninformed woman, hundreds of miles away from where she could inform herself by personal investigation, even if she were capable of making such, as to condition of the affairs of her deceased step-son, who had recently died leaving no brothers or sisters, writes, as she most naturally and properly would, to the guardian and executor of the deceased. Her communication is answered by the speedy personal appearance of the attorney of such guardian and executor, who comes representing that guardian and executor as anxious that the wishes of the boy should be carried out, and who is working ostensibly in furtherance of

the objects of the will. This attorney had for many months been managing the dead boy's business and was thoroughly advised as to the state of his affairs. He had personally superintended the burial of the boy and was sent by the guardian and executor to the step-mother, for the express purpose of giving her information and advice. Nothing is more natural than that the step-mother should place implicit confidence and faith in the representations thus made her. And she had a right to rely on statements made to her under such circumstances. As executor under the will, Gates stood in a fiduciary character to appellee, the beneficiary and sole legatee under the will. And Scoville came to her as the attorney and representative of this trustee. The principles which govern the case of dealings of persons standing in a fiduciary relation apply to the case of persons who clothe themselves with a character which brings them within the range of the principle. Kerr on Fraud and Mistake, 104, and cases there cited.

The parties here did not stand upon an equal footing, and at arm's length, and the confidence reposed and undue influence exerted are affirmatively shown by the facts and circumstances in proof, even were we to assume that no fiduciary relation existed as between the beneficiary under the will and the attorney and confidential representative of the executor.

The parties came together at a great disadvantage to appellee; and the false suggestions made, the misleading innuendoes thrown out, the suppression of material information, the haste urged when there was no necessity for speedy action, and the threats of a speedy sale of property specifically bequeathed, when there was abundant cash on hand to more than pay all probable or possible demands against the estate, are all badges of fraud. We think the other circumstances in evidence, when added to the fact of gross inadequacy of price, afford ample and sufficient proof of the fraud charged in the bill.

It is urged, that, although appellants held an order on Gregory for the city bond, and an assignment of the claim from appellee, yet as they never collected the bond or any part

thereof, they should not be held for its value. It is true Gregory testifies he never paid to Reed or to the Illinois Land and Loan Company the bond or any part of it. But it appears that on the 19th of October, 1870, there was a compromise and full settlement between Gregory and the company of all disputes between them growing out of the Bonner property; that Gregory had or claimed certain rights and interests of some of the heirs of the original Bonner estate, and of one of the heirs of the estate of Percy W. Bonner, then lately deceased, and tax and other claims, and that the company held conflicting titles and claims, and the interest in the litigation pending against Gregory and others, and that these conflicting interests were compromised in that agreement. As we understand the evidence, the company got the benefit of the demand for the bonds in that settlement.

Reed testifies, speaking of the order on Gregory for the bond: "I gave it to our attorneys, to be used to enable us to recover bonds said to be in his (Gregory's) possession," "held by him belonging to the Bonner heirs, issued by the city." "If there were such it was intended to begin proceedings, or prosecute proceedings already begun for their recovery." He further says: "I understood in that settlement the various interests, including titles procured by Gregory from various heirs, the dower interest, adverse possession by him, and all other antagonistic interests and claims, were fully settled."

Mr. Gregory states that he thinks a suit was brought by Mr. Gates against him to recover the bonds. In this he is corroborated by appellee, who swears that Scoville represented to her, at their interview in New York, that Percy left a suit pending for a certain set of bonds held by Gregory. Gregory also swears, with reference to this suit: "It was dismissed, and I presume was a part of the general settlement," and he also makes other statements to the same effect. It is true, as is urged, he testifies, "the bonds received by me are all properly accounted for," but he nowhere tells or is called upon to tell to whom or when they were accounted for.

But the most satisfactory evidence on this point is found in the agreement itself. The bonds were issued by the city of Chicago in payment for a part of the Bonner lots taken for the extension of La Salle street; and the ground on which the injunction heretofore referred to was predicated, was that the bonds stood as the representative of the land taken, and were, in equity, the property of the owners of the several estates and interests therein. In the agreement this provision occurs: "It is further understood and agreed, that each party hereto releases and discharges the other from all claims and demands arising from or growing out of transactions connected with said property heretofore; the compromise hereby effected being based upon such release and discharge." This stipulation of the parties includes the matter of the demand for the bonds.

It is also urged, the decree is erroneous in that it is not only against the company, but personally against the appellant Reed for the payment of $5578.18 and costs; that as Reed was cashier of the company and acting in all these transactions for the company, and as the moneys realized went to the company, and none of it personally to him, he should not be held liable personally therefor. We do not care to quote from the testimony to show that Reed was the controlling spirit in all these various transactions. And then all the several transfers of property were made directly to him, and he had, at the time, a large amount of stock in the company. He was interested in the profits derived therefrom, and received pecuniary benefits thereby.

In an action at law for damages, the fact that a defendant acted throughout in the capacity of agent, in a fraud perpetrated by him, will afford him no excuse. *Allen* v. *Hartfield*, 76 Ill. 358; *Campbell* v. *Hillman*, 15 B. Monroe, 508; Story on Agency, sec. 311. The same doctrine seems to have been applied by the court of chancery in cases of bills filed for purposes somewhat similar to the scope and objects of this bill. In *Arnot* v. *Biscoe*, 1 Vesey, Sr. 95, Lord HARDWICKE held there was a good equity for the plaintiff against Biscoe, and

said: "If the attorney or vendor of an estate, knowing of incumbrances thereon, treats for his client in the sale thereof without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce the buyer to trust his money upon it, a remedy lies against him in a court of equity, to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man." In *Seddon* v. *Connell*, 10 Simons, 86, the bill was against Evans and others, and Evans was neither a director nor shareholder, but was manager of the bank. The Vice-Chancellor said: "Whether he was a shareholder or not is immaterial, because a case of fraudulent misrepresentation is sufficiently stated against him, in respect of which he is liable, though he gained nothing by it."

But it is not necessary for us, here, to go thus far. Reed was a shareholder in the company, and it must be presumed he gained by the fraud and shared in the spoils. The court of equity will not attempt to make a contribution between the perpetrators of the tort, but, as they each shared in the proceeds, will hold each liable for all the consequences.

The judgment and decree of the circuit court is affirmed.

Judgment affirmed.

The Chicago and Iowa Railroad Company

v.

William H. H. Russell, Admr. etc.

1. Negligence—*permitting obstruction near passing railway cars.* A railway company permitted a telegraph pole to stand, for a period of some three years, so near to a side track that it was within eighteen inches of freight cars passing on such track, so that a brakeman in descending from the top of a freight car while in motion, in the performance of his duty, came in collision with the pole, and was thrown from the car and killed. It was held to be culpable negligence in the railroad company to permit, for so long a time, such an obstruction to be in such close proximity to its track.

Syllabus.

2. Nor was it essential to the liability of the railroad company, in case of injury resulting from such obstruction, that it should itself have placed the telegraph pole where it was. It was enough that the company should have suffered it to be and remain in such dangerous proximity to the track.

3. Same—*of notice to the company.* In November, 1875, a brakeman on a railway train was killed by reason of coming in collision with a telegraph pole which was in close proximity to the track. There was the testimony of one witness that he had known of the telegraph pole being where it was since in March, 1875, and of another, a brakeman on the road, that he once came in contact with the same pole in 1872: *Held,* from the length of time of the telegraph pole standing where it did, as shown by the evidence, the jury were warranted in finding that the company knew of it—that they ought to have known of it, and so might be considered as having notice.

4. Contributory negligence—*as to injury received by an employee on a railroad.* Some freight cars were standing on a side track, to be attached to a train which was upon the passing track of the road. A locomotive and one car were switched on to the side track, a brakeman coupled the cars, and as they were moving out he climbed up on the side of a car next to the passing track, but, finding another brakeman on the top of one of the cars, he started down on the other side of the car—the business side—to turn the switch so as to throw the engine and cars attached to it back upon the passing track. In descending the ladder of the car, the brakeman was struck by a standing telegraph pole, which was only eighteen inches from the car, and knocked between the cars and killed. It was *held,* that, under the circumstances, the brakeman, in abandoning the safe side of the side track and going over the car to the obstructed side, was not guilty of such contributory negligence as would preclude a recovery against the company.

5. The conductor had given express instructions to brakemen "not to get on or off the work side of cars, or get down or climb up while they were moving,—that is, round elevators, stock yards and so on." In this case it was not regarded that the brakeman violated this order, as there was no impediment between him and the telegraph pole when he attempted to get down.

6. Nor was the brakeman chargeable with negligence in not looking and seeing the pole in time to save himself. There was no evidence he knew anything of the pole;—and his eyes, it may be supposed, were directed to the side of the car while he was in the act of getting down.

7. It appeared that just before the accident the brakeman was seen to have hold of the round of the ladder above the roof of the car; that his feet were on the first round of the ladder on the side of the car, the rounds being about a foot apart; that that position extended his body backward from the line he would have occupied if he had stood upright; and it was claimed that in thus carelessly and unnecessarily extending his body backward he increased the danger of a collision with the telegraph pole. But it was not considered there

was such negligence on the part of the brakeman as to the mode of descending the car as should affect the right of recovery.

8. Evidence—*parol to show contents of telegram.* In a suit against a railroad company, whose superintendent was C. B. Hinckley, the court allowed parol evidence of the contents of a telegram signed C. B. H., without producing the original, or the foundation being laid for the proof of its contents, or proof that the telegram came from C. B. Hinckley the superintendent: *Held*, that the court erred in admitting the evidence.

9. Error—*will not always reverse.* An error in the admission of evidence, when it is not material enough to affect the result, is not fatal, or sufficient to authorize a reversal.

Appeal from the Circuit Court of Kane county; the Hon. H. H. Cody, Judge, presiding.

Messrs. Kretzinger, Veeder & Kretzinger, for the appellant.

Mr. A. J. Hopkins, and Mr. Charles Wheaton, for the appellee.

Mr. Justice Sheldon delivered the opinion of the Court:

This suit was brought by William H. H. Russell, as administrator of the estate of James C. Russell, deceased, against the Chicago and Iowa Railroad Company, under the statute of this State, for causing death by wrongful act, neglect or default.

The circumstances of the case were as follows:

On the first day of June, 1875, James C. Russell commenced work for the railroad company in the capacity of brakeman on one of its freight trains running from Aurora to Forreston and return. On the second day of November, 1875, as the train upon which Russell was employed was on its return trip to Aurora, the station agent at Mount Morris, a station on the road, informed the conductor when the train reached that place that there were two cars on one of the side tracks to be attached to his train. At that place there are three tracks, viz: the main track, the passing track and a back or business track. These two cars which were to be attached to this train

were on the back track. To take these cars with them the conductor and brakeman ran the train on the passing track, uncoupled the train, and, with engine, tender and one car, switched on the back track, coupled these and three other cars, and pulled out to switch back on the passing track. Russell had turned the switch when the engine, tender and car were backed down on this back track to take the cars there, and after assisting in coupling them, he climbed upon the first car back of the tender, but as the other brakeman was on top of one of the cars, Russell started to get down and turn the switch so as to throw the engine and cars back on the passing track and connect them to the main train. As he was climbing down the ladder of the car to throw the switch, he was struck by a standing telegraph pole, which was only eighteen inches from the car, and knocked between the cars on the track, run over and almost instantly killed. There was a verdict for the plaintiff, upon which judgment was entered, and the railroad company appealed.

Appellant claims that the evidence is not sufficient to support the verdict.

It is said there is a failure of proof that the telegraph pole was placed near the track by the railroad company, its agents or servants, or that the company had any knowledge or notice thereof.

It was not essential to the liability of the railroad company that it should itself have placed the telegraph pole where it was; it was sufficient that the company should have suffered it to be and remain in such dangerous proximity to the track.

It is true there is no direct evidence that the company had actual knowledge or notice of the position of the telegraph pole. There was the testimony of one witness that he had known of the telegraph pole being where it was since in March, 1875, and of another, a brakeman on the road, that he once came in contact with the same pole in 1872. From the length of time of the telegraph pole standing where it did, as shown by the evidence, the jury were warranted in finding

that the company knew of it—that they ought to have known of it, and so might be considered as having notice of it. This court has often decided that notice of a defect or obstruction will be presumed after the lapse of a sufficient time. *City of Springfield* v. *Doyle*, 76 Ill. 202; *City of Chicago* v. *Fowler*, 60 id. 322.

It is insisted further, that there was such negligence on the part of the deceased himself, as should prevent a recovery.

It appears that this back or business track was not used for passing trains, but that it was used for all working purposes, for cars to receive and deliver freight and for cars to stand on; that two warehouses, a coal shed, cattle shute, and some lumber stood on the outside of this business track; that when the deceased coupled the cars on the back track and the engine started to pull out, he was on the inside of the back track, that is, between the passing track and the back track; and that he climbed the side of the freight car on the inside of the back track while they were moving out, crossed over the car, and commenced to descend on the business or outside of the back track for the purpose of moving the switch.

There are four particulars wherein it is claimed there was this alleged negligence.

First, in abandoning the safe side of the back track by climbing over the car from the inside, an unobstructed side, and attempting to climb down on the outside, an obstructed side. The switch in question was on the outside, or so situated that the train man who turned it had to be on the outside of the back track. From the evidence it would seem that Russell had expected his co-brakeman to turn the switch as they went out on the passing track, and did not know to the contrary until after he had reached the top of the car.

It is said next, he violated the express order of the conductor in attempting to climb down on the outside of the business track. The instructions given in this respect, as testified to, were, "not to get on or off the work side of cars or get down or climb up while they were moving, that is, round elevators,

stock yards and so on." The evidence does not show satisfactorily that this order, as it was susceptible of being construed, was violated, as it appears that the deceased waited until the cattle shutes and elevator were passed, and there was no impediment between him and the telegraph pole, when he attempted to get down.

It is said again, deceased was negligent in not looking and seeing the pole in time to save himself. He had reason to believe, after the cattle shutes and elevator were passed, that the track was clear. His eyes, it may be supposed, were directed to the side of the car while he was in the act of getting down. There is no evidence that he knew anything of this telegraph pole, or that he was ever required, previous to this second day of November, 1875, to assist in switching cars off on this back track at Mount Morris.

It was testified, that just before the accident deceased was seen to have hold of the round of the ladder above the roof of the car; that his feet were on the first round of the ladder on the side of the car, the rounds being about a foot apart; that that position extended his body backward from the line he would have occupied if he had stood upright; and it is claimed again, that in thus carelessly and unnecessarily extending his body backward he increased the danger of a collision. The evidence upon that point was that men differ in their manner of getting off a car. Some do as deceased did; others sit down on the side of the car and throw themselves over on the ladder.

It certainly was culpable negligence in the railroad company to permit, for so long a time, such an obstruction to be in such close proximity to its track that an operative of the road should come in contact with the obstruction and be killed, when on a car, engaged in the necessary performance of his duties in the management of the train. We do not find in all the conduct of the deceased any such negligence on his part as should preclude a recovery in the case.

It is also urged that the court below erred in admitting

improper evidence on behalf of the appellee, and refusing proper evidence on behalf of appellant.

Plaintiff below gave evidence of the removal of the telegraph pole by one of the employees of the railroad company soon after the accident, in pursuance of a telegram signed C. B. H., C. B. Hinckley being superintendent of the road. Against the objection of the defendant the court allowed parol evidence of the contents of the telegram to be given in evidence, without production of the original telegram, or the foundation being laid for the proof of its contents, or proof that the telegram came from C. B. Hinckley. In this we think the court erred. See *Railroad Company* v. *Mahoney*, 82 Ill. 73, as to the first point. But we do not regard that there was materiality enough in this evidence to make its admission a fatal error. In the other respects alleged of improperly receiving or rejecting evidence, we deem it sufficient to say that upon careful examination we find no error therein.

Error is also assigned in the giving of instructions on behalf of the plaintiff below, and refusing instructions asked on behalf of the defendant.

A large number of instructions were given on both sides, and we think the law of the case was very fully and fairly given to the jury. As viewed with reference to the facts of the case, we perceive no error in the giving or refusing of any instructions.

The judgment will be affirmed.

Judgment affirmed.

ORLANDO A. SMITH

v.

JOHN FERGUSON.

1. LIMITATION—*good faith of holder of color of title.* A defect in the title, if known to the purchaser of land when he purchases, is not enough to establish the fact that he was not a purchaser in good faith, under the Limitation

law of 1839. If the purchase is made with an honest purpose of obtaining title, and under a *bona fide* belief that the party is getting title, he will be protected, under the statute, on possession and payment of taxes for seven successive years. The question of good faith is one of fact, for the jury.

2. The fact that a party purchasing land, in 1858, is shown to have had knowledge of a suit in regard to its possession in 1842, affords no sufficient evidence that his purchase was not made in good faith, nor is the fact that a partner of a former occupant, in 1856, leased the property to the grantor of the party sufficient to destroy the good faith of his purchase, in 1858, from the lessee, who then claimed the title, nor will the fact that the party, before purchasing, was informed that the title was not good, impeach the purchase.

3. Where a party purchases land, taking a deed therefor and paying for the same, it will be presumed, in the absence of proof to the contrary, that he purchased in good faith. Knowledge that his grantor's title was defective, or was not a perfect title, will not impeach the good faith of his purchase.

4. Where there is no actual fraud, and no proof showing that the color of title was acquired in bad faith (which means in or by fraud), it must be held to have been acquired in good faith. Where there is no proof that the party, in making the purchase, designed to defraud the person having the better title, or was actuated by fraud, the good faith of his color of title is not impeached.

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

Mr. JOHN B. RICE, and Mr. CHASE FOWLER, for the appellant.

Mr. E. F. BULL, for the appellee.

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

This was an action of ejectment, brought by John Ferguson in the circuit court of La Salle county, against Orlando A. Smith, to recover a tract of land in the town of Marseilles, originally known as "the Funk acre."

The plaintiff introduced in evidence a patent from the United States to Woodworth, dated March 16, 1837, for the west half south-west quarter sec. 18, township 33, range 5 east, of which the land in question is a part; also, a deed from Woodworth to A. D. Butterfield, dated August 12, 1837, and a deed

from A. D. Butterfield to Seth Otis, dated January 10, 1837, for the acre of land; also, a deed from the heirs of Otis to the plaintiff, dated June 7, 1871. The plaintiff also introduced proof of the death of Otis, and that the persons in the deed last named were his heirs.

The defendant, to defeat the title of the plaintiff, relied upon claim and color of title, made in good faith, with actual possession in himself and grantors for seven successive years, and payment of all taxes assessed upon the land for the same period.

The first deed offered in evidence by defendant to establish color of title, was one from Joseph Funk to Alonzo Walbridge, dated January 20, 1858, and recorded March 27, 1858. It was then proven, that in the same year Geo. E. Hubbard rented the premises of Walbridge for $60 per annum, and remained in possession, as tenant, until the first of April, 1861, when he bought the property for $200, payable in five years, with interest at the rate of twelve and one-half per cent, payable annually, in advance. When he bought, he reeeived a contract for a warranty deed in payment of the purchase money. Under this contract Hubbard occupied the property, and on the 4th day of November, 1865, Walbridge conveyed to him the east one-third of the acre of land, which we understand to be the land in controversy. This deed was recorded November 8, 1865. It also appears that Hubbard remained in the possession of the property until 1870, when he delivered the possession to the defendant, Smith. Hubbard, however, deeded the land to James Long, in 1869, and he paid the taxes in that year. The taxes for the years 1861, 1862, 1863, 1864, 1865, 1866, 1867 and 1868, were all paid by Hubbard.

It is clear, from the evidence, that the plaintiff established a regular chain of title to the property in question from the government to himself.

A question was raised in regard to the sufficiency of the proof of the heirs of Otis, but it was more technical than sub-

stantial, and it will serve no useful purpose to consider it here.

In regard to defendant's title, it is conceded in the argument that defendant established possession in himself and his grantors for seven successive years, under claim and color of title, accompanied with the payment of taxes for that period. But it is contended that the claim and color of title were not made in good faith, and this, as we understand the record, is the controverted question in the case.

There is no testimony in the record which even tends to connect the defendant, Smith, with bad faith in the purchase of the property. On the contrary, it is conceded that he acquired the property in good faith, and under his purchase he has erected a valuable building on the property, which, doubtless, gave rise to this litigation, as the property, before Smith improved it, was of but little value.

In regard to the purchase of Hubbard, the only evidence we find in the record that he did not acquire the property in good faith is the testimony of the plaintiff and his son, who, in substance, testified, that after the plaintiff had bought a part of the premises, Hubbard said he was glad plaintiff had purchased, because there had been difficulty about the title, and the plaintiff was just the man to straighten it out. This evidence, if undisputed, would not establish a want of good faith on the part of Hubbard. A defect in the title, if known to Hubbard when he purchased, would not be enough to establish the fact that he was not a purchaser in good faith. *Rawson* v. *Fox*, 65 Ill. 201, is conclusive upon this point. It was there said: "To hold that a person is chargeable with bad faith because the register of deeds or the judgment docket may show a paramount outstanding title, or that the title of claimant is defective, would operate as an abrogation of the statute." Now, although Hubbard may have known that defects existed, yet if, with an honest purpose of obtaining title, he purchased of Walbridge, and paid his money under a *bona fide* belief he was obtaining title, he ought to receive the pro-

tection of the statute, although he may have been mistaken in regard to the goodness of the title he acquired. But, aside from the force or effect of such evidence, Hubbard, who has no interest whatever in the result of this litigation, expressly denies that he ever made the statements attributed to him, and says that he never heard of any controversy about the land until Ferguson obtained the deeds from the Otis children,—that he received the contract for a deed from Walbridge in good faith, and had no knowledge that the title was defective or in dispute.

So far, then, as shown by this record, the evidence fails to show that Hubbard purchased in bad faith; but, as a part of the seven years' payment of taxes was made while Hubbard held a bond for a deed, it is contended that the payment was made under the deed from Funk to Walbridge, and if he was not a purchaser in good faith, the bar of the statute can not be invoked. Under this view, the principal part of the evidence upon the question of bad faith was directed to the purchase of Walbridge from Funk.

The question, then, narrows down to this: whether Walbridge purchased in good faith. It is true, the question was one of fact, to be found and settled by the jury like any other question of fact, and if the record shows testimony sufficient to sustain the verdict, under the uniform ruling of this court, we can not interfere; but if, on the other hand, there is a clear want of evidence to sustain the judgment, then it will have to be reversed.

From the evidence it appears that Seth Otis bought the property in 1837. At that time there was no controversy in regard to the title. In June, 1839, Otis rented the property to Col. Pierce. At this time there was a house and barn on it, used as a hotel and stage house. In June, 1841, Pierce bought the property, and received of Otis a contract for a deed, in which he obligated himself for $250, in addition to $300 which had been paid, to convey the premises. Pierce occupied the property a short time, and moved to Chicago, where he

died, in 1855. After Pierce left, one Kimball claimed the property, and Parmelia Cone testified that he obtained the possession from Pierce. "She supposed Kimball obtained the tract from Pierce in payment of some debts." Kimball died in 1849. Before his death, however, according to the testimony of Mrs. Cone, Joe Funk was occupying the property, as tenant of Kimball.

It appears, from the testimony of John T. Nichol, that, in 1851, he was employed by the administrator of the estate of Lovel Kimball to sell the property at public sale, and that he sold it to Joe Funk, who was then in possession, but no deed was made. Funk continued to occupy the property until January, 1858, when he sold and conveyed it to Walbridge.

We will now consider the evidence relied upon to establish that Walbridge was not a purchaser in good faith. On this point, plaintiff proved by Adam V. Hughes that in the spring of 1856 he rented the property to Funk; he stated that the property needed some repairs, and he told Funk to make the repairs and pay the taxes for the rent. Funk was to give thirty days' notice before leaving the property, and witness was to give two months' notice in case he wanted the property. This witness also testified, that he had a conversation with Walbridge in La Salle, in 1860, in which Walbridge told the witness that Funk was still living in his old home, and inquired the price. It was also shown by this witness, that in 1842 there was a trial before a justice of the peace between Ward and Kimball, in regard to the possession of the property, and Walbridge was one of the jurymen. It was also proven by Dr. Hathaway, that about the time Walbridge purchased of Funk he investigated the title, and had several conversations with Walbridge in regard to the "goodness" of the title. Aside from the fact that Walbridge had resided in the neighborhood for many years and knew who had lived upon the property, the foregoing is the substance of the proof relied upon to establish that Walbridge did not purchase in good faith.

That the testimony can not be regarded sufficient to establish bad faith in the purchase by Walbridge, must be apparent. Suppose he was a juryman in 1842, in a controversy at that time between Ward and Kimball in regard to the possession of the property, this would not be satisfactory evidence that the purchase made in 1858 was in bad faith. So many changes occur in a country like this during a period of sixteen years, and property is changing hands so often, that it would not necessarily follow that those who owned or possessed property in 1842, would be owning and possessing the same property in 1858, or that the title would remain in the same parties. Suppose Hughes, who, so far as appears, was a stranger to the title to the property, except he was related to Col. Pierce by marriage and was his partner in business at one time, leased, in 1856, the property to Funk, and Walbridge knew that fact. Such fact can not be regarded sufficient to destroy the good faith of the purchase in 1858 from Funk, who then claimed to be the owner of the property. Nor could the fact that Walbridge was told by Dr. Hathaway that the title was not good, be held sufficient to impeach the purchase. The fact that a person purchases a defective title, does not impeach the good faith of the purchase. But if this evidence, introduced by the plaintiff, when standing alone, was regarded sufficient to impeach the good faith of Walbridge's purchase, when considered in connection with the proof on the other side there can be no doubt in reference to its insufficiency. Kimball was in possession of the property from 1845 until he died, in 1849, under claim of ownership. In 1851, at public vendue, the land was sold by the administrator of Kimball's estate, and bought by Funk, who was then in possession. He continued to occupy, using and claiming the property as his own, offering to sell on different occasions.

Nelson Rhines, who resided near the property for many years, testified, that about the time Walbridge purchased, Funk offered to sell to him, claiming to own it, and he supposed it belonged to Funk. In 1857 Funk offered to sell to Shadwell;

he did not wish to buy, and so told Funk, who then made him his agent to sell, and he called Walbridge's attention to the fact the property was for sale, and the result was, he made the purchase. Walbridge, however, before making the purchase, consulted Mr. Gray, then an eminent lawyer, in regard to Funk's title, and Gray told him he had examined the matter, and from Funk's statement he was safe in buying; "if he wanted the property to go and buy it; Funk has all the title to it and has possession."

The presumption of law is, that Walbridge purchased in good faith. Does the evidence, when fully considered, overcome that presumption? It may be true that Walbridge knew, when he purchased, that Funk's title was defective, or at least not a perfect title, but that did not impeach the good faith of the purchase, as said in *McCagg* v. *Heacock*, 42 Ill. 153. The doctrine is, that bad faith, as contradistinguished from good faith, in the Limitation act, is not established by showing actual notice of existing claims or liens of other persons to the property, or by showing a knowledge, on the part of the holder of the color of title, of legal defects which prevent the color of title from being an absolute one. Where there is no actual fraud, and no proof showing that the color of title was acquired in bad faith, which means in or by fraud, this court will hold it was acquired in good faith.

In *McConnel* v. *Street*, 17 Ill. 254, where the proper meaning of the words "good faith," as used in the Limitation act of 1839, was under consideration, it was said, "good faith, within the meaning of this statute, I understand to be the opposite of fraud and bad faith, and its non-existence, as in all other cases where fraud is imputed, must be established by proof." So, too, in *McCagg* v. *Heacock*, 34 Ill. 476, where the statute was under consideration, it was said, the good faith required by the statute in the creation or acquisition of color of title, is, freedom from a design to defraud the person having the better title. So far as is shown by this record, there is not a particle of proof that Walbridge, in making the purchase,

designed to defraud any person, or that he was actuated by fraud, which seems to be an essential element in the purchase if it is to be impeached as having been made in bad faith.

The evidence we do not regard sufficient to sustain the verdict of the jury, and for this reason the judgment will be reversed and the cause remanded for another trial.

Judgment reversed.

The Chicago and Alton Railroad Company

v.

Sarah Maher.

1. Assignment—*what may not be assigned so as to pass legal title.* A cause of action on a verbal contract, or for an injury to the person or property of another, is not, under our law, assignable so as to pass the right of action to the assignee.

2. A right of action for a trespass to land, or for a wrongful act resulting in injury to land, can not be transferred to another by an instrument in writing for that purpose, or by conveying the land. Such a right of action is not appurtenant to the land, and does not, like a covenant for title, inhere to or run with the land. It is a personal right, and is not transferable.

3. Where a railroad company placed a protection to a draw-bridge in a river, whereby the approach of vessels to a dock was obstructed, and the value of the lot upon which the dock was placed was permanently depreciated, and, afterwards, the owner of the lot and dock sold the same to his wife, and conveyed the legal title to her, it was *held*, that she could not maintain any action against the company for placing the obstruction in front of the dock.

4. Former recovery—*when a bar to suit for continuing injury.* Where an injury to real estate is permanent in its nature, and not of a temporary character, the owner may recover not only for the present, but also for future damages, as, for the depreciation in the value of the property caused by the erection of an obstruction or nuisance, and such a recovery will be a bar to any other suits for damages growing out of the continuance of the cause of the injury.

5. Action—*when for a continuance of an injury.* Where an injury is caused to real estate by a cause of a permanent character, after which the owner of the property so injured conveys the same to another, his grantee can not maintain an action for the continuance of the cause of the injury, although the former owner may not have brought any suit for the original injury.

Appeal from the Appellate Court of the First District; the Hon. Theodore D. Murphy, presiding Justice, and the Hon. Geo. W. Pleasants and Hon. J. M. Bailey, Justices.

This was an action of trespass, brought by the appellee against the appellant, for an injury to a certain lot on the South Branch of the Chicago river. The material facts are stated in the opinion of the court.

Mr. Geo. W. Smith, and Mr. R. A. Childs, for the appellant.

Mr. Jesse Cox, Jr., and Mr. Sidney Smith, for the appellee.

Mr. Justice Walker delivered the opinion of the Court:

Appellee sued to recover damages for injuries claimed to have been sustained to her land by a pier erected by appellant for a bridge of the company.

The property out of which this litigation arises originally belonged to the trustees of the Illinois and Michigan Canal. One Michael Scanlan purchased of them block 16, of their subdivision of the quarter section. He having died before the block was conveyed, the trustees deeded the property to his heirs, and they, on the 6th day of February, 1868, conveyed to Hugh Maher the portion which lies east of the South Branch of the Chicago river, fronting on the East Branch of the South Branch, except all of that part which lies north of the track of the Chicago, Alton and St. Louis Railroad Company. Maher, subsequently, on the 29th of June, 1872, sold the property to his wife, and, to vest the title in her, conveyed to James Roberts, and he deeded it to Mrs. Maher.

When Maher purchased of the Scanlans, he entered into possession and constructed a brick yard on the land, and dredged, deepened and widened the river in front of it, for dock purposes. He had completed the dock before he sold to his wife, and she has held possession, through tenants, since

her purchase. After Maher had completed his dock, the railroad company, in 1871, replaced a bridge over the river by a new one, with a swing, to admit of the passage of vessels through the structure. This swing was placed on a pier, in the center of the river. The length of the swing was 150 feet, and spanned the width of the river. The protection stands up and down the river, the length of the swing, and was made by driving piles, capping them with timber, and planking the sides. Before this last bridge was built, the swing of the old bridge, which this replaced, rested on a clump of piles driven in the river, so the ends of the draw would rest on them when it was opened to permit vessels to pass.

It is claimed that this structure is of great injury to this property for dock purposes, and that the amount of the verdict ($4000) is not excessive, but, on the contrary, does not compensate appellee for the loss. On the other side it is contended, that as this structure is permanent in its nature, and was placed there whilst Maher was the owner of the land in fee, the action accrued to him, and not to his wife, and that she can not sue and recover for the injury.

It is, however, contended, that the continuance of the structure is an injury to the property, since the wife became the purchaser, and for which she may recover. On the other hand it is urged, that, the injury being permanent and depreciating the price of the land, all damages for past and future injury to the property could have been sued for and recovered by Maher, and that such a recovery would have been a bar to all actions growing out of the trespass by the company in creating the obstruction to the dock of appellee,—in other words, the trespass was upon Maher's land, the damage, if any, was sustained by him, and he could not, nor did he, assign the cause of action to his wife by conveying her the property, or otherwise; and if she was entitled to the benefit of a recovery, the suit should have been brought in his name, for her use.

That Maher was the owner when this last structure was made is conceded, and all will admit that, being the owner in

fee, he could have maintained an action for the recovery of damages for such injury as he sustained. His right of action was complete. It was a chose in action, fully and undeniably vested in him. At common law it could not be assigned or sold, so as to vest the legal title to the claim, or a right to sue, in another person. Even promissory notes, until authorized, (by act of Parliament in England, or by act of the General Assembly in the States of the Union,) could not be assigned so as to transfer the right of action from the payee to another. It was against the policy of the common law to permit causes of action to be sold and transferred. Bills of exchange formed an exception to the rule, as their transfer was governed by the commercial law; nor have causes of action, other than promissory notes or instruments for the payment of money or articles of property, or for money payable in property, been made assignable under our statute. A cause of action on a verbal contract, or for an injury to the person or property of another, is not, under our law, assignable, so as to pass the right of action to the assignee. This is a familiar doctrine of our law, and requires the citation of no authorities for its support.

It is true, there are some exceptions to the rule. The conveyance of land transfers or assigns leases on the land, as a general rule; and when the tenant recognized the purchaser of the land as landlord, the assignment of the lease, with all its covenants, became complete. Again, when the owner conveyed the land with covenants for title, all previous covenants of warranty, for quiet enjoyment, etc., made by previous grantors, passed to the grantee, and, on a failure of title, he might sue on such covenants, and recover in his own name. But this exception grew out of the feudal tenures, and is peculiar to the law of real estate. We are not aware that any court has ever held that a mere trespass to land, giving a right of action, can be assigned by an instrument in writing for the purpose, or by conveying the land. Such a right of action is not appurtenant to the land, nor does it, like a covenant for

title, inhere to or run with the land. It, when accrued, is a personal right, and is not transferable.

It, then, follows, that appellee did not acquire the right of action which accrued to her husband by the construction of this protection to the bridge. The action for that wrong was vested in him, and she can recover nothing on account of the placing of the obstruction in front of the dock. 1 Chit. Pl. 77.

But the question is presented, whether she may recover for damages she has sustained by the continuance of the obstruction since she purchased.

The question then recurs, whether this was the character of injury for which a recovery would lie, in bar of all future actions growing out of the erection of this structure. That it is permanent in its character seems to be apparent. It is more than probable that it will continue perpetually, by being renewed as necessity may require. If so, then it could be determined, with a reasonable degree of certainty, how much it depreciated the value of the land as a permanent structure,—how much less it was worth after the erection of the structure than before.

The case of *Ottawa Gas Light and Coke Co.* v. *Graham*, 28 Ill. 73, was a case where a gas company, by the manufacture of gas, coke, etc., in the vicinity of the premises of appellee, polluted and injured the water of his well, and the suit was to recover damages therefor. In considering the means of measuring the damages, the court said: "Another means of arriving at the damages would be, to ascertain the depreciation of the value of the property by reason of the erection of the gas works,—to ascertain how much less the property would sell for in consequence of the erection than if it had not been made; and in ascertaining that fact, all the circumstances which might show a depreciation in value should be considered. If the property would sell for the same amount, independent of a rise in similar property, then there would be no

loss; but if it would not, then the difference would be the damages sustained."

Again, in the case of *Illinois Central Railroad Co.* v. *Grabill*, 50 Ill. 241, which was an action on the case to recover damages for a nuisance in erecting and maintaining cattle pens near the premises of appellee, it was held, that in estimating the damages resulting from the nuisance, it is proper to consider the depreciation in the value of the plaintiff's property occasioned by the erection and maintenance of the nuisance, and also the injury and annoyance to the plaintiff whilst occupying the premises; and if a recovery in such a case should be based upon the depreciation in value of plaintiff's property, such a recovery would be a bar to any further prosecution for the injury resulting from the erection and continuance of the nuisance. But if a recovery be had for the nuisance, merely, and for rendering the air unwholesome, then a similar recovery may be had at any succeeding term of the court whilst the nuisance may be continued.

In the case of *Chicago and Pacific Railroad Co.* v. *Stein*, 75 Ill. 41, it was held, that where the erection of a railroad bridge across a river in a city, causes a depreciation in the value of a lot in the immediate vicinity which is used for dock purposes, such injury is a proper element of damages in an action by the owner against the company, and it is proper to allow the plaintiff to show such damage by proving the value of the lot before the erection of the bridge, and what it is worth afterwards,—to show how much less the property would sell for in consequence of the erection of the bridge.

This last case, in its controlling facts, is similar to the case at bar. Here, as there, the protection to the bridge depreciated the value of the property for dock purposes. It was as permanent in its character in this case as in that, and this case can not be distinguished from that.

These authorities establish the doctrine that Maher might have sued for and recovered all the damages which were sustained by the property from the erection, whether at the time

or in the future; that he could have sued and recovered for the depreciation in the value of the property caused by the erection of this protection. This being true, the right of action was in him for a recovery of all damages that were or might be caused by the structure, and as the right has not nor can be transferred to the appellee, she has shown no right of recovery.

The court below erred in rendering judgment on the verdict, and it must be reversed.

Judgment reversed.

ISAAC FLEISCHMAN

v.

SAMUEL J. WALKER *et al.*

1. APPELLATE JURISDICTION *of the Supreme Court—Practice act of* 1877*—of its constitutionality as respects the subject of the act and its title.* The Practice act, as amended in 1877, has the following title: "An act to amend an act entitled 'an act in regard to practice in courts of record.'" It is held, that sections 67 and 88 of the act, in assuming to increase the jurisdiction of the Appellate courts and restrict the jurisdiction of this court, are not in violation of section 13 of article 4 of the constitution, which provides that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title."

2. SAME—*and herein, what is comprehended in the word "practice."* The mode and order of procedure in obtaining compensation for an injury by action or suit in the courts, from the inception of such suit until it ends in the final determination of the court of last resort, are all comprehended in the term "practice." The relative jurisdiction of the several courts, the modes by which, and the extent to which controversies may be transferred for trial or review from one tribunal to another, and, when several transfers are allowed, the order of sequence in such transfers, are all included in what is called the practice of the courts. So the sections of the statute mentioned appertain to the course of practice in the courts of record, and are germane to the subject expressed in the title.

3. SAME—*of the right as provided by the constitution.* The constitution, by section 2 of article 6, confers upon the Supreme Court original jurisdiction in certain cases, "and appellate jurisdiction in all other cases," but this does not give the option to a party as to whether he will go to the Appellate court in

any case. It may well be, under section 11 of the same article, that this appellate jurisdiction "in all other cases," shall be acquired through the intermediate appellate courts therein provided.

4. Moreover, construing these sections 2 and 11 together, as should be done, the constitution does not give the right of appeal to this court in all cases, either direct from the trial court or through the intermediate courts.

5. SAME—*in suits in chancery.* Since the first day of July, 1877, this court has no jurisdiction of an appeal from a decree in a chancery suit directly from the circuit court, when such appeal has been allowed and perfected after that date.

6. APPELLATE COURTS—*extent of their jurisdiction.* There is no constitutional restriction as to what jurisdiction the Appellate courts should have, except that such courts must be of uniform organization and jurisdiction, and that their determination shall not be final in certain cases.

7. JURISDICTION—*can not be conferred by consent.* The power to hear and determine a cause is jurisdiction, and consent of parties can not confer jurisdiction upon a court in which the law has not vested it. Consent can not give this court jurisdiction of an appeal in a chancery case directly from the circuit court.

APPEAL from the Circuit Court of Cook county.

This was a motion made by the appellees to dismiss the appeal.

Mr. A. M. PENCE, for the appellant.

Mr. JOHN L. THOMPSON, for the appellees.

Mr. JUSTICE BAKER delivered the opinion of the Court:

The motion in this case to dismiss the appeal raises the same question considered by the court in the opinion filed at this term in *Young* v. *Stearns, ante,* p. 221. We are urged to reconsider the decision announced in that case; and, impelled by a consideration of the importance of the question involved to the profession and to litigants, rather than by any perceived difficulty in its solution, we will, without repeating the argument upon which that decision is based, refer to the additional points suggested by appellant in his brief filed in opposition to this motion.

The point is made, that sections 67 and 88 of the Practice act, in so far as they assume to increase the jurisdiction of the Appellate courts and restrict the jurisdiction of this court, are in violation of section 13 of article 4 of the constitution, which provides, that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title."

The title of the act in question is, "An act to amend an act entitled 'an act in regard to practice in courts of record.'"

The several courts of record in this State are either recognized or created by, or are authorized to be created by the constitution. The jurisdiction of some of these courts is fixed by the constitution itself, while the jurisdiction of others is left, under certain restrictions, to be determined by the General Assembly. Of this latter class are the Appellate courts, and it depended altogether upon the legislative will whether such courts should be created or not, and what appellate jurisdiction they should have if created; and this legislative will was restricted only in these respects: that such courts should be of uniform organization and jurisdiction, and that their determinations should not be final in certain specified cases. The Appellate Court act created such appellate courts, provided for their organization, and gave them a certain and uniform jurisdiction.

By sections 67 and 88 of the Practice act this jurisdiction was increased, and we see no valid reason why this could not be so done. The mode and order of procedure in obtaining compensation for an injury by action or suit in the legally established courts, from the inception of such suit until it ends in the final determination of the court of last resort, is all comprehended in the term "practice." The relative jurisdictions of the several courts; the modes by which and the extent to which controversies may be transferred, for trial or for review, from one tribunal to another; and, where several transfers are allowed, the order of sequence in such transfers, are all included in what is called the practice of the courts. The word practice is so understood and treated by the text

writers, and it is defined by Bouvier to be "the form, manner and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law, and the rules laid down by the respective courts." Said sections legitimately appertain to the course of practice in the courts of record, and are germane to the subject expressed in the title. It was held in *Murphy* v. *Menard*, 11 Texas, 673, under a similar constitutional requirement, that an act "to regulate proceedings in the county court," properly embraced a provision giving an appeal to the District Court, and regulating the proceedings therein on the appeal. See, also, *Robinson* v. *Skipworth*, 23 Ind. 311.

The objection here made would apply with equal or greater force to the matter of the jurisdiction of circuit courts in appeals from justices of the peace. Section 12 of article 6 of the constitution provides, that circuit courts shall have such appellate jurisdiction as is or may be provided by law, and the several Circuit Court acts will be searched in vain for any provision giving them any jurisdiction in the matter of such appeals. The only authority for such appeals, the only jurisdiction in that regard (except in the cases of some special statutory proceedings) will be found in chapter 79, Revised Statutes, and the title to that act in no way purports to confer jurisdiction on the circuit court, unless it be held to be embraced and expressed in the word "practice" contained in such title. And yet, it will hardly be seriously questioned that circuit courts have such appellate jurisdiction.

Again, it is urged that appellees, having appeared and submitted the case and consented that it might be taken on call, have assented to the jurisdiction and can not now interpose a motion to dismiss for want of jurisdiction. The power to hear and determine a cause is jurisdiction; and consent of parties can not confer jurisdiction upon a court in which the law has not vested it. *Ginn* v. *Rogers*, 4 Gilm. 131; *Peak* v. *The People*, 71 Ill. 278. And, as we have seen in *Young* v. *Stearns*, *supra*, the law has not, in chancery suits, vested this court

with power to hear and determine appeals from or writs of error to the circuit courts.

It is also urged, that, by section 2 of article 6 of the constitution, the Supreme Court is vested with original jurisdiction in certain cases, "and appellate jurisdiction in all other cases," and that it is, therefore, a matter of option with the appellant whether he will go to the Appellate court in any case. But the constitution nowhere provides that this appellate jurisdiction "in all other cases" shall be direct from the circuit or other trial court; it may well be, under section 11 of the same article, through the intermediate appellate courts therein provided for. Moreover, these two sections, 2 and 11 of article 6, should be construed together, and when so construed it is plain that appellants in all cases do not have a constitutional right, either direct or through the intermediate courts, of appeal to this court. To hold that they do would be to attach no meaning whatever to much that is contained in said section 11. Potter's Dwarris' Stat. 144; 1 Kent's Com. 462.

It is a sufficient answer to the remaining point made by appellant to say, that the decree was rendered on the 6th day of July, 1877; that the order allowing the appeal was entered thereafter; that the attempted appeal was perfected after that date; that the order allowing the appeal is no part of the decree itself, and that at the date of such order and at the time such order was complied with there was no law in existence allowing such appeal. The Legislature has the right and power, except wherein such right and power may be circumscribed by the constitution, to prescribe the procedure of and practice in our courts, and change the same whenever, in its opinion, the promotion of justice so requires.

We adhere to our conclusions heretofore announced in *Young* v. *Stearns*, *supra*, and further examination has but confirmed us in our views therein set forth.

The motion in this case is sustained and the appeal is dismissed for want of jurisdiction.

Appeal dismissed.

HARVEY T. MEEKS

v.

ALONZO LEACH.

1. APPELLATE JURISDICTION *of Supreme Court—as respects the circuit courts.* This court has no jurisdiction to entertain a writ of error sued out since July 1, 1877, to reverse a judgment of the circuit court in an action of assumpsit, and such writ will be dismissed on the court's own motion. The writ should issue from the Appellate Court.

2. COSTS—*in Supreme Court.* Where a writ of error was dismissed by this court, on its own motion, for want of jurisdiction, each party was required to pay his own costs in this court.

WRIT OF ERROR to the Circuit Court of Will county.

Mr. C. B. GARNSEY, for the plaintiff in error.

Mr. G. D. A. PARKS, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This suit was originally commenced in the circuit court of Will county, in assumpsit, against plaintiff in error and other makers of the notes declared on. Service was had on the other defendants, and judgment rendered against them by default. Afterwards it was sought to make plaintiff in error a party to the judgment on *scire facias.* On the 10th day of February, 1877, which was one of the regular days of the January term of that court, the cause was submitted to the court for trial, without the intervention of a jury, on a plea of *nul tiel record,* and the court, on finding the issues for plaintiff, assessed his damages at $2513.86, and rendered judgment against plaintiff in error for that amount. It is recited in the record that plaintiff in error entered "his motion in arrest of judgment and for a new trial." On the 10th day of March, 1877, the cause appears to have been continued to the next term of court. At the following June term of court the cause was stricken from the docket by order of court. The

record contains no bill of exceptions, nor do we find anywhere in the record that the "motion in arrest of judgment and for a new trial" was ever disposed of by any action of the court.

On the 10th day of September, 1877, a transcript of the record in this case was filed in the office of the clerk of this court. No writ of error or *scire facias* was in fact ever issued, but defendant entered his appearance by joining in error. At that date the law creating Appellate Courts was in force, and the writ of error should have been sued out of the Appellate Court for the proper district. The case of *Fleischman* v. *Walker*, *ante*, p. 318, is conclusive on this question.

No motion has been made to dismiss the cause out of this court, but it is done by this court on its own motion for want of jurisdiction to hear the errors assigned.

The writ of error will be dismissed, each party to pay his own costs in this court.

Writ of error dismissed.

JAMES WEBSTER

v.

LAWRENCE H. GILMORE.

1. APPELLATE JURISDICTION—*in respect to contested election cases in county court.* The statute does not give the right of appeal from the county courts to the Appellate courts in contested election cases. In that class of cases an appeal lies from the county court directly to the Supreme Court.

2. ELECTIONS—*presumption of right to vote.* Where an election board permits a person to vote, that creates a *prima facie* presumption of his right to vote, which must be overcome by proof on a contest of the election.

3. SAME—*vote on separate piece of paper from ballot.* A vote for a candidate on a separate slip of paper folded within the numbered ballot deposited, not attached to the ballot in any way, is properly rejected, the statute requiring the names of all the candidates voted for to be upon the same ballot.

APPEAL from the County Court of Warren county; the Hon. ELIAS WILLETTS, Judge, presiding.

Messrs. PORTER & MOSHER, for the appellant.

Messrs. STEWART, PHELPS & GRIER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

An election was held in the town of Spring Grove, in Warren county, in this State, on the 3d of April, 1877, at which Gilmore and Gulaw were each voted for as candidates for the office of supervisor of the town. On counting the vote at the close of the election each candidate was found to have received 139 votes. Lots were thereupon drawn, and Gilmore drew the successful lot, and entered upon the duties of the office. Webster (appellant) chose to become a contestant, and filed a written statement in the county court of that county within 30 days after Gilmore was declared elected, and, after answer and replication, the cause was heard at the October term, 1877, and judgment rendered in favor of appellee. From that judgment Webster appeals to this court and asks a reversal.

By the election law, jurisdiction is conferred on the county court to hear and adjudicate in contested elections for county officers, and an appeal is given to this court in the same manner and upon like conditions as is provided by law for taking appeals in cases in chancery from the circuit courts. Section 8 of the act creating Appellate courts (Sess. Laws 1877, p. 70,) allows appeals from and writs of error to the circuit courts or the Superior Court of Cook county or from city courts. Section 88 of the Practice act of the same session (Sess. Laws, p. 153,) only refers to the same courts in connection with appeals to or writs of error from the Appellate courts.

But the act of the 21st of May, 1877, (Sess. Laws, p. 77,) provides that "appeals and writs of error may be taken and prosecuted from the final judgments and decrees of the county courts to the Supreme Court or Appellate Court, should such a court be established by law, in proceedings for the sale of lands for taxes and special assessments, and in all common law and attachment cases and cases of forcible detainer and

forcible entry and detainer." Under this act, appeals and writs of error lie to bring cases of the character named to this court, but since the establishment of Appellate courts they lie to those courts. But it is seen that a contested election case is not provided for unless it is a common law case. Such cases were not know to the common law in the mode prescribed by the statute. Other actions and modes were resorted to for the purpose. But our statute has conferred the power on the county court, and prescribed the practice and given an appeal to this court. The appeal in this class of cases is not taken away by this act of 1877.

It follows, that the appeal in this case did not lie to the Appellate Court. The appeal was therefore properly brought to this court, and the questions raised by the assignment of errors are before us for consideration.

It is charged, in the petition filed in the county court for the recanvass of the vote, on the contest, that there were five persons, who were not legally qualified electors, who voted for appellee. The answer alleges that there were a number of illegal votes cast for Gulaw, and denies that illegal votes were cast for appellee. After hearing the evidence, the county court held that Gilmore was duly elected.

Appellee's counsel admit that Dennison and Wilson had not been in the county or township the requisite time previous to the election to entitle them to vote, and their votes should be deducted from those cast for Gilmore.

As to King and Boggess, who voted for Gilmore, it is claimed they did not have a sufficient residence to qualify them to exercise the privilege. They were permitted to vote by the election board, and that creates a *prima facie* presumption of their right. A careful examination of the evidence fails to satisfy us that the *prima facie* presumption has been overcome, and their votes were properly counted by the county court for Gilmore.

We find no evidence in the abstract as to any want of qual-

ification of Burns and there is no pretense for excluding his vote.

The evidence, we think, shows that Murphy, who voted for Gulaw, had not resided in the town thirty days next preceding the election, and the county court did right in rejecting his vote.

It then remains to determine whether the small slip of paper with Gulaw's name on it for supervisor, found folded in another slip of paper, was properly rejected on the contest in the court below.

Section 53 of the Election law is this: "The names of all candidates for which the elector intends to vote shall be written or printed upon the same ballot, and the office to which he desires each to be elected shall be designated upon the ballot."

Now, if the person depositing these two pieces of paper designed to vote for all the candidates named on each, then that was not a compliance with these provisions of the statute. The General Assembly has the power reasonably to regulate the manner in which each elector may exercise the elective franchise, and when he fails to comply with the requirements of the statute, his vote must, when contested, be thrown out as improperly received. The law is thus written and we can only enforce it.

The vote for Gulaw is not on the numbered piece of paper, nor does anything appear on either paper to indicate they were one, or intended to be one ballot. Had the two pieces of paper been pasted, pinned, or otherwise fastened together, then we could no doubt say they were one ballot, but they were not. Had the vote been *viva voce* for Gulaw, when the voter put in the numbered piece of paper, it would have been void as not conforming to the statute requiring it to be by ballot. If the voter had the legal right to place a slip of paper on which Gulaw's name was written, in a numbered piece of paper, he had the same right to deposit it separately, and if he had the right, all other voters at the election had the same right, and had they all exercised that privilege it would have

been, to say the very least, anomalous. To so hold would lead to confusion, delay, and, it may be, to frauds on the elective franchise.

But, as we have seen, it is prohibited by the statute, and being so prohibited the vote should be rejected, and if rejected, it would leave each candidate with 137 votes, and a tie as before, and as it was a tie, the casting of lots decided it in favor of Gilmore, and the county court decided correctly.

The judgment of that court is affirmed.

Judgment affirmed.

CHARLES COMSTOCK *et al.*

v.

DAVID A. GAGE, for use, etc.

1. DELIVERY OF BOND — *possession by the obligee, and acquiescence therein.* The possession of a bond by the obligee is *prima facie* evidence of its delivery, and the acquiescence on the part of the obligors in its retention by the obligee, without taking any steps to procure its return, affords strong evidence of an unconditional delivery, or, if there was a condition to the delivery, as, that another person was to sign the bond, that it was waived, or that the condition was only for the interest of the obligee and to satisfy him, and not one which was considered as of importance to the obligors, to be performed before they were willing the bond should be delivered and have effect.

2. SURETYSHIP—*condition that another was to sign as co-surety—of evidence in respect thereto.* In a suit upon a bond executed by several, some of whom were sureties only, the latter offered to show on the trial, that, at the time they signed the bond, they did so upon the condition explained to one of the co-obligors, who had the custody of the bond at the time, that it should not be delivered to the obligee until it was signed by another, but whose name did not appear upon the bond. There was no offer to show that this understanding between the defendants was made known to the obligee. The court refused to admit the evidence, and it was held there was no error in doing so.

3. It is no defence for a surety in a bond that he signed it on condition that it should also be executed by another person as a co-surety before its delivery, and that in violation of such condition the bond was delivered to the obligee without having been executed by such other person, it not appearing that the obligee had notice of the condition.

Syllabus.

4. SAME—*failure to communicate facts—effect upon liability of surety.* In order that a failure to communicate a fact to a surety, in respect to the subject matter of the proposed contract, should have the effect of a fraud upon him, and vitiate the contract, it must be a fact which necessarily must have the effect of increasing the responsibility of the surety, or operating to the prejudice of his interest.

5. SAME—*in respect to deposits in bank by a city treasurer—such deposits being pledged as collateral security for the treasurer's private indebtedness.* A bond given to a city treasurer recited that the obligee, as such treasurer, had deposited money in a certain bank, and was about or might deposit other sums of money, such moneys being the property of the city, and was conditioned that the bank should promptly, upon demand or presentation, pay the checks or drafts drawn by the obligee, as such treasurer. In a suit upon the bond the sureties alleged, that, by an arrangement between the bank and the depositor, the moneys deposited were to remain as security for the depositor's private indebtedness to the bank, so that his power to withdraw the money depended upon his ability to pay that indebtedness, and the fact of such arrangement not having been communicated to the sureties, they were not bound. But it was *held*, as the depositor had no right to pledge the public money as a security for his private indebtedness, and the bank ought to have known that, such an arrangement would have been no obstacle to his drawing the money; and the omission to inform the sureties of the existence of such an arrangement did not operate to relieve them from their obligation.

6. SAME—*as to deposits drawing interest—and herein, of the scope of the bond.* The fact that the deposits mentioned were, by an agreement between the bank and the depositor, to draw interest, and the sureties were not informed of such agreement, would not affect the liability of the sureties. Such deposits frequently are by agreement made to bear interest. The terms of the bond were broad enough to include deposits of that class, and if the interest feature were an objection with the sureties it was their business to have found out how it was in this respect when they executed the bond.

7. SAME—*illegality of contract, as affecting liability of sureties.* Where a bank has received money belonging to a city on deposit, through the city treasurer, even though the deposit was obtained through an illegal scheme, and wrongfully on the part of the bank, still it would not be illegal for the bank to pay back the money to the city, and there would arise an implied promise to do so. An express engagement, then, by a third person that the bank should perform such implied promise, would be binding.

8. CONTRACT—*embezzlement by city treasurer—"loan" of public money by deposit in bank.* The crime of embezzlement, as defined in the charter of the city of Chicago, is the conversion by the treasurer of the city to his own use in any way whatever, or the use by way of investment or loan, with or without interest, (unless differently directed by the common council) of any portion of the

city money entrusted to him. It is *held*, the word "loan," as employed in the statute, or the use of money by way of loan, would not embrace the case of a deposit of money of the city in a bank for safe keeping. So, in a suit upon a bond given by a bank for the return to the city treasurer of money deposited by the treasurer, on the allegation the bond was void as given to secure a contract forbidden by the statute, it was *held* the matter of making the deposit did not constitute the offence of embezzlement.

9. SAME—*deposit of public money without authority.* And even if the city treasurer should deposit the money of the city in a bank without proper authority from the city council, the council having the control of that subject, still the absence of such authority would not relieve the bank of its duty to return the money when called for, or constitute a defence to a bond executed to secure its return.

10. SAME—*fraudulent collusion, or neglect of duty of officer, as affecting validity of contract to pay back public money.* And any irregularity or failure in the discharge of his duty by a public officer in respect of a deposit of public funds in a bank, or any fraudulent or illegal collusion with the bank, could not render illegal and incapable of being enforced a bond given by the bank to secure the safe return of the money to the public treasury.

11. CONSIDERATION—*for bond to repay deposits.* The deposit of money with a bank, is an ample consideration for a bond given by the bank, with sureties, to return the money so deposited when called for.

12. TENDER—*in city orders.* In a suit by a city treasurer upon a bond given by a bank to secure the return to the city treasury of moneys deposited, evidence of an offer by the bank to deliver orders of the city on its treasurer, and money equal to the remaining deposit, is properly excluded, such orders not being a legal tender.

13. BANKRUPTCY—*discharge of surety.* A claim against a surety who is declared a bankrupt may be proved against his estate, at any time after his liability becomes fixed, and before the final dividend is declared; and his discharge will release him from any liability that might have been proved against his estate in bankruptcy.

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

This was an action brought in the name of David A. Gage, for the use of the city of Chicago, upon a bond to said Gage in the penal sum of $500,000, signed by Ira Holmes, Charles Comstock, James Kelley, J. A. Holmes, W. A. Butters, and William M. Tilden, who were all directors, and Ira Holmes

also president, of the Manufacturers' National Bank of Chicago, and by one other person—Samuel J. Walker.

The date of the bond was January 9, 1872, and its condition as follows:

"The condition of this obligation is such, that whereas, the said David A. Gage, as treasurer of the city of Chicago, has, at the request of the above named obligors, or some of them, deposited with the Manufacturers' National Bank of Chicago certain moneys, the property of the city of Chicago, and is about or may deposit other sums of money, from time to time, as such treasurer, with said Manufacturers' National Bank of Chicago:

"Now, therefore, if the said Manufacturers' National Bank of Chicago shall promptly, upon demand or presentation, pay all checks or drafts which may be made by the said David A. Gage, as such treasurer, or by any of his authorized clerks or agents, and shall, at all times, render to said David A. Gage full, just and true statements of his account with said Manufacturers' National Bank of Chicago, whenever required to do so by said Gage, then this obligation is to be void, otherwise to remain in full force and virtue."

Gage was treasurer of the city of Chicago from December, 1869, to December, 1873,—two terms. He opened an account with the bank some time during the year 1871, upon the agreement that the bank should pay him four and one-half per cent interest upon his deposits. It did pay him at that rate up to September, 1873, when it closed business. At the time of the giving of the bond, Gage had $40,000 in the bank to his credit, as treasurer. The bank held about the same amount of his individual guarantees on paper, for which he afterwards gave his own notes. In December, 1872, Gage took up his own notes, giving in their place other securities, known as the Reed & Sherwin paper, amounting, substantially, to $40,000, —the first piece of the paper maturing in sixty or ninety days, and every six months thereafter until all was paid, $5000 matured.

Holmes testified, that at the time the bond was given there was an arrangement that Gage would leave the $40,000 on hand as long as the bank would carry the paper for Gage, and, also, that when the Reed & Sherwin paper was taken by the bank, Gage agreed that the deposit should remain and be an off-set, so that the bank should be no money out.

Gage testified, that he told Holmes that the city would probably be having money, and that if Holmes would give him a bond (which he did about that time or after that time), Gage would keep an account with him, and very likely the average account would be $40,000,—perhaps sometimes more and sometimes less; and when the Reed & Sherwin notes were discounted, he told Holmes he had no doubt there would be an average account there of $40,000. There might be more and there might be less. That this was substantially all the arrangement upon the subject of keeping the permanent deposits there. No further deposit than the $40,000, at the date of the bond, appears to have been made, and that sum remained on deposit, intact, until June 30, 1873, when $25,000 was drawn out by Gage, by check. At that time Gage was indebted to the bank as guarantor upon the Reed & Sherwin paper, which was taken by the bank in December, 1872. The Reed & Sherwin notes have all since been paid. The other $15,000 of the deposit was never paid. A proper check for that amount was presented to the bank about January 1, 1874, and the president of the bank declined to pay the money, saying that the bank had suspended, and the check would not be paid.

Section 31, chap. 5, of the charter of the city of Chicago, and the amendment thereto, in force at the date of this bond, provided, in substance, that the city treasurer should keep safely the city money, without loaning or using the same (unless differently directed by ordinance or resolution of the common council), and if he should convert to his own use, in any way whatever, or should use, by way of investment or loan, with or without interest (unless differently directed by

ordinance or resolution of the common council), any portion of the city money intrusted to him, every such act should be an embezzlement of the money so taken, converted, invested, used or loaned, and a felony; and all persons advising or participating, or being a party, are punishable by six months' imprisonment in the penitentiary, and a fine equal to the amount of the money embezzled. Sec. 17 of the same act, as amended, provided, that the treasurer might be required to keep any and all money in his hands, belonging to the city, in such bank or banks, or other place or places of general deposit, or in such place or places of deposit, in the manner and upon the conditions, and upon such rate of interest, or otherwise, as the common council might, from time to time, direct. This section further requires him to keep the money separate from his own, and not to use the same, directly or indirectly. Sec. 19 provides, that in case any money belonging to the city shall be directed, by the common council, to be deposited in any bank, it shall be its duty, before the deposit, to cause such bond or other security to be given to the city as the common council may approve. (Act Feb. 13, 1863, and amendments of March 29, 1869.)

The jury found a verdict for $18,000 against the signers of the bond, except two, Ira Holmes and Butters, discharged in bankruptcy. A motion by the defendants for a new trial was overruled, and a judgment entered upon the verdict. Three of the defendants, Comstock, Kelley and Tilden, take this appeal.

Messrs. HURD & NICHOLSON, Messrs. MCCAGG, CULVER & BUTLER, and Mr. GEO. F. COMSTOCK, for the appellants.

Messrs. MATTOCKS & MASON, and Messrs. MILLER & FROST, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The first point made by the appellants is, that there was no delivery of the bond. The only two material witnesses upon

the trial were the defendant Ira Holmes, the president of the bank as well as a director, and Gage. William H. Adams was one of the directors of the bank, and the bond is signed by all the directors except Adams.

The testimony of Holmes is, that Gage required a bond to secure his deposit with the bank, and he, Holmes, said that he would give the names of all the directors of the bank and Samuel J. Walker, and Gage said that would be entirely satisfactory, and witness then got the signatures to the bond, and Gage got it from him under these circumstances:—that Gage came to him and asked for the bond, and witness stated to him that the bond was not complete and not ready for delivery to him,—that it lacked the signature of Adams; that Gage said he wanted to submit it to the finance committee, which was to meet that day; that witness gave him the bond to show to the finance committee, and he was to hand it back to witness, and Adams was to sign it, and it was to be delivered afterwards; that Gage did not bring it back, and witness never saw the bond afterwards until the trial, and never afterward had any conversation with Gage in regard to it.

Gage testifies that the proposal of Holmes was to give him a bond with all the directors upon it,—he does not recollect that Walker was to be upon it; that at the time he got the bond he thinks Holmes told him Adams' name was not on the bond, and witness told him the bond was satisfactory to him and does not remember of having said anything more about it at that or any other time, and then he took the bond; that Walker was supposed to be worth $1,000,000 at that time. This is the testimony which is relied upon as proof of the non-delivery of the bond. The possession of the bond by the appellee was *prima facie* evidence of its delivery. The acquiescence in the retention of the bond by Gage without afterward speaking to him upon the subject, is quite strong evidence, either that there was an unconditional delivery to Gage, or that if there was such a condition attached to the taking of the bond by Gage as testified to by Holmes, it was waived,

or that it was one only for the interest of the obligee and to satisfy him, and not one which was considered as of importance to the signers of the bond to be performed before they were willing the bond should be delivered and have effect as their bond.

The question of the delivery was one of fact for the jury, and there is no sufficient reason for disturbing their finding under the evidence.

It is next urged, that the court below erred in refusing to allow the appellants to show the condition on which they signed the bond. They offered to show on the trial that at the time they signed the bond, they did so upon the condition explained to Holmes, who had the custody of the bond at the time, that it should not be delivered until it was signed by Adams.

The court refused to admit the evidence, and exception was taken. There was no offer to show that this understanding between the defendants was made known to Gage. This precise question was decided by this court in the case of *Smith* v. *Peoria County*, 59 Ill. 412, where it was held to be no defence for a surety in a bond, that he signed it on condition that it should also be executed by another person as a co-surety, before it should be delivered, and that in violation of such condition the bond was delivered to the obligee without having been executed by such other person, it not appearing that the obligee had notice of the condition. We are entirely satisfied with the correctness of that decision as founded on principles of sound policy and justice, and sustained by authority, and it must control and be held as decisive upon the present question. The court did not err in excluding the evidence. In support of the decision in *Smith* v. *Peoria County*, in addition to the authorities there cited, see *Dair* v. *United States*, 16 Wall. 1, *Butler* v. *United States*, 21 id. 272, *Russell* v. *Freer et al.* 56 N. Y. 67, and see *Stoner* v. *Millikin*, 85 Ill. 218.

Another and the most important ground of error insisted upon, arises out of the arrangement made between Gage and

the bank, as testified to by the witnesses Holmes and Gage, in respect to the deposit, and Gage's individual indebtedness. This is presented in a twofold aspect, as being a fraud upon the sureties, the makers of the bond, and as an illegal transaction. The question is raised upon instructions, and so is one of law, and not of fact upon the evidence.

In the bearing upon the sureties, the objection is, that material facts were concealed from them at the time of the execution of the bond; that the bond itself implies a different transaction from the real one; that this invalidates the contract of suretyship.

It is said the transaction here presented to the mind of the surety by the bond was the well known and customary one of depositing money in a bank where the customer is at liberty to draw out his money at such times and in such sums as he pleases, where neither party is under any special obligation to the other; while in fact, an entirely different state of things existed. That the sum nominally on deposit was really pledged to the bank to secure a debt of the depositor in a like amount, and his power to withdraw it depended upon his ability to pay that indebtedness. We do not see that this alleged arrangement that the deposit should remain as security for Gage's private indebtedness stood in the way of drawing out the money at pleasure. The money was the city's money, so known to the bank, and deposited as such. Gage had no right to pledge or in any way appropriate it for the security or payment of his individual indebtedness to the bank, which the latter must have, or ought to have known; and notwithstanding such alleged arrangement, Gage might have drawn his checks at any time upon the deposit, and if refused payment, the bank could at once have been made to refund to the city.

In order that failure to communicate a fact to a surety should have the effect of a fraud upon him and vitiate the contract, it must, we conceive, be a fact which necessarily must have the effect of increasing the responsibility of the surety,

or operating to the prejudice of his interest. The only way in which we can see how the arrangement alleged to have been had could have worked to the disadvantage of the sureties is, that it might have, as it probably did have the effect, to keep a continuous deposit on hand to the amount of the Gage indebtedness. But this was not the necessary effect.

The bond recognizes an existing deposit, and that there might be further deposits from time to time, and intimates no idea of any restriction in respect of amount. That deposit was $40,000 and so remained until the drawing out of the $25,000 June 30, 1873.

The testimony is that the amount of the city moneys on deposit in the different banks was large, $1,600,000, and that at the time the $25,000 was drawn, there were $400,000 or $500,000 so on deposit. This shows the extent of the responsibility which the sureties must reasonably have contemplated, and that a constant deposit of as high an amount as $40,000 could not have been unexpected; so that the non-disclosure of an arrangement that that amount was to remain in constant deposit, may be regarded as of but little import to the signers of the bond. It is said the deposit drew four and a half per cent interest, that this was not on the usual terms of making deposits in banks, and that it was only such deposits, on the usual terms, that the bond contemplated. Such deposits frequently are by agreement made to bear interest The terms of the bond are broad enough to include deposits of the latter class, and if the interest feature be an objection with the defendants it was their business to have found out how it was in this respect when they executed the bond. As one of the makers of the bond, Walker, was not a director of the bank, we have not relied upon the view presented on the other side, that this arrangement having been made with Holmes himself the president and one of the bank directors, and all the other makers except Walker being directors, the defendants had, or must be held to have had, full cognizance of the transaction. But this may not improperly perhaps be adverted to as a cir-

cumstance in repelling the charge of fraud upon the sureties. We do not think the appellants have any just ground of complaint of the non-communication to them of material facts in the respect alleged, at the time of the execution of the bond, as being a fraud upon them, and reason for not being held bound.

As respects the illegality insisted on, it is contended that the bond was to secure a contract forbidden by statute, and is therefore void. It is claimed that the transaction between Gage and the bank was the crime of embezzlement as defined by section 31, chap. 5 of the charter of the city of Chicago. The crime of embezzlement as there defined is, the conversion by the treasurer to his own use in any way whatever, or the use by way of investment or loan, with or without interest (unless differently directed by ordinance or resolution of the common council) of any portion of the city money entrusted to him. There was no conversion of the money by the treasurer to his own use, nor investment of it; but it is said there was a loan of it, and various authorities are cited to show that a general deposit of money in a bank is in effect a loan,—as, 2 Chit. Cont. 278; Morse on Banks and Banking, 25–6; *Marine Bank of Chicago* v. *Rushmore*, 28 Ill. 463, etc.

Admitting that a general deposit of money with a bank is, in a strict technical and legal sense, a loan, it does not follow that that is the sense and meaning of the word loan as used in this statute. Such a deposit of money is not in the ordinary and popular sense a loan of the money, and we are satisfied that the words "loaning" and "loan," employed in this statute, were used in their popular sense, and not in the strict legal meaning to include a bank deposit. It is not simply the loan of the money, but the "use by way of loan," which is prohibited and made a penitentiary offence, and it can not be supposed that the use of the money by way of loan was considered as embracing the case of a deposit of the money in a bank for safe keeping. As said in *Maillard* v. *Lawrence*, 16 How. 256, the popular or received import of words furnishes the general rule for the interpretation of public laws as well as

of private and social transactions. The crime of embezzlement denounced by the statute we do not regard as having been committed here.

The act recognizes the propriety of such a mode of keeping and taking care of the public funds, by deposit in bank under direction of the common council, as to the manner, conditions and rate of interest. It is insisted, that in the absence of such direction from the city, the deposit would be illegal, and that the bond providing for its return is also illegal. It is some evidence that Gage was not acting without authority of the common council in the premises, that he got the bond from Holmes for the purpose of submitting it to the finance committee of the common council. But if Gage did act without such authority, his doing so would seem to be a matter between him and the council, and that the absence of the authority should not relieve the bank of its duty to return the money when called for, or constitute a defence to the bond in suit.

The treasurer is further required by the statute to keep the city money separate from his own and not to use the same directly or indirectly, and it is said there was here a use of the money by the treasurer, by carrying his own paper in the bank with the deposit. The having of a deposit of that amount may have been an object of interest with the bank and have influenced the accommodation extended to Gage. But any agreement that this money of the city should remain and be held as security for the payment of Gage's indebtedness would have been of no validity, and the agreement made, whatever it was, does not appear to have stood in the way of any call for the money, further than that it was suffered to remain until June 30, 1873, when $25,000 of the deposit was paid upon the check of Gage, notwithstanding the agreement, and that Gage then stood liable as guarantor upon the Reed & Sherwin paper.

True, Holmes says that he did not feel any obligation to

pay it, but he thought it good policy to pay it, and paid it to save the credit of the bank.

This conclusion might well have been come to in view of such an agreement having no legal validity.

All the arrangement that there was seems to have been to let that amount of money remain on deposit if the bank would accommodate Gage. There was nothing in that, that interfered with the safe keeping of the money.

The interest appears to have been paid to Gage monthly until the bank suspended, which he may have misappropriated to his own use, but this so far as appears was without the knowledge of the bank.

There may have been irregular and censurable conduct of Gage in mixing up public with private business, but we can not think it should have the effect of vitiating this bond. Its condition requires nothing illegal, but guarantees that the bank shall simply perform its duty, which, in law, it was, in any event, bound to perform, viz, to pay over the city money thus being in deposit, to the city treasurer when demanded. It was not part of any scheme to violate the law, or to misappropriate the public moneys, but a guaranty that the money should be paid over to the party to whom it rightfully belonged. If an illegal scheme had, in fact, been entered into, and the bank had obtained this money of the city wrongfully, it would not be contrary to law for the bank to pay back the money to the city through its legal representative, the city treasurer, nor for others to engage that it should do so. This was just what the bank ought to do. There would arise an implied promise on its part to do it; and why might not an express engagement by another person, that the bank should perform this, its implied promise, be valid? Authorities are not wanting to the point, that money which has been paid on a contract prohibited by statute, may be recovered back. As in *White* v. *Franklin Bank*, 22 Pick. 181, it was held that where, upon the deposit of money in a bank, upon an agreement that it should remain for a certain time, the agreement was illegal

and void under the statute of the State, as being a contract by the bank for the payment of money at a future day certain, and that no action could be maintained by the depositor against the bank upon such express contract, but that he might recover back the money in an action founded on an implied promise. And in *Curtis* v. *Leavitt*, 15 N. Y. 291, where negotiable bank certificates of deposit for a loan payable on time, in violation of the statute in that respect, were given, it was held that the lenders were entitled to recover the money lent, and in reference to the question the court say: "There can be no difficulty in a case like the present, for another reason; the bank had a right to receive money on deposit —that is, to borrow money payable on demand; and its contracts to borrow the money in question on time being void, the law may properly regard the money as deposited, and the bank as liable to repay it whenever called for. An *express contract* by parol to that effect would no doubt be valid."

Here, there is but such an express contract for repayment. And see *Bradley* v. *Ballard*, 55 Ill. 413.

The principle "*ex turpi contractu actio non oritur*" does not seem to us to have any just application to this case. The city was not the offending, but the wronged party, if wrong there was, and there is no reason why it should be mulcted by the destroying of its security, and the loss of its money. Whatever provision of the statute or principle of public policy is supposed to have been violated, was for the protection of the city, and the bond is in furtherance of the same purpose, the city's protection.

The bond, though to Gage, was to him "as treasurer," and was really for the benefit of the city, and the suit is being prosecuted for the use of the city. Though the enforcement of payment of the bond may inure to the benefit of Gage by the discharge of a claim to the city which he is under liability to pay, still, the object of the bond is for the city's own benefit and protection. We can not think that there is any rule of law or principle of public policy which requires that it

should be held that Gage, by any irregularity or failure in the discharge of his duty, or by any fraudulent or illegal collusion with the bank, has rendered these public funds incapable of being collected from the bank, or has rendered illegal and incapable of being enforced the very security taken for the protection of those funds, and to secure the safe return of the money to the city through its treasurer, and which it was the right and duty of the city council to exact.

As to the suggestion that there was no consideration for the bond, if it be admissible, as claimed, to deny the consideration under our statute, the deposit of the money and allowing it to remain as it did, was ample consideration.

The exclusion of the proffered evidence of the offer to Gage of the orders of the city of Chicago on its treasurer and money to the amount of the deposit, was manifestly proper. The orders were not legal tender and the city was not obliged to accept them.

It is objected that the verdict and judgment should have been as well against the defendant Butters, as against the appellants, inasmuch as his discharge in bankruptcy purports to discharge him from debts existing October 23, 1873, the time he was adjudicated a bankrupt, and that there was no breach of the bond until after that time. At the time of the trial, May 3, 1877, the estate of the bankrupt was still open, the assignee not discharged, and no dividend declared.

The Bankruptcy act provides, that when the bankrupt is bound as surety upon any bond, but his liability does not become fixed until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, before the final dividend is declared; and that a discharge in bankruptcy, duly granted, releases from all liabilities which were or might have been proved against his estate in bankruptcy. U. S. Rev. Stat. §§ 5069, 5119. The liability on this bond became fixed January 1, 1874, no final dividend in his estate had been declared May 3, 1877, the time of the trial, and the liability might have been proved in bankruptcy at any

time between the last two dates. His discharge released him from any liability which might have been proved against his estate in bankruptcy, and, therefore, from any liability on his bond.

The judgment must be affirmed.

Judgment affirmed.

Mr. JUSTICE DICKEY, having been of counsel for the city, took no part in the decision of this case.

Mr. JUSTICE MULKEY, dissenting:

Upon the consideration of this case for a rehearing, a majority of the court adhere to the views expressed in the foregoing opinion. Having participated in its consideration upon the rehearing, I feel impelled, from a sense of duty, to present my views upon one of the questions therein discussed.

Without expressing any opinion as to the correctness of the general conclusion in this case, I am unable to concur in one of the positions assumed by the court in reaching that conclusion; and believing, as I do, it is in direct conflict with law and correct practice in the trial of causes, as laid down by the best elementary writers, and the decisions of this and other courts of high standing; and believing, if the position in question is once firmly established, it will greatly confuse and obstruct the administration of the law, and often result in wrong and a complete denial of justice, I deem it a duty to dissent from that position and state my reasons for doing so.

Appellants offered to show, on the trial in the court below, that they executed and delivered the bond sued on to Holmes upon the express condition and understanding that it was not to be delivered to Gage till signed by all the directors of the bank, and that, in violation of this condition and understanding, the bond had been delivered to Gage, without the signature of William H. Adams, who was at the time one of the directors of the bank.

The court below refused to allow appellants to make proof

of these facts, and the exclusion of this testimony is one of the errors relied on for a reversal. The action of the court below, in excluding this testimony, is sustained by a majority of this court, upon two grounds:

First, That the facts proposed to be shown would not, of themselves, constitute a defence. Second, That there was no offer to show or prove that Gage had notice of these facts.

That the facts proposed to be shown would not, of themselves, constitute a defence, is unquestionably true. But is that a sufficient reason for excluding the testimony? I had always supposed that it was sufficient, if evidence *tended* to prove the issue, or, in other words, tended to prove the plaintiff's claim or charge or establish the defendant's defence. If a bond be executed and delivered by the maker to an agent with instructions not to deliver it to the obligee until some other specified person shall sign it, and the obligee has notice of the maker's instructions, he will have no right to receive the bond until they have been complied with; and if he does so, he can not maintain an action upon it unless the maker shall subsequently, in some manner, ratify the act of his agent, or otherwise so conduct himself as to estop him from setting up the defence. That this proposition is true, I presume no one will question.

It therefore follows, that if, under the circumstances supposed, the maker is sued on the bond, he makes out a *prima facie* defence by showing, first, the maker's instructions to his agent; second, the delivery of the bond in violation of the instructions; third, that at the time of the delivery the obligee had notice of the maker's instructions. Now, these three facts, let the order of proof be what it may, constitute a *prima facie* defence to the action, but the natural and logical mode of presenting them to the court and jury would be to prove them in the order of their occurrence as I have just stated them, and there is no question in my mind but that the court in the exercise of its discretion would have the right to require them to be proved in the order mentioned.

The case under consideration, like the one supposed, was a suit upon a bond. The makers, on the trial in the court below, offered to prove the first fact in this line of defence, namely, that the bond was signed upon the condition that it was not to be delivered until all the directors of the bank had signed it. This fact was the first in the series which constituted the defence, and was offered in the natural and logical order above stated. The court, without assigning any reason therefor, excluded the evidence. Was the fact proposed to be shown of a purely collateral character, so that the trial court could not see its bearing upon the case before it? If so, it was properly excluded from the jury—otherwise it was not. Can any lawyer, however humble and inexperienced, have a doubt as to the purpose of this testimony? I think not. It must be conceded that the object in offering it was apparent. Hence there was no necessity of informing the court. I do not at all question the rule that where a fact purely collateral is offered in evidence, if objected to, it is the duty of the party offering it to point out its materiality, and if he does not do so, it is the duty of the court to exclude it. I also admit the rule to its fullest extent, that where a party is called upon by the court to state the purpose for which a certain fact is offered whose relevancy is not obvious, it is his duty to do so, and if he refuses, the court has a perfect right to reject it.

So, also, while courts do not ordinarily interfere with the order in which testimony is produced, when its pertinency is apparent, yet I concede they have the right, where the evidence relied on, in support or defence of an action, consists of a number of dependent facts or links in the chain of testimony, to require them to be produced in their natural and logical order, or, in other words, in the order of their occurrence, and if this requirement is not complied with, the court may reject the testimony. This, however, is conceding more than the decisions of this court or the authorities generally warrant.

But where the evidence, consisting of a number of dependent facts, or links constituting a chain of testimony, is offered

in its natural and logical order, and its relevancy is apparent, I deny the right of the court to exclude it merely because the first fact offered is not accompanied with a statement that the subsequent facts or links in the chain will also be put in evidence.

And this brings me to the second reason assigned by the court for holding there was no error in excluding the testimony offered by appellants as above stated. As already appears, appellants proposed proving that the bond sued on had been delivered to Holmes upon the express condition that it was not to be surrendered to Gage till all the directors of the bank had signed it. To prove this fact, was the first step towards making out a complete defence. That it tended to prove the issue, was manifest.

To make the defence complete, two other facts had to be proved, two other steps taken, but only one could be proved or taken at a time. Why not allow the first step to be taken,—the first fact to be established in its order? A majority of the court say, because appellants did not, at the same time, offer to prove the other two facts, namely the delivery of the bond to Gage, without performance of the condition, and that he (Gage), at the time, had notice of the condition upon which the bond was to be delivered. But why should this offer have been made as a condition precedent to proving the first fact? Surely not to enable the court to see the drift or relevancy of the testimony actually offered, for a mere novice in the law could see that. And if it was not necessary for that purpose, I am unable to see any good reason for requiring such an offer.

Had the court supposed that counsel was not acting in good faith, and that there was no purpose of following up the fact offered to be proved with proof of the other facts, depending upon that one and necessary to make the one offered available, it was but just to counsel to have asked him if he was prepared to prove the dependent facts, and if counsel had admitted that he was not, or that he had no purpose of doing

so, then it would have been proper to have rejected the testimony.

There are some adjudicated cases decided by this court which may be supposed to sustain the view expressed by the majority of the court, but I am satisfied that a careful examination of them will demonstrate that they do not. On the contrary, it will clearly show that the view in question can not be maintained.

Lombard v. *Cheever et al.* 3 Gilm. 469, was an action of replevin for certain boats which the plaintiff claimed had been forfeited to him as the owner of a ferry. On the trial, the court below excluded from the jury the license of the plaintiff to keep a ferry, and this court, in reviewing the action of the court below, in excluding the license, said: "The object of the plaintiff, in offering this evidence, as explained by the bill of exceptions, was a legitimate one. He claimed to be proprietor of a ferry, and that the boats replevied by him, having been run by the defendant in derogation of his rights, were forfeited to him. It consequently became material for him to prove his title to the franchise claimed. Such proof was not made by the mere production of the license. It should have been preceded or at least accompanied by proof of the order of the county commissioners' court granting it. * * * Then, though the license is a necessary link in the chain of title to the ferry franchise, and that offered by plaintiff, being regular on its face, was for such purpose legally admissible, it does not follow that it was erroneously rejected. The true rule on the subject is, that although the court will not indicate to parties the order of the introduction of their testimony, yet, when evidence is offered of any fact which, in the order of its occurrence, must have been preceded by some other fact, without proof of which the evidence offered is wholly insufficient for the purpose for which it is introduced, it should be received only on the assurance of the party offering it that such other proof will also be made. If it should not be, the court, on motion of the opposite party, will exclude such testimony, or

instruct the jury that it is insufficient to entitle the plaintiff to a verdict."

The case just cited is not, in principle, like the one now under consideration, and does not at all sustain it, but, on the contrary, the rule therein laid down is in direct conflict with it. The fact which appellants proposed to prove in this case, and which was excluded by the court, was not one which, in the order of its occurrence, must have been preceded by some other fact upon which it was dependent, but, on the contrary, it was the first in the order of occurrence, and its probative force did not at all depend upon any fact preceding it. The truth is, appellants were proceeding in strict conformity with the rule laid down in that case. Under the rule in that case, so long as a party offers the facts in the order in which they occurred, he is not bound to make any statement to the court with reference to what he expects to prove. It is only when he passes by a fact in regular sequence, and proposes to show some other fact in the chain of testimony whose probative force depends upon the fact thus passed by, that he is bound under the rule to make a statement to the court as to what he expects to prove.

It is quite apparent, as already stated, that the rule now laid down is in direct conflict with the rule laid down in that case. Let us look at it. Here is a defence consisting of three connected facts, following each other in regular sequence. It takes them all to make the defence complete, yet each fact has a separate probative force that tends to make out the defence. The rule in *Lombard* v. *Cheever et al.* says, these facts must be offered in the order of their occurrence, and if not so offered, the party offering the testimony must make a statement to the court, showing that the link or links in the testimony which he proposes for the present to pass over, will be subsequently proven, and if he fails to make such statement, the fact or facts so offered out of their order may be rejected by the court.

Now, this is clearly the rule in *Lombard* v. *Cheever et al.* If, then, no statement is required where the facts are offered in the order of their occurrence, the conclusion is irresistible

that the court below erred in excluding the evidence in question, for it will not and can not be denied that the fact first offered in evidence was first in occurrence. It follows, therefore, the case last cited, so far from supporting the view of the majority of the court, is an authority directly against it.

Lonergan v. *Stewart*, 55 Ill. 44, is also supposed to sustain the rule laid down in the case now under consideration, but I do not view it in that light. Lonergan deposited a lot of corn with Bradt, who was the owner of a warehouse in which the corn was stored. Bradt failed, and Stewart succeeded him in the possession of the warehouse and its contents, including the corn in question. After the transfer to Stewart, Lonergan demanded the corn of him, and, on his refusal to deliver it, brought an action of trover to recover its value. On the trial in the circuit court, Lonergan offered in evidence a receipt for the corn, executed by Bradt at the time of the delivery of the corn to him, and it was held by this court that the court below properly excluded it from the jury. And in speaking of this receipt, and its exclusion from the jury, the court say: "It was not executed by the defendant, and no foundation had been laid for its introduction, nor was the offer preceded by any statement that the defendant would be connected with it by proof. The relevancy at the stage of the cause at which it was offered was not shown, *and was not apparent.* It was in the discretion of the court to admit it or not."

There is nothing in this case but what is in perfect harmony with the view I have already expressed. Here, a receipt executed by a stranger was offered in evidence against the defendant. For aught that appeared, it had no connection in the world with the case, and it was therefore properly excluded. So, I say, in all cases where the court can not see the relevancy of testimony, and no statement is made by the party offering it showing its relevancy, the court, in its discretion, may exclude it. Indeed, the rule laid down in this case is, perhaps, of more frequent application than any one known to the law relating to the production of testimony.

It is universally true, that where the pertinency of evidence is not apparent, and its relevancy is not pointed out, the court will, on motion, exclude it. This is the principle which the case announces, and I presume no one would question it for a moment, for it is to all lawyers as familiar as household words, and as old as the law of evidence.

In *City of Alton* v. *Hartford Fire Insurance Co.* 72 Ill. 328, which was an action to recover a penalty imposed by an alleged ordinance, the court below excluded from the jury the ordinance upon which the action was based, on the ground that plaintiff had shown no authority in the city to pass it, and this court, on error, sustained the ruling of the court below. This case differs materially from the one last cited. Here the relevancy of the testimony was apparent, but it was not offered in the order of its occurrence. The validity of the ordinance was wholly dependent upon the fact whether or not the city had been clothed with power to pass it.

It affirmatively appears in that case, that the defendant denied the power of the city to pass the ordinance, and objected to its introduction for that reason; and the plaintiff failing or refusing to show the requisite power to pass the ordinance, it was, of course, properly excluded. It is evident, therefore, that this case is not at all analogous to the one under consideration, and the latter is not, in any sense, supported by it.

It will be further perceived, that the proof offered was not presented in its natural order, or, as expressed in the case of *Lombard* v. *Cheever et al. supra*, it was not offered in the order of its occurrence. The fact offered to be shown—namely, the existence of the ordinance,—without proof of power to pass it, would have had no probative force whatever. Now, had the plaintiff first offered to show the authority of the city to pass the ordinance, and the court had excluded it because the plaintiff did not, at the same time, inform the court that plaintiff intended to follow up this evidence by proof of the passage of an ordinance by the city, in pursuance of the power, the cases would be analogous. The one cited is not of the kind sup-

posed, and I confidently assert that no case can be found decided by this court, or any other court of equal standing, sustaining the rule laid down in the present case.

The foregoing are all the authorities to which my attention has been called, and which it has been suggested favor the rule under consideration, and I am willing to submit them without further comment.

The rule laid down by Mr. Greenleaf on this subject, in his work on Evidence, is expressed in these words: "It is not necessary, however, that the evidence should bear directly upon the issue. It is sufficient if it tends to prove the issue or constitutes a link in the chain of proof, although, alone, it might not justify a verdict." And with respect to evidence whose relevancy is not apparent when offered, he adds: "Nor is it necessary that its relevancy should appear at the time when offered, it being usual to receive, at any proper and convenient stage of the trial, in the discretion of the judge, any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case." 1 Greenlf. (12 ed.) page 62, sec. 51 a.

In *Haughey* v. *Strickler*, 2 Watts & Serg. 411, where a partnership note had been admitted to the jury before (as it was claimed) the partnership of the defendants had been established, the Supreme Court of Pennsylvania held there was no error, saying: "This was rather a question as to the order of giving evidence than its admissibility. Distinct matters forming separate links in a connected chain of title often can not be conveniently given in evidence together. It is no answer to evidence that it does not prove the plaintiff's whole case. If it is a link in the chain of the evidence afterwards to be given in, it is admissible." To the same effect are the cases of *State* v. *McCallister*, 11 Shepley, 139; *Johnson* v. *Warden*, 3 Watts, 104; *Tams* v. *Bullitt et al.* 35 Penn. 308; *Lake* v. *Mumford*, 4 Smedes & Marsh. 312.

The case of *Bartlett* v. *Evarts*, 8 Conn. (old series) 523, is exactly in point, and supports the view I have taken. There the establishment of two facts was necessary to make out the case, namely: that certain posts and rails were erected, and that they were erected by the defendant. The plaintiff offered to show, first, the fact of erection, but the court below rejected the testimony, and it was held error. It is to be observed that the evidence was offered in its natural order, and, as in this case, its relevancy was apparent. Mr. Wharton, in his work on Evidence, (2d ed.) vol. 1, sec. 21, says: "Hence, it is relevant to put in evidence any circumstance which tends to make the proposition at issue more or less improbable; *nor is it necessary*, at once, to offer all the circumstances necessary to prove such proposition. The party seeking to prove or disprove the proposition may proceed step by step, offering link by link."

Dunning et al. v. *Matthews*, 16 Ill. 308, was an action of trespass *quare clausum fregit*. The defendants in the court below justified under certain proceedings in the county court authorizing the location of a highway over the *locus in quo*. The papers and files in that proceeding which were offered in evidence failed to show that all the requirements of the statute had been complied with, and the evidence was objected to on that ground. The court thereupon stated to counsel, that if it was proposed to follow the testimony offered with proof that the other provisions of the statute had been complied with, the evidence offered might go to the jury; but the defendants, on being thus called on by the court, refused to make such further proof, and the court thereupon excluded the testimony, and this court held there was no error in doing so. If any such rule existed as is now contended for, the case certainly afforded a very opportune occasion for its announcement, but it was not done; and that decision is placed upon the express ground that the defendants did not, when their attention was called by the court to the insufficiency of the facts proposed to be shown, and the necessity of supplementing

them with other facts in order to make out a defence, pretend to be able to supply the wanting links in the chain of testimony, or make any offer or explanation with reference thereto. Under the circumstances it would have been a useless consumption of time to have gone on to prove a part of the facts constituting the defence, when it was substantially admitted that the residue of the facts would not or could not be proved. If, as a matter of law, the defendants in that case were bound to state, in the first instance, without any request to do so by the court, all the facts constituting their defence, at the peril of not being permitted to prove anything, it is somewhat remarkable that the court did not place its decision upon that ground.

In *Hough* v. *Cook*, 69 id. 581, this court, in discussing the relevancy of testimony, lay down the rule in these terms: "To determine the relevancy of evidence, the question is, not whether it was sufficient of itself to make out the defence, but would it tend to prove the defence."

Willoughby v. *Dewey*, 54 id. 266, was an action brought by plaintiff in error as constable, against defendant in error, for the price of a field of growing wheat sold under execution. On the trial below, the plaintiff, for the purpose of proving the judgment upon which the execution issued, offered in evidence the justice's docket containing the judgment.

This evidence was excluded by the court on the ground that it was not first shown that the justice had jurisdiction to render the judgment. And this was held to be error. The court say, "the objection here made is, that the docket, if admitted, would show only the judgment, but would not show that the magistrate had jurisdiction of the subject matter or of the person sued. Should that be so, it would not render the docket incompetent evidence. Competency of evidence is one thing, what it may prove is entirely another thing." The evidence here was offered in its natural order, or, in other words, in the order of its occurrence.

The case of the plaintiff consisted of a chain of facts: First, the judgment; second, the execution; third, the sale; fourth, the purchase by the defendant. If the rule now laid down by this court is the law, the case just cited ought not to have been reversed. The court ought to have sustained the ruling of the court below, in excluding the justice's docket, on the ground the plaintiff did not, at the same time he offered the docket in evidence, inform the court that he expected to follow up the proof of the judgment by showing the execution, the sale and purchase by the defendant. To have proved all these facts would have shown the justice had jurisdiction at least of the subject matter. It is very clear the judgment in this case would no more have established the plaintiff's claim for the price of the field of wheat, than proof that the makers of the bond in question delivered it to Holmes with instructions not to deliver it to Gage till all the directors had signed it would have constituted a defence to the bond.

The two cases are precisely alike in principle, and I insist the latter case ought to be controlled by the former, not only on the ground of precedent but on the ground of reason and convenience.

But, going further back in the line of decisions of this court upon the question under consideration, I invite attention to the case of *Rogers* v. *Brent*, 5 Gilm. 575. This case was an action of ejectment wherein the defendant in the court below had offered in evidence a certificate of the register of the land office, showing a purchase from the government of the land in controversy by one Bowman, through whom defendant claimed. This evidence was excluded by the court below, and it was held error.

In passing upon the question the court say: "It only remains to be seen whether the evidence which he offered, and which was excluded by the court, tended to prove such a case: for, according to Mr. Greenleaf, the court was authorized to exclude all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference

as to the principal fact or matter of dispute." "Was the evidence offered incapable of affording such reasonable presumption or inference? On the contrary, it was the very foundation of the case, which it was competent for him to prove. Without it, all other evidence would have been useless. Without it, it would have been impossible for him to have made out his proposed defence. The question is not, whether it was sufficient of itself to make out the defence, but would it *aid* to make out the case;—would it tend to prove the defence? Most cases have to be proved by a succession of distinct facts, neither of which, standing alone, would amount to anything,—while all, taken together, form a connected chain and establish the issue, and, from necessity, a party must be allowed to present his case in such detached parts as the nature of his evidence requires. *It would be no less absurd than inconvenient, when proof is offered in its proper order of one necessary fact, to require the party to go on and offer to prove at the same time all the other necessary facts to make out the case. Such a practice would embarrass the administration of justice and prove detrimental to the rights of parties.*"

This case is in point, and in direct conflict with the rule laid down by the court in the present case. That which the case cited declares to be absurd, the court now lays down as a rule in all future cases. And this is done even without a reference to the case which holds that such a rule would be absurd; and, indeed, without reference to any case that supports the rule now laid down.

Going still further back, I find that the same rule laid down in *Rogers* v. *Brent*, is distinctly announced in the case of *Hulick* v. *Scovil*, 4 Gilm. 168. This court, in discussing the very question now under consideration, say: "Testimony, if relevant, may be properly received, although in itself insufficient to show good ground of recovery or defence, as the case may be, and where its deficiency may be supplied by other proof, as, for instance, a sheriff's deed, which, to show title, must be accompanied by evidence of a judgment and execution; or, the

ordinary case of a series of deeds to show title. *In such case it is not necessary to exhibit the entire chain of evidence at a single view*, but, from the very nature of the case, it must be extended progressively. The question is not as to the sufficiency of the link offered and its associate links to complete the chain, or endue it with the necessary strength for its intended purpose, but *simply as to its adaptation to the composition of the proposed chain.* Nor will the court undertake so to control a party endeavoring to make out his chain of title, as to require that each link be the regular sequence of that next preceding in the order of the evidence. When, however, the whole evidence on the subject has been heard, if the court consider it insufficient they may, on the application of the party against whom it is offered, either exclude it, or instruct the jury it is insufficient to maintain the action or defence, as the case may be."

It is evident that the doctrine of this case can not be harmonized with the rule which the court now lays down. Indeed, no effort is made to do so. Nor is there even so much as a passing reference made to this case, or any of the other cases which I have cited announcing, in substance, the same principle.

Now, I submit, with all deference to the majority of the court, that where a rule, governing the production of testimony, has been announced in plain, emphatic, and unmistakable terms, as was done in the two cases last cited, if it becomes necessary to change such rule by judicial decision, it is due to the cause of jurisprudence, to the court itself, and an enlightened bar, that the reasons for doing so should be distinctly stated, and that the cases establishing the rule should be in express terms overruled.

Believing that the rule now laid down is unsupported by any previous decision of this court, but, on the contrary, is in direct conflict with a number of well considered cases, as I have fully shown; and feeling assured that it must, sooner or later, be repudiated, for the reason that it would be impossible to enforce it without leading to great delays and confusion in

the trial of causes, and often in palpable injustice, I can not give my assent to it.

Mr. JUSTICE SCHOLFIELD: I concur in the foregoing views of Mr. JUSTICE MULKEY.

Mr. CHIEF JUSTICE WALKER: I think the whole question is fully determined by the cases of *Lombard* v. *Cheever*, 3 Gilm. 469, *Lonergan* v. *Stewart*, 55 Ill. 44, *City of Alton* v. *Hartford Fire Ins. Co.* 72 id. 328, and others in our reports. They show that evidence offered by a party, not in itself pertinent to the issue, may be rejected, unless the party proposing to introduce it shall offer to follow it up with evidence which shall render it pertinent. There was no such offer in this case, and the presumption that the judge decided correctly has not been overcome. There are cases that hold that an action in ejectment is an exception to the rule, but this is not such an action.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIAM H. HARPER *et al.*

1. INSPECTION OF GRAIN—*delegation of power in respect thereto.* There is no provision of the constitution which, either expressly or by necessary implication, inhibits the General Assembly from committing the inspection of grain to a board created for that purpose. The right to pass inspection laws belongs to the police powers of the government, and the legislature has authority to arrange the distribution of such powers as the public exigencies may require, apportioning them to local jurisdictions to such extent as the law-making power deems appropriate, and committing the exercise of the residue to officers appointed as it may see fit to ordain.

2. So it was competent for the General Assembly to delegate to the Railroad and Warehouse Commission the power to control the subject of the inspection of grain.

Syllabus.

3. SAME—*as to fees to be paid.* The expenses occasioned by the inspection of grain may be required to be borne by those presumably benefited by it. Fixing fees for such services, and prescribing the manner of their collection, and upon whom they shall be imposed, do not fall within the constitutional limitation concerning the imposition of a local burden by way of taxation.

4. SAME—*delegation of the power to fix inspection fees.* It is within the legislative power to invest the Railroad and Warehouse Commission with authority to prescribe what fees shall be charged for grain inspection, and to regulate them from time to time as circumstances may require. The delegation of this legislative function may well be regarded as a necessary incident to the exercise of this branch of the police power of the government.

5. SAME—*constitutional requirement that fees and salaries shall be fixed by law.* The officers in respect of whom the constitution speaks of fees and salaries fixed by law, are only those specifically named in that instrument, and do not embrace officers appointed under the inspection laws of the State.

6. SAME—*inspection law as a local and special law.* Although the statute concerning the inspection of grain in the city of Chicago is, in a certain sense, a local and special law, it is not within the inhibition of any provision of the constitution on that account. Local or special laws are only prohibited in the enumerated cases in sec. 22, art. 4 of the constitution, and "laws for the inspection of grain" are not included.

7. Besides, the constitution itself, in sec. 2, art. 13, discriminates between public warehouses in cities of not less than 100,000 inhabitants and those in cities of less population, and recognizes that there is a necessity for regulations in respect to the former not necessary to the latter.

8. SAME—*inspection laws are not regarded as imposing burdens upon trade,* nor as unjustly discriminating in favor of one class at the expense of another, so long as they are reasonable. The law of this State, on that subject, is not liable to the objection of unconstitutionality on this ground.

9. OFFICIAL BOND *of chief inspector of grain—extent of liability of sureties.* The official bond of a chief inspector of grain was conditioned that the principal should well and strictly discharge the duties of his office, according to law and the rules and regulations prescribing his duties, and pay all damages to any person or persons injured by his neglect, etc. The Board of Railroad and Warehouse Commissioners, under a power given them by statute, fixed the duties of his office before the execution of the bond, requiring him to collect inspection fees and disburse them, and pay over any balance in his hands to his successor: *Held,* that the sureties were liable for moneys in the hands of their principal at the close of his term of office which he failed to pay over to his successor, and that the undertaking was not confined to the payment of damages to any person or persons injured by his neglect. In such case the sureties must ascertain the duties so imposed upon their principal, or bear the consequences.

10. Although the Board of Railroad and Warehouse Commissioners are only authorized to fix the fees for the inspection of grain at such rates as may be necessary to meet the expenses of the service, yet, if a sum in excess of that required for the payment of expenses is accumulated in the hands of the chief inspector at the close of his term, he and his sureties are liable upon his official bond for his neglect or refusal to pay over such excess to his successor in office.

11. SAME—*recovery against principal not necessary to suit on bond.* It is not necessary to recover judgment against an officer for his default before bringing suit on his bond.

12. PARTY—*at law, in suit on official bond of inspector.* The people of the State of Illinois, as the payees in the official bond of a chief inspector of grain, are proper parties plaintiff in a suit upon such bond, although the sum recovered must be paid into the inspection fund for which it was originally received by the inspector.

13. PLEADING—*declaration on official bond.* Where the term of a party's office was limited to two years from his appointment, in a suit upon his bond for not paying over moneys in his hands to his successor, the declaration showed the date of the expiration of the term of the obligor in the bond, and the date of the appointment of his successor, without showing the qualification of the latter, and alleged the duty of the obligor to pay over to such successor, it was *held*, that the allegation of the expiration of the party's term of office, and the appointment of his successor, to whom he failed to pay over such moneys, was sufficient.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

This was an action of debt on the bond of William H. Harper, as chief inspector of grain for the city of Chicago. The declaration is as follows:

"The people of the State of Illinois, plaintiffs herein, by Luther Laflin Mills, State's attorney of Cook county, and James K. Edsall, Attorney General of Illinois, their attorneys, complain of William H. Harper, William Harper, Robert G. Ingersoll, John M. Rountree, Charles B. Farwell, and Solomon P. Hopkins, defendants herein, of a plea that they render to the said plaintiffs the sum of $50,000, which they owe to and unjustly detain from plaintiffs.

"For that, whereas, the said William H. Harper, heretofore, to-wit, on the 3d day of April, A. D. 1873, was duly

appointed and commissioned by the then Governor of said State of Illinois, by and with the advice and consent of the Senate of said State, to the office of chief inspector of grain in and for the city of Chicago, in said Cook county, for the term of two years, and that he, the said William H. Harper, then and there accepted the said appointment and commission to said office, and entered upon the duties thereof; and that the said William H. Harper, as principal, and the said William Harper, Robert G. Ingersoll, John M. Rountree, Charles B. Farwell, and Solomon P. Hopkins, as sureties, afterwards, to-wit, on the 24th day of September, A. D. 1873, executed and delivered to the said plaintiffs, as the official bond of said William H. Harper, as such chief inspector, the bond hereinafter described, that is to say: that on the day and year last aforesaid, in the county aforesaid, the said defendants, by their writing obligatory, bearing date of that day, and sealed with their seals, did acknowledge themselves to be held and firmly bound to said plaintiffs in the penal sum of $50,000, to be paid to said plaintiffs,—which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect that the said William H. Harper had been appointed chief inspector of grain for the city of Chicago, it was provided, that if he, the said William H. Harper, should faithfully and strictly discharge the duties of said office of chief inspector of grain according to law and the rules and regulations prescribing his duties, and pay all damages to any person or persons who might be injured by reason of his neglect or failure to comply with the laws and the rules and regulations aforesaid, then said writing obligatory was to be void, otherwise to be and remain in full force and effect, as by the said writing obligatory and the said condition thereof appears.

"And the plaintiffs aver that, to-wit, on the 4th day of November, A. D. 1873, the Board of Railroad and Warehouse Commissioners of the State of Illinois approved and accepted the said writing obligatory, and the sureties therein, as the

official bond of the said William H. Harper, as such chief inspector of grain; and that the said William H. Harper continued to act as such chief inspector until the expiration of the term for which he was so appointed, to-wit, until the 3d day of April, A. D. 1875, and that afterwards, to-wit, on the 24th day of April, 1875, John C. Smith was duly appointed to the office of chief inspector of grain in and for the said city of Chicago, and thereby became, and from thence hitherto has been, the successor of the said William H. Harper in said office.

"And the plaintiffs further aver, that before the making of the said writing obligatory, to-wit, on the 8th day of May, A. D. 1873, the said Board of Railroad and Warehouse Commissioners, in pursuance of the statute in such case made and provided, made and adopted certain rules and regulations prescribing the duties of such chief inspector of grain, of the tenor and effect following, to-wit:

"'RULE 4. The said chief inspector is hereby authorized to collect such charges for the inspection of grain as may be established from time to time by the commissioners, and pay out the proceeds arising therefrom, as hereinafter provided; and he shall turn over to his successor in office all moneys, uncollected bills, or other property belonging to the inspection department, taking his receipt therefor.'

"'RULE 15. The said chief inspector shall make out and transmit to the office of the commissioners, previous to the first Tuesday of each month, a full and correct statement, in duplicate, of the amount of cash receipts from any and all sources during the previous month; also, the amount of uncollected bills due the department. Said statement shall also include an account of the expenses of the department for the same month, and be accompanied by the bills of said expenses, duly certified by the chief inspector or the warehouse registrar to be correct, and the pay-roll, giving the names and duties of all employees in the offices of the inspector and registrar, and the amounts due each, duly certified as above. Upon the

approval of the said bills and pay-roll by the commissioners, and the return of the same to the chief inspector, he is hereby authorized to pay such bills and pay-roll, thus approved, out of any funds belonging to his department, and, as soon thereafter as practicable, return said pay-roll and bills, duly receipted, to the office of the commissioners.'

"And that said rules and regulations continued in force from the date last aforesaid, during the time the said William H. Harper so continued to act as such chief inspector of grain, and from thence hitherto.

"And the plaintiffs further aver, that before the making of the said writing obligatory, to-wit, on the 8th day of May, A. D. 1873, and from time to time thereafter, the said Board of Railroad and Warehouse Commissioners, in pursuance of the statute in such case made and provided, fixed and regulated the rates of charges for the inspection of grain in such manner as would, in the judgment of said commissioners, produce sufficient revenue to meet the necessary expenses of the service of inspection, and no more.

"And the plaintiffs further aver, that by virtue of the premises it became and was the duty of the said William H. Harper, as such chief inspector of grain, during his said term of office, and his continuance in said office, to inspect grain in the said city of Chicago, or cause the same to be inspected, and to collect and receive the lawful fees and charges for such inspection fixed by said Board of Railroad and Warehouse Commissioners, in accordance with the said rules and regulations of said board in that behalf, and to make monthly reports to the said board of commissioners of all such fees collected and received by him, and to pay out the same in defraying the expenses of said inspection service in the manner prescribed in said rules and regulations and the statute in such case made and provided, and after the expiration of his said official term to turn over and deliver to his successor in said office of chief inspector, all such moneys and other property in his hands

belonging to such inspection department, as provided in said rules and regulations defining his duties in that regard.

"And for assigning a breach of the said condition of said writing obligatory, the plaintiffs aver that the said William H. Harper, after the making of the said writing obligatory, and during and before the expiration of his said term of office, as aforesaid, as such chief inspector, collected and received large sums of money, of such fees, for the inspection of grain, as aforesaid, amounting to a large sum, to-wit, the sum of $25,000, over and above all sums paid out by him in defraying the expenses of said inspection service, and without right or authority of law converted and disposed of the same to his own use, and, although requested so to do upon the expiration of his said term of office, hath neglected and refused to turn over and deliver said sum of money so remaining in his hands to his successor in office as such chief inspector, and still doth neglect and refuse so to do, and without lawful right still retains the said sum to his own use, to-wit, at the place aforesaid.

"By means whereof an action hath accrued to the plaintiffs to demand, have and receive of and from said defendants said sum of $50,000, above demanded. Yet, the said defendants have not paid to said plaintiffs the said last named sum of money, or any part thereof, but refuse so to do, to the damage of said plaintiffs of the sum of $40,000, and therefore the plaintiffs bring suit."

The defendants demurred to the declaration on the ground that the statute under and by which the Board of Railroad and Warehouse Commissioners assumed to act and establish the rules in the declaration mentioned, and so far as it authorizes the appointment of the chief grain inspector and authorizes said board to establish rules for the inspection of grain and the imposition of fees and charges therein on such inspection, is invalid. The court sustained the demurrer, and the people electing to stand by their demurrer, gave judgment for the defendant.

The people bring the case here by writ of error.

The only error assigned is, that of sustaining the demurrer to the declaration.

Mr. JAS. K. EDSALL, Attorney General, for the People.

Messrs. ROOT & ARRINGTON, and Mr. R. G. INGERSOLL, for the defendants in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The points urged against the sufficiency of the declaration are:

1. The authority granted to the Railroad and Warehouse Commissioners to fix the rates of charges for the inspection of grain and compensation of officers, is an unwarrantable delegation of legislative power.

2. The act is void, so far as it attempts to classify warehouses into classes A, B and C, and provide for the appointment of an inspector in cities where is located a warehouse of class A, because it is special and local.

3. The General Assembly is not authorized, directly or indirectly, to impose burthens, for specific purposes, upon grain and produce, and so the inspection fees are illegal.

4. It is an imposition, a burthen, levied in a manner and by officers not authorized by the constitution.

5. The condition of the bond is not broad enough to hold the principal or sureties for the fees collected, as the bond is a guaranty only against a misinspection of grain.

6. The accumulation of a surplus was unwarranted by law, and the sureties are not liable for the same.

These will be considered in the order in which they are presented.

1st. The constitution, art. 13, § 7, requires that "the General Assembly shall pass laws for the inspection of grain, for the protection of producers, shippers and receivers of grain and produce." No system is prescribed, and the General

Assembly is, therefore, left to the exercise of its discretion in the enactment of statutes, in compliance with this mandate.

By "An act to establish a board of railroad and warehouse commissioners and prescribe their powers and duties," in force July 1, 1871, a commission, styled "Railroad and Warehouse Commission," is created. It is composed of three persons, appointed by the Governor, by and with the advice and consent of the Senate, and the term of office is for two years and until their successors are appointed and qualified. Rev. Stat. 1874, p. 828, § 129.

In addition to the duties imposed on this commission in reference to railroad corporations, by § 14 of "An act to regulate public warehouses, and the warehousing of grain, and to give effect to art. 13 of the constitution," the Board of Commissioners of Railroads and Warehouses are empowered "to fix the rate of charges for the inspection of grain, and the manner in which the same shall be collected," and also "to fix the amount of compensation to be paid to the chief inspector, assistant inspector, and all other persons employed in the inspection service, and prescribe the manner and time of their payment." The chief inspector is appointed by the Governor, by and with the advice and consent of the Senate. Assistant inspectors and other employees are appointed by the Board of Commissioners of Railroads and Warehouses, upon the nomination of the chief inspector; and that board is also empowered to appoint a warehouse registrar and such assistants as may be deemed necessary. The entire inspection is expressly placed under the supervision and control of the Board of Railroad and Warehouse Commissioners. "All necessary expenses incident to the inspection of grain, and to the office of registrar, economically administered, including the rent of suitable offices, shall be deemed expenses of the inspection service, and shall be included in the estimate of expenses of such inspection service, and shall be paid from the funds collected for the same."

The charges for inspection are required to "be regulated in

such a manner as will, in the judgment of the commissioners, produce sufficient revenue to meet the necessary expenses of the service of inspection, and no more."

That the board thus created is a *quasi* public corporation, admits of no controversy. Angell & Ames on Corporations, §§ 23, 24; Dillon on Municipal Corporations, § 9. And it is now too late to question the power to create such agencies in the administration of the government, and invest them with such legislative power as shall be appropriate and necessary to effectuate the objects of their creation. Cities, towns, villages, counties, townships, road districts and school districts are familiar instances of local, corporate and *quasi* corporate agencies in the administration of the government, invested with powers to some extent of a legislative character. Besides these, and of a different character of public agencies, are boards for the control of the public charitable, penal and reformatory institutions, and that for the construction, management and operation of the Illinois and Michigan canal,—all of which have been and are invested with power and authority to make contracts, fix prices, and adopt such rules, regulations and by-laws as shall be reasonably adapted to and necessary to carry out the purposes of their creation. And the last named board, since the act in relation to the construction, etc., of the canal, approved January 9, 1836, has been invested with and exercised the power of making rules, regulations and by-laws for fixing tolls to be paid for transportation, for governing persons employed about the canal, for injuries done to the canal, locks and tow-paths, and for the management and navigation of the canal. 1 Purp's Stat. 432, § 75; id. 467, § 261; Rev. Stat. 1874, 189, § 98. During this period, now nearly forty years, although the people have twice remodeled their constitution, this delegation of legislative power has neither been condemned by the people nor questioned by the courts.

And, as further illustrative of the principle, reference may be also had to the corporations created for park purposes, which are invested with extensive legislative powers and the com-

missioners of which we have said "are agents, by whom in part the people of the State carry on the government. Their functions are essentially political, and concern the State at large, although they are to be discharged within certain local limits. *Wilcox* v. *The People*, 90 Ill. 192. See also, *Chicago* v. *Wright*, 69 id. 318.

The right to pass inspection laws belongs to the police power of the government. Cooley's Const. Limitations (1st ed.) 584–5. Inspections are necessary incidents to the execution of quarantine and health laws, and laws to prevent fraud, imposition and extortion in quality or quantity in sales; and the power to provide for them has been uniformly recognized as the subject of delegation to municipal corporations. Cooley's Const. Limitations, *supra*; Sedgwick on Stat. and Const. Law, 463.

If, therefore, the power here conferred upon the Railroad and Warehouse Commissioners had been conferred upon the city council of Chicago, the objection that it involved a delegation of legislative power, would have been, to the apprehension of all, destitute of any plausible basis.

But, it was said in *The People ex rel.* v. *Salomon*, 51 Ill. 50: "There is no prohibition which we have been able to discover, and we have been pointed to none, against the creation by the legislature of every conceivable description of corporate authority, and when created to endow them with all the faculties and attributes of other pre-existing corporate authority. Thus, for example, there is nothing in the constitution of this State to prevent the legislature from placing the police department of Chicago, or its fire department, or its water works, under the control of an authority which may be constituted for such purpose by a vote of the people, and endow it with power to assess and collect taxes for their support, and confide to it their control and government." Again, it was said: "The constitution nowhere commits corporate objects or purposes irrevocably to authorities now existing, nor does it prohibit the committal of them to such corporate authority as may be

called into life by the same law which creates the subject and commits it to their jurisdiction."

In *The People* v. *Draper*, 15 N. Y. 532, a like principle is announced. It was there held: "The legislature may, constitutionally, establish new civil divisions of the State, embracing the whole or parts of different counties, cities, villages or towns, for general purposes, permanent or temporary, of civil government, provided the divisions recognized by the constitution are not abolished, nor their capacity impaired, to subserve the purposes and arrangements to which they are made instrumental by the constitution." See also, to the same effect, *Police Comrs.* v. *City of Louisville*, 3 Bush, 597.

And again, in *The People* v. *Shepherd*, 36 N. Y. 285, it was held the legislature has authority to arrange the distribution of police powers, "as the public exigencies may require; apportioning them to local jurisdictions to such extent as the law-making power deems appropriate, and committing the exercise of the residue to officers appointed as it may see fit to ordain." See also, *People* v. *Pinckney et al.* 32 N. Y. 377.

Analogous principles have been recognized by this court in *Bush* v. *Shipman*, 4 Scammon, 186; *Trustees, etc.* v. *Tatman*, 13 Ill. 27; *County of Richland* v. *County of Lawrence*, 12 id. 1.

Where it is sought to impose burdens upon municipal or *quasi* municipal corporations to be discharged by revenues raised by taxation on the local constituency, under the constitution, the burden can only be imposed by the local corporate authorities—as held in *Harward et al.* v. *St. Clair Drainage Co.* 51 Ill. 130, and other cases of kindred character; and the corporation can not be imposed upon the locality without its consent signified by a majority vote of its electors, as held in *People ex rel.* v. *Salomon, supra.*

But this is a protection against taxation, only, and not a limitation upon the powers of the State government in selecting agencies through which to protect the people against wrong and injustice, where no local burden is sought to be imposed.

No taxation is imposed on any locality by this law; and the power to be exercised is solely for the benefit of commerce in grain which is necessitated to pass through a particular channel, exposing producer, shipper and receiver to the danger of loss through imposition, extortion and fraud, and it can, in no proper sense, be deemed a burden upon the locality.

There is no provision of the constitution which, either expressly or by necessary implication, inhibits the General Assembly from committing the inspection of grain to a board created for that purpose; and we are not authorized to say that the Board of Commissioners of Railroads and Warehouses is not quite as legitimate as any other board that could have been selected or created for that purpose.

It evidently was not designed that the inspection should be made a source of revenue, either to the State or to municipalities; for it is not enjoined as a means of raising revenue, but solely for the "protection of producers, shippers, and receivers of grain and produce;" and there is natural justice in requiring that the expenses occasioned by the inspection should be borne by those presumably benefited by it. Certainly no clause of the constitution is violated by this requirement.

The principle, repeatedly recognized by this and other courts of last resort, that the General Assembly may authorize others to do those things which it might properly, yet can not understandingly or advantageously do itself, seems to apply with peculiar force to the fixing of the amount of inspection fees—so as to adjust them properly with reference to the expenses of inspection.

The expenses of inspection must necessarily vary, to some extent, from time to time, with the changes in the price of labor, office rent, fuel, lights, stationery, etc., and the amount to be received at a given rate per cent for inspection fees must also necessarily vary in proportion as the quantity of grain to be inspected, from time to time, increases or diminishes. And hence an arbitrary permanent rule, as one by

statute would have to be, would be liable either to produce less than the inspection expenses demanded, or an excess which would not be needed, and which would therefore, to that extent, be an unjust imposition on those paying the fees.

It would seem obvious that anything like a fair approximation to an adjustment of the fees to the expenses could only be made upon thorough local knowledge, and by changing the rate per cent of fees to be paid, from time to time, and as often as experience should prove to be necessary to correspond with changes in expenses and the fluctuations in the quantity of grain to be inspected.

The delegation of this legislative function may therefore well be regarded as a necessary incident to the exercise of this branch of the police power of the government; and the reasoning which sustains a like delegation to a city council must be of equal potency here. We can not say we are clearly satisfied the constitution has been thereby violated.

The officers in respect of whom the constitution speaks of fees and salaries fixed by law, are only those specifically named in that instrument. *Davis* v. *The State*, 7 Md. 161.

2d. It may be conceded that the statute under consideration is local and special, as, in a certain sense, it is, without bringing it within the inhibition of any provision of the constitution. Local or special laws are only prohibited in the enumerated cases in sec. 22, art. 4, of the constitution, and "laws for the inspection of grain" are not included. Besides, the constitution itself, in sec. 2, art. 13, discriminates between public warehouses in cities of not less than 100,000 inhabitants, and those in cities of less population, and recognizes that there is a necessity for regulations in respect to the former not necessary to the latter.

The difficulties that may be encountered in the practical execution of a law are never regarded as of controlling significance in determining its constitutionality.

3d. Inspection laws are not regarded as imposing burdens upon trade, nor as unjustly discriminating in favor of one

class at the expense of another, so long as they are reasonable. That the statute before us is not liable to the objection of unconstitutionality on this ground is sufficiently shown by the reasoning in *Munn et al.* v. *The People*, 69 Ill. 80, and *Munn* v. *Illinois*, 94 U. S. (4 Otto) 113.

4th. The objection that the inspection fee is a burden levied in a manner and by officers not recognized by the constitution, is based upon a misapprehension.

Inspection fees are not taxes, nor is the right to impose them to be found under the power to impose taxation. They are imposed as compensations for services rendered presumably beneficial to the party upon whom they are imposed under and by virtue of the general police powers of the State. Cooley on Taxation, 413; *Charleston* v. *Rogers*, 2 McCord, 495.

It is somewhat significant that all objections to the burdensome and oppressive character of these fees come not from those by whom they were paid, but from the man who has confessedly appropriated them to his own use and those who are sought to be held liable for his appropriation as his sureties.

5th. In *The People* v. *Tompkins et al.* 74 Ill. 482, when the chief inspector's bond was executed the Commissioners of Railroads and Warehouses had not designated the chief inspector as the collector of the inspection fees and custodian of the fund when collected, and we held that his sureties were not chargeable with knowledge by the law that he would be required to collect and have the custody of the fund. But we said, "Had the duty been enjoined upon Tompkins, as chief inspector, when the bond was executed, to collect this fund and retain its custody, a different and much stronger case in favor of the plaintiffs would have been presented," and we declined an expression of what we would have held in that event.

In the present case, the chief inspector was designated and appointed as collector of the inspection fees and charged with the custody of the fund thus raised, and required to make

payment on bills chargeable to the inspection service, and of the residue in his hands to his successor in office, when the bond in suit was executed.

The statute declares, that "the chief inspector of grain and all assistant inspectors of grain, and other employees connected therewith, shall be governed in their respective duties by such rules and regulations as may be prescribed by the Board of Commissioners of Railroads and Warehouses; and the said board of commissioners * * * shall also have power to fix the rates of charges for the inspection of grain, and the manner in which the same shall be collected." When rules and regulations were adopted, in conformity with the statute, they became just as much the law describing and regulating the duties of the chief inspector as if they had been expressly enacted as a part of the statute, and the undertaking of the bond is, that the said William H. Harper shall "faithfully and strictly discharge the duties of said office of chief inspector of grain according to law, and the *rules and regulation prescribing his* duties," etc.

We do not think it admissible to say, as contended by counsel for defendants, that the undertaking here is simply that the chief inspector will pay all damages to any person or persons who may be injured by reason of his neglect. This view entirely excludes the preceding sentence, which requires that he shall "faithfully and strictly discharge the duties of his said office of inspector, according to law and the rules and regulations prescribing his duties," which constitute all that is needed to a complete official bond. The next clause is then inserted, not as a limitation upon, but as an addition to, this undertaking, and must so be construed.

When, therefore, the bond was executed, the law gave notice that power was given the commissioners to prescribe and regulate the duties of the chief inspector in his office. Those duties were prescribed, and it devolved upon those guaranteeing their performance to ascertain what they were. If the sureties did not know, when they signed the bond, that it

was the duty of the chief inspector to collect inspection fees, pay them out from time to time, as the inspection service demanded, and pay over the residue to his successor in office, it was their own folly. The means of information were before them, and they can not be heard to say they did not know what they ought to have known.

The undertaking of the sureties is, that their principal shall faithfully and strictly discharge the duties of his office of chief inspector, as well those prescribed by the Commission of Railroads and Warehouses as those prescribed by law. It was no less his duty to pay over the surplus inspection fees in his hands to his successor in office, than it was to make careful and honest inspections, and for this default, his sureties are, in our opinion, clearly responsible.

6th. We think it clear the statute does not contemplate the accumulation of a large and constantly increasing fund to be derived from inspection fees, and that the fund thus collected shall be only sufficient to meet the demands of the inspection service. This is substantially its language. But it must have a reasonable construction, and, in giving it such construction, it is obvious that there must be accumulations of fees in the hands of the chief inspector amounting to considerable sums and varying at different times according to circumstances. It is impracticable that the inspection fees for each bushel, or even each car load of grain, shall go directly from the hands of the party paying them into the hands of those having claims upon the fund. The amount of the fees must necessarily be fixed in advance of their collection, and while, with proper care by the board of commissioners, the general demand upon the inspection fund may be anticipated with a reasonable approximation to exactness, it is very evident that the amount of fees to be received, may, by reason of sudden and exceptional fluctuations in the shipments of grain, sometimes fall far below a reasonable anticipation, and at other times rise as much in excess of it.

There is nothing in the record before us from which we can

determine that the balance in Harper's hands is, in fact, even if we regarded that as material, in excess of the inspection service. For aught that appears, through his negligence in paying bills, or otherwise, there may be ligitimate demands upon the fund to cover every dollar of it.

But we do not regard this as important. From the mode of collecting the fund, and the nature of the claims upon it, we think the only reasonable conclusion is that it must have been anticipated some amount would accumulate in his hands, greater or smaller as circumstances might affect it. The rules and regulations of the Railroad and Warehouse Commissioners contemplated there might be a surplus in his hands, which they made it his duty to pay over to his successor. The sureties undertook that he should discharge this duty, and in doing so, having before them knowledge of the purpose of the fund, the source from which it was to be raised and all the circumstances that might affect it, they voluntarily took the chances of the amount. It does not lie with them to say that it is larger than it ought to be. If those for the benefit of whom the inspection was made, without protest and voluntarily paid money as inspection fees to Harper, it lawfully became a part of the inspection fund, and as such must be accounted for.

There are ample means known to the law by which the amount to be raised by inspection fees can be restrained within reasonable limits, and we doubt not they will speedily be found by producers, shippers, etc., and by those representing the State, when any necessity therefor shall exist.

We see no objection to the parties. The people, as payees, are proper plaintiffs, though the balance due, when collected, must be paid into the fund for which the fees were originally collected.

The averment is that Harper acted as chief inspector of grain until the expiration of the term for which he was so appointed, to-wit, until the 3d day of April, 1875, and that afterwards, to-wit, on the 24th day of April, 1875, John C.

Smith was duly appointed to the office of chief inspector of grain in and for the said city of Chicago, and thereby became and from thence hitherto has been the successor of William H. Harper in said office. The term of office of the chief inspector is limited to two years, not until his successor shall be elected and qualified. We therefore think the allegation here is sufficient as to the expiration of Harper's term of office, and since his duty was to pay to his successor, without other qualification to that term, it is sufficiently averred that he had a successor, to whom he has failed to pay over the moneys in his hands after demand made for that purpose.

The objection that judgment should have been obtained against Harper for his default, before suit could be brought on his bond, is without merit.

Harper was bound either to pay the money he had received to his successor, or lawfully account for its disposition, and having done neither, a liability is sufficiently established against him and his sureties upon his bond. (Rev. Stat. 1874, p. 730, § 13.) *Comrs.* v. *The People*, 76 Ill. 390.

The judgment is reversed and the cause remanded.

Judgment reversed.

Mr. JUSTICE DICKEY, dissenting: I think the sureties undertook for the proper discharge of Harper's duties *as inspector*, and did not contract for his fidelity *as treasurer*.

AGESILAUS ROCKAFELLER *v.* THE VILLAGE OF ARLINGTON.

CONVEYANCE — *reservation — sufficiency of description.* Where the owner of a tract of land had laid out a block thereon subdivided into lots, placing stones at the corners of the block, and had sold two of the lots in the block, and after possession taken by the purchaser, conveyed the whole tract, "excepting five lots in first block and second lot in second block, south of the railroad and plank road, as the same shall be hereafter subdivided into village lots" by the grantee or his assigns, "said lots having been heretofore sold by" said grantor, it was *held*, that the exception in the deed was not void for uncertainty, and that the title to lots previously sold did not pass by the deed.

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

Messrs. KENDALL & LOVEJOY, for the appellant.

Messrs. PETERS, ECKELS & KYLE, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This is a bill, filed by appellant, to enjoin appellee from opening an alley through his inclosed grounds in the village. The circuit court, on final hearing, dismissed the bill, and complainant appeals.

Appellee claims the right to open the alley upon the ground that Cassady, who formerly owned the land of which this is a part, conveyed the whole to Day, August 14, 1854, and that Day, on the 30th of April, 1855, surveyed and platted the whole tract into streets, alleys, blocks and lots, and acknowledged the plat, and that on the 14th of May, 1855, the plat was recorded; and that upon that plat, the ground in question was dedicated as a public alley.

Before Cassady conveyed to Day, he had contemplated surveying and platting a part of the land, described in his deed as Cassady's addition to Arlington, but had not made the plat. He had, however, laid off one block as block 1, placing stones at the corners. He had also sold to Gibson two lots of that block, being lots 4 and 5 of that plat. Gibson took possession, under his purchase, in May, 1854, and began the construction of a building for a retail store, and before the conveyance to Day this house was so far completed that Gibson had placed goods in the same, although he had built no fence around these lots.

In this condition the conveyance was made to Day. The deed to Day describes 180 acres of land, and conveys the whole thereof, "excepting five lots in first block and second lot in second block, south of the railroad and plank road, as the same shall be hereafter subdivided into village lots by said

Day, or his assigns, said lots having been heretofore sold by said Cassady."

Gibson inclosed these lots with a fence in May, 1855, and continued his possession until he sold and transferred the property and possession to Rockafeller, who has been in possession ever since. The deed from Cassady to Gibson was made December 30, 1854, and recorded in June, 1855, and Gibson conveyed to Rockafeller in 1869.

It is insisted that the exception contained in the deed from Cassady to Day was void for uncertainty. We think not. The block of which the ground in controversy was a part was laid off, and the corners marked with stones, and Gibson was constructing his building upon one of the lots, and the lots had in fact been sold to him by Cassady. The title to these lots did not pass by the deed of Cassady to Day.

It is suggested that the last words of the clause of exception show that no definite property was excepted, or intended to be excepted, and that instead of there being property excepted from the deed, the words import that the title to the whole 180 acres passed to Day, with a covenant that Day would, when he had laid off the land in lots, convey to the purchasers of Cassady such lots as he might designate on the plat, in his discretion, as the "five lots in first block," and second lot in second block. This suggestion is not reasonable. First block was already designated by the stone monuments, and the deed declares that Cassady had sold five of those lots and they are excepted from the operation of the deed. The proof shows that these lots of Rockafeller were two of the five. Whether Day was expected to have any discretion as to the location of the "second lot in second block" is not material to this question; but the fair inference, from the language of that part of the clause of exception, seems to be, that the mode in which Day or his assigns were to subdivide the second block was known to the parties, and, therefore, the lot in that block to be excepted from Day's deed was designated as the lot in that block which Cassady had before that time sold, and also

as the second lot, according to the plan by which Day was to subdivide the property.

Where a claimant has occupied as owner land for nearly twenty years, and the same has been acquiesced in by the public as lawful and proper under the title papers, courts should not seek sharply for a construction of the same which would condemn such occupation as wrongful.

We think the decree of the circuit court was wrong, and it must be reversed, and the cause remanded.

Decree reversed.

THOMAS QUAYLE *et al.*

v.

ALEXANDER E. GUILD, Admr.

1. LIMITATIONS—*action of account.* The action of account is not specifically provided for in the Statute of Limitations, and therefore is embraced in that clause of the statute which declares that "all civil actions not otherwise provided for" shall be barred, unless commenced within five years next after the cause of action shall have accrued.

2. SAME—*where there are concurrent remedies at law and in equity.* Where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statutory bar as the former.

3. SAME—*on bill in chancery for an account, as between partners.* The administrator of a deceased partner has his remedy at law, by action of account as well as by bill in chancery, against the surviving partners, for an account. So, if the administrator shall resort to his remedy in chancery in that regard, the suit will be subject to the limitation of five years, as that would have controlled the remedy at law had it been resorted to.

4. SAME—*in respect to trusts.* While the Statute of Limitations does not apply to direct trusts created by deed or will, and perhaps not to those created by appointment of law, such as executorships and administrations, yet constructive trusts, resulting from partnerships, agencies, and the like, are subject to the statute.

5. So, upon bill filed by the administrator of a deceased partner against the surviving partners for an account, it was held the trust existing between the parties in respect to the subject matter of the suit was but a constructive trust, and so subject to the Statute of Limitations.

Syllabus.

6. SAME—*effect of an accounting by one partner as destroying the fiduciary relation.* But even if the fiduciary character of the several partners in respect to each other were such as to exclude the operation of the statute, still, where there has been an accounting by the surviving partners with the administrator of the deceased partner, and the amount resulting from such accounting paid over to the administrator, and claimed to be the whole amount due, though not accepted as such by the administrator, the court are inclined to consider such action on the part of the surviving partners as an abandonment of their fiduciary character, and that their relationship thereby became adverse, so that from the time of the payment the Statute of Limitations would begin to run.

7. SAME—*of payment as taking a case out of the statute.* After the accounting by the surviving partners, and the payment by them of the amount resulting therefrom, they made a further payment to the administrator of a sum arising out of a suit between the partnership and a third person, and which was undetermined at the time of the accounting; it was *held*, this second payment would not operate to draw the general account after it, or as any admission in respect to it, because that general account, since its payment, was no longer admitted by those who made the accounting to be an open and current account.

8. In order to take a case out of the statute, there must be a promise to pay the debt. It is not enough that the debtor admitted the account to be correct, etc., but he must have gone further and admitted that the debt was still due, and had never been paid.

9. SAME—*at what stage of the cause the defence under the statute may be considered—and herein, of a former adjudication.* Upon bill by the administrator of a deceased partner against the surviving partners for an account, the defendants denied their liability to account, and also set up and relied upon the Statute of Limitations in their answer. The court below found that there had already been an accounting between the parties, and the sum due the complainant thereby ascertained, and that sum was decreed to be paid. Upon an appeal to the Supreme Court, it was held the complainant was entitled to an account, and that the cause ought to have been referred to the master to take and state an account between the parties, and because that was not done the decree was reversed and the cause remanded. No notice was taken, on the appeal, of the defence of the Statute of Limitations: *Held*, there was nothing in the finding and judgment of this court on that appeal amounting to an adjudication against the defence of the Statute of Limitations, or precluding it from being afterward insisted on in the lower court.

10. In such case there can be no proper application of the Statute of Limitations until there has been a statement of the details of the account, and when the cause is ready for hearing on all the pleadings and proofs.

APPEAL from the Appellate Court of the First District; the Hon. THEODORE D. MURPHY, presiding Justice, and the Hon. GEO. W. PLEASANTS and Hon. J. M. BAILEY, Justices.

This was a bill in chancery for an account, exhibited in the circuit court of Cook county. The cause was heard before the Hon. E. S. WILLIAMS, Judge, presiding. From the decree rendered in the circuit court an appeal was taken to the Appellate Court of the First District, wherein the decree was affirmed. An appeal was thereupon taken from the Appellate Court to this court.

Messrs. BECKER & DALE, for the appellants:

The Statute of Limitations is a good bar to an action of account between a representative of a deceased partner and his surviving partner. *Weisman* v. *Smith,* 6 Jones' Eq. 124; *Ogden* v. *Astor,* 4 Sandf. (S. C.) 314; *Ray* v. *Bogart,* 2 Johnson's Cases, 432; *Tharp* v. *Tharp,* 15 Vt. 105.

If it be said that the statute does not apply to this case because it is a case of trust, the reply is that the accounting with the administrator was an abandonment by appellants of their fiduciary character; their relationship thereby became adverse, and the statute began to run. Angell on Lim. § 174; *Albretch* v. *Wolf,* 58 Ill. 186; *Weisman* v. *Smith, supra.*

The payment of $118 in September, 1870, was not such a payment within the five years as would draw the general account after it, because (1) the general account was no longer an open and current account, but had been stated by the acquiescence of appellee in the account rendered, and had been settled by the payment of the $800. (Angell on Limitations, § 150.) (2) Even though still open and current, the payment in September, 1870, can not be construed as a new promise to pay the general account, and thus draw after it the general account, because the payment was specifically appropriated by the appellee and appellants, not to the general account, but to the claim growing out of the collision suit. *Lowery* v. *Gear,* 32 Ill. 382; *Mills* v. *Fowkes,* 5 Bing. N. C. 455.

The admissions above mentioned, if conceded, do not amount to a new promise to take the case out of the statute, for though they may be construed as admissions of indebtedness, they can not be tortured, by the most exquisite construction, into promises to *pay*, which are essential to constitute a new promise. *Keener* v. *Grull*, 19 Ill. 190; *Kimmel* v. *Schwartz*, Breese, 278; *Wachter* v. *Albee*, 80 Ill. 47; *Carroll* v. *Forsyth*, 69 id. 127.

Neither an admission that the account was correct and a promise to call and settle, nor an offer of security, constitutes a new promise. *Ayers* v. *Richards*, 12 Ill. 147; *Wachter* v. *Albee, supra; Exeter Bank* v. *Sullivan*, 6 N. H. 124; *Hancock* v. *Bliss*, 7 Wend. 267.

Mr. SIDNEY SMITH, for the appellee:

The Statute of Limitations does not apply in a case of this character, for the reason that, as surviving partners in possession of the partnership assets, the appellants occupied the position of trustees, and so it has been held by this court. *King* v. *Hamilton*, 16 Ill. 190; *Nelson* v. *Hayner*, 66 id. 487.

Moreover, appellants made a payment on account of the partnership interest to appellee of $118.12, on the 6th of September, 1870, and the bill in this cause was filed June 4, 1875, within five years thereafter, so that if the statute applied it had not run.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill for an accounting, filed by Alexander Guild, Jr., as administrator of the estate of Henry L. Curran, deceased, against Thomas Quayle and James McKeown, as joint owners and partners with Curran in the ownership and navigation of the brig "Robert Burns."

The master in chancery, to whom there had been a reference of the cause to take and state an account, made his report, stating a balance against the defendants of $2200.59. Excep-

tions filed by both parties to the report were overruled, and a decree for this balance was rendered against the defendants, from which they appealed.

It appears that on March 25, 1867, the appellants and Curran purchased the brig, the former taking a three-fourths and the latter a one-fourth interest in the vessel. The brig was employed in the wood and lumber trade, on the lakes, for the seasons 1867, 1868, and until the 16th of November, 1869, when she was lost, with all on board, including Curran, who was then sailing her as captain.

On May 13, 1870, the appellee was appointed administrator of the estate of Curran. The appellants, who had acted for the brig on shore, collecting the freights and paying the expenses, desired the appellee to state the account between them and the estate. This he declined, but recommended to them, as a proper person to do it, Mr. Kohlsaat, of the firm of Smith & Kohlsaat. In accordance with this suggestion, appellants carried their books of account, and certain vouchers relating to the vessel, to the office of Smith & Kohlsaat, who prepared an account and a surviving partner's inventory, presenting the former in the latter part of May or first part of June, 1870, to the appellee, who said it was all wrong, and filing the inventory in the county court during said month of June. A balance of about $800 in favor of the estate was found by Kohlsaat. On May 25, 1870, appellants paid to appellee $800, which the latter receipted for as being to apply on money in appellants' hands, received from insurance of the brig "Robert Burns," and belonging to the heirs at law of Henry L. Curran, deceased.

A suit for damages to the "Robert Burns" from a collision with another vessel was then pending, in which judgment was afterwards rendered in favor of the "Burns" for $472.50, one-fourth of which ($118.12), the share of the deceased, was paid to appellee September 6, 1870, and his receipt taken.

In November, 1872, appellee brought an action at law against appellants in the circuit court of Cook county, which

involved the same subject matter as this suit, wherein a judgment against appellee, by non-suit, was entered, July 2, 1874. The bill in this case was filed June 4, 1875.

The Statute of Limitations is set up as a bar to this suit, it being, that "actions on unwritten contracts, expressed or implied, * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Rev. Stat. 1874, p. 675, § 15. Our statute in regard to the action of account provides, that such action may be sustained by one joint tenant, tenant in common, or coparcener against the other or others—by one or more co-partner or co-partners against the other co-partner or co-partners, to settle and adjust their co-partnership accounts and dealings,—on book account,—by and against executors and administrators, in all cases in which the same might have been maintained by and against their testator or intestate. Rev. Stat. 1874, p. 100. No time of limitation of the action of account is specifically provided, hence leaving the five years' limitation above named for actions not otherwise provided for to apply.

Story, speaking of bills for an account, remarks: "In cases of this sort, where the demand is strictly of a legal nature, or might be cognizable at law, courts of equity govern themselves by the same limitations, as to entertaining such suits, as are prescribed by the Statute of Limitations in regard to suits in courts of common law, in matters of account. If, therefore, the ordinary limitation of such suits at law be six years, courts of equity will follow the same period of limitation. In so doing, they do not act, in cases of this sort, (that is, in matters of concurrent jurisdiction,) so much upon the ground of analogy to the Statute of Limitations, as positively in obedience to such statute." 1 Eq. Jur. § 529, and see *Hancock* v. *Harper*, 86 Ill. 446, and *Tharp* v. *Tharp*, 15 Vt. 105.

The entire account here involved had accrued previously to May 25, 1870. No transaction on the general account has since occurred. The present suit was instituted more than five

years afterward. So far as we can see, the bar of the Statute of Limitations set up must be held to be a good defence.

The same subject matter of the demand here might have been made the subject of an action at law, to-wit, an action of account, and where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statute bar with the former. *Kane* v. *Bloodgood*, 7 Johns. Ch. 90.

There are but two answers made by appellee against the allowance of the bar of the statute:

1st. That as surviving partners in possession of the partnership assets the appellants occupied the position of trustees,—citing *King* v. *Hamilton*, 16 Ill. 190, and *Nelson* v. *Hayner*, 66 id. 487, as to that effect; and that the Statute of Limitations does not apply in cases of trust.

In *Albretch* v. *Wolf*, 58 Ill. 186, this court held the following language: "In *Farnam* v. *Brooks*, 9 Pick. 212, it was held that the Statute of Limitations does not apply to direct trusts created by deed or will, and perhaps not to those created by appointment of law, such as executorships and administrations; but constructive trusts, resulting from partnerships, agencies, and the like, are subject to the statute. The doctrine of that case is supported by good authority. *Walker* v. *Walker*, 16 Serg. & Raw. 379; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *Merwin* v. *Titsworth*, 18 B. Mon. 582." *Wilhelm* v. *Caylor*, 32 Md. 151, is an authority to the point, that the rule with respect to the bar of the Statute of Limitations is equally applicable in the case of a bill for an account by one partner against another, as in other cases of a bill for an account; and see *Weisman* v. *Smith*, 6 Jones' Eq. Rep. 124.

The trust here claimed we regard as but a constructive trust, and so subject to the Statute of Limitations.

And even were it a case of proper trust which would not be within the application of the statute, we would be inclined to consider that the accounting with the appellee and the payment made to him on May 25, 1870, was an abandonment by

appellants of their fiduciary character; that their relationship thereupon became adverse, and that the statute from that time would begin to run. *Albretch* v. *Wolf*, *Hancock* v. *Harper*, *supra*. Ang. on Lim. § 174. The account made out and presented by appellants or their attorney to appellee, although not assented to by the latter, purported to be a full statement of the account between appellants and Curran, showing a balance of about $800 to be due the estate of the latter; to be a statement of the whole amount due from appellants; and was equivalent to an open denial that anything more was due. The payment by appellants to appellee of $800, May 25, 1870, though not so stated in the receipt, is reasonably to be taken as having been made by appellants on their part, as for the balance due from them as found by the account rendered. This would seem to amount to an open denial or repudiation of the trust, which required appellee to act as upon an asserted adverse right.

2d. It is next claimed, that even if the statute does apply here, the payment made by appellants of $118.12 on the 6th of September, 1870, takes the case out of the statute.

We do not see that this was such a payment within the five years as would draw the general account after it, because the general account since May 25, 1870, was no longer admitted by appellants to be an open and current account, but they had rendered an account stating the balance due as they claimed, which they had paid, and which was in the full adjustment of it, as may be supposed to have been claimed by them. The collision suit for damages to the "Robert Burns" was pending at the time of the payment made May 25, 1870, judgment in which was afterward rendered in favor of the "Burns," and this payment of $118.12 was the one-fourth part of that judgment. The payment was not on the general account, but was specifically appropriated by both parties to the claim growing out of the collision suit; and it is not perceived how this can be construed into an admission of anything with respect to the general account, much less as a promise to pay. In order to take a case out of the Statute of Limitations, there must be a

promise to pay the debt. It is not sufficient that the debtor admitted the account to be correct, etc., but he must have gone further, and admitted that the debt was still due and had never been paid. *Ayers* v. *Richards*, 12 Ill. 146; *Wachter* v. *Albee*, 80 id. 47.

Holding the plea to be a bar to the suit, the decree will be reversed, and the cause remanded for further proceedings in conformity to this opinion.

Decree reversed.

Afterward, a rehearing in this cause was granted, upon the petition of the appellee.

Mr. SIDNEY SMITH, for the petitioner:

The ruling of this court on the former appeal (83 Ill. 553) was an adjudication against the defence of the Statute of Limitations. If the appellants were not satisfied with that decision their only remedy was by petition for a rehearing.

Having failed to avail themselves of this, they are as remediless as though they had originally failed to set up the Statute of Limitations as a bar to the relief prayed for in the complainant's bill of complaint. *Hallowbush* v. *McConnell*, 12 Ill. 203.

Where the facts are the same upon the second appeal, the decision of this court upon the first appeal is conclusive. *Elston* v. *Kennicott*, 52 Ill. 272.

The court below "is concluded by the legal principles announced by the appellate court" on a former appeal. *Chickering* v. *Failes*, 29 Ill. 294; *Rising* v. *Carr*, 70 id. 596; *Chicago and Alton Railroad Co.* v. *The People*, 72 id. 82; *Johnson* v. *Von Kettler*, 84 id. 315.

After a case has been brought to the appellate court and remanded, "if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be re-heard or examined upon the second." *Roberts* v. *Cooper*, 20 How. (U. S.) 467–81.

Where a case has been before the court above, and a decision made upon the law of the case as presented by the record, and the court below proceeds, in pursuance of the opinion of the court above, and gives judgment accordingly, the judgment will be affirmed, "for the reason that the court below, being bound by the decision of the court above, could not err in giving judgment in conformity to it." *Clerklee* v. *Mundell*, 4 Harr. & John. 497.

See also, to the same effect, *Mong* v. *Bell*, 7 Gill, 244; *Porter* v. *Hanley*, 5 English, 186; *Gill* v. *Williamson*, 1 Porter (Ala.) 321; *Price* v. *Price*, 23 Ala. 609.

The same principle has been applied even in criminal cases. *Marshall's case*, 5 Gratt. 663, and again reported at page 693.

Messrs. BECKER & DALE, contra:

By examining the opinion, it will be seen that the court passed *sub silentio* the question raised by appellants on the former appeal as to the Statute of Limitations. It is insisted that appellants, if they desired still to rely upon the statute, should not have contented themselves with a reversal of the cause on the ground assigned by the court, but should have petitioned for a rehearing, again relying on the statute.

This might be true if the order referring the case to a master was final and irrevocable, or determined anything else than the *liability to account*. But it was merely interlocutory, establishing nothing but such liability, and continued subject to the chancellor's power to modify, alter or vacate, as justice might require. *Gibson* v. *Rees*, 50 Ill. 383.

"The only question at the original hearing is, whether the defendant is an accounting party." Gresley's Eq. Ev. [168.]

"Where the suit is for an account, all the evidence necessary to be read at the hearing is that which proves the defendant to be an accounting party, and then the decree to account follows of course." 1 Daniell's C. P. 857.

Notwithstanding a reference to a master to take an account, and a report by him finding a certain sum due from the de-

fendant, the court may, upon final hearing, dismiss the bill; and this, too, after an appeal and a mandate from the upper court to proceed with the account. *Fourniquet* v. *Perkins*, 16 How. 83.

So complete is the control of the court over its interlocutory orders, that it has been held that a reference to take an account does not preclude the parties from insisting at the final hearing that they ought not to be decreed to account. *Smith* v. *Estes*, 2 Haywood, (N. C.) 338; *Smith* v. *Mallett*, id. 381.

Where there has been no final judgment in a cause, a party may on appeal examine the whole case, and open for consideration all prior or interlocutory decrees any way connected with the merits of the decree from which he has appealed; and this, too, notwithstanding such orders or decrees may have been affirmed by the appellate court. *Price* v. *Nesbit*, 1 Hill Ch. (S. C.) 445.

Even at law, the judgment *quod computet* establishes nothing except the defendant's liability to account, is under the control of the court, and subject to be set aside if improperly entered. *Spear* v. *Newell*, 2 Paine C. C. 267.

Where a defendant at law has failed to plead in bar *plene computavit*, he may still show before the auditors, by an exhibition of the accounts, that nothing is due, or that plaintiff has been fully paid. *Lee* v. *Adams*, 12 Ill. 111.

It has been questioned whether the Statute of Limitations is a proper plea in bar, in the action of account at law. *Bishop* v. *Baldwin*, 14 Vt. 145.

This court, by passing in silence appellants' assignment of error relating to the Statute of Limitations, simply reserved its consideration for some subsequent occasion. A special reservation in the opinion was unnecessary, since, from the nature of the case, and from well established equity practice, an order to account determines nothing but the relationship of the parties.

Per CURIAM: The sole point made upon the rehearing of this case is, that this cause was once before us on a former appeal, (*Quayle* v. *Guild*, 83 Ill. 553,) and that the finding of the court then that the complainant was entitled to an account, and the order remanding the cause for a reference to the master in chancery, to take and state an account between the parties, amounted to an adjudication of this court against the defence of the Statute of Limitations, and precluded it from being afterward insisted on in the lower court. In the decree from which the former appeal was taken, the circuit court found that there had been an accounting between the parties, and ordered the payment to the complainant of the sum which had been found due to him on such accounting. It was insisted in the argument of appellants' counsel on that appeal, among other things, that the Statute of Limitations was a bar to the suit.

We merely found then, that there was nothing in the record to warrant the finding of the lower court that there had been an accounting between the parties, and said: "That complainant is entitled to an account, as prayed for in his bill, is apparent on examination of the testimony. Having ascertained that fact, the court ought to have referred the cause to a master in chancery, to take and state an account between the parties. * * * According to the practice so often declared by this court, where accounts involve large sums of money, and the testimony as to the rights of the parties is conflicting and unsatisfactory, the cause must be referred to a master to render a concise and accurate statement of the accounts, so that the same may be readily comprehended, and any objection taken passed upon understandingly. Because that was not done in this case the decree will be reversed and the cause remanded." This is substantially all that was then decided.

There was no decision of the case on the merits on the former appeal. It was not necessary to consider, nor did the court consider the effect of the Statute of Limitations. The court, by passing in silence appellants' assignment of error relating to the Statute of Limitations, simply reserved the con-

sideration thereof for some subsequent and proper stage of the cause.

The order to account was but an interlocutory order, and only determined the liability to account. *Spear, Carlton & Co.* v. *Newell,* 2 Paine C. C. 267. Notwithstanding a reference to a master to take an account, and a report by him, finding a certain sum due from the defendant, the court may upon final hearing dismiss the bill. *Fourniquet* v. *Perkins,* 16 How. 83; and see *Smith* v. *Estes,* 2 Haywood, 338; *Smith* v. *Mallett,* id. 381; *Price* v. *Nesbit,* 1 Hill Ch. (S. C.) 445. Where the suit is for an account, all the evidence necessary to be read at the hearing is that which proves the defendant to be an accounting party, and then the decree to account follows of course; and any evidence as to the particular items of an account, however useful they may be in a subsequent stage of the cause, would be irrelevant at the original hearing. 2 Dan. Ch. Pr. (Perkins' ed.) 854. The Statute of Limitations was set up here in the answer. When so set up, defendant can not have that part of his answer constituting a distinct and substantive bar disposed of before the cause is ready for hearing on all the pleadings and proofs. *McLin* v. *McNamara,* 1 Dev. & Batt. 408. Hence, the only proper time for passing upon the defence of the statute was not until after the account had been taken, and at the final hearing. There could not have been made a proper application of the Statute of Limitations to the case until there had been a statement of the details of the account.

Upon the taking of the account before the master, after the cause had been remanded, the defendants insisted upon, before him, the defence of the Statute of Limitations, which was overruled by the master, and an exception taken by defendants.

We are of opinion that appellants are not estopped from relying upon the defence of the Statute of Limitations by reason of any action of this court upon the former appeal, and seeing no cause to change our previous decision upon the present appeal, we must adhere to our former opinion herein.

Mr. JUSTICE SCOTT: I do not concur in this decision.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION.

JANUARY TERM, 1879.

EMANUEL SALZENSTEIN *et al.*

v.

WILLIAM MAVIS.

1. TEXAS AND CHEROKEE CATTLE—*statute unconstitutional.* The statute entitled "An act to prevent the importation of Texas or Cherokee cattle into the State of Illinois," (Rev. Stat. 1874, p. 141,) so far as it attempts to prohibit the importation of such cattle, and prevent any person in this State from owning or having such cattle in possession between the first days of October and March following, is void, under the constitution of the United States, as interfering with inter-State commerce.

2. FORMER DECISION—*overruled.* The case of *Yeazel* v. *Alexander*, 58 Ill. 254, holding that the statute to prevent the importation of Texas and Cherokee cattle into this State, etc., was a proper and legitimate exercise of the police power of the State, and not in violation of the constitution of the United States, is overruled.

3. POLICE POWER OF STATE—*must not interfere with commerce.* While a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders, and may prevent persons and animals suffering under contagious or infectious diseases, etc., from entering the State, and, for the purpose of self-protection, may establish quarantine and reasonable inspection

laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. The police power of a State can not obstruct foreign commerce, or inter-State commerce, beyond the necessity of its exercise.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. CHARLES S. ZANE, Judge, presiding.

Mr. L. F. HAMILTON, for the plaintiffs in error:

The grounds of complaint, as alleged in the plaintiff's declaration, are, *first*, that the defendants unlawfully and wrongfully brought Texas and Cherokee cattle into Sangamon county; *second*, that they unlawfully owned them in said county, and *third*, that they unlawfully and wrongfully had them in possession in said county, from which said cattle the native cattle of the plaintiff contracted a disease. It is nowhere alleged how such bringing into the county, ownership or possession became unlawful and wrongful. It is not stated that defendants' cattle were in fact diseased, nor is it stated that defendants knew that their cattle were diseased at the time the plaintiff's contracted such disease. The declaration does not allege that the defendants were guilty of any fault or negligence whereby such disease was communicated, or that the disease was contagious or infectious.

In the absence of a statute, it is not in itself an act of culpable negligence to keep animals having an infectious disease. The owner can not be held responsible for the communication of the disease to other animals, without proof of some fault on his part, other than the mere keeping of such animals on his premises; nor does the fact that his neighbor keeps, to his knowledge, healthy animals upon an adjoining lot, alter the case. Shearman & Redfield on Negligence, sec. 193; *Fisher* v. *Clark*, 41 Barb. 329.

If the declaration shows no cause of action at common law, was there any valid statute giving a right of action? The declaration is apparently framed under "An act to amend an act entitled 'an act to prevent the importation of Texas and

Cherokee cattle into the State of Illinois.'" If this statute is in conflict with the constitution of the United States, the declaration shows no cause of action. That it is, see *Railway Co.* v. *Husen*, 5 Otto, 465.

It may be insisted that the part of the statute which renders the owners and possessors of such cattle in this State liable for all loss occasioned by such ownership or possession, is not in conflict with the Federal constitution.

The right to bring into the State this class of property can not be exercised, if the person owning or possessing it in the State is liable for such ownership or possession, since the right to bring into the State includes the right to possession and ownership in the State.

If the legislature may single out one particular article of commerce and make its simple ownership or possession by any person in the State the sole basis of liability for all loss suffered by reason of such ownership or possession, all inter-State commerce in this class of property is not only regulated by the legislature, but absolutely prohibited.

Messrs. MCCLERNAND & KEYES, for the defendant in error:

The main question presented is the validity or constitutionality of the statute cited (Rev. Stat. 1874, p. 134,) as forming the foundation of the action in the court below. The plaintiffs in error assume the negative, and cite, as supporting their position, *The Hannibal and St. Joseph R. R. Co.* v. *Husen*, 5 Otto, 465. We deny the soundness of this position,—1, upon matters of fact, 2, upon principle, and 3, upon authority.

1. THE FACTS.—The second and third counts proceed upon the fact that the defendants *owned* or *had in possession* in this State a number of cattle, the ownership or possession whereof in the State was prohibited by statute, and that by reason thereof the same cattle spread a disease, whereof the native cattle of the plaintiff became diseased and died.

The difference between the present case and the Missouri case, reduced to its lowest terms, amounts to this,—the former dealt with *persons* and their acts, being or transpiring within the territorial jurisdiction of the State, and with a statute regulating the *internal police* of the same, as to both persons and their acts therein, while the other dealt with persons and their acts, the *situs* of which was external to the territorial jurisdiction of the State, and with a statute affecting an extra-territorial operation.

"All those powers which relate merely to municipal legislation, or which may more properly be called *internal police*, are not surrendered or restrained; and consequently, in relation to these the authority of the State is complete, unqualified and exclusive." Potter's Dwarris' Stat. and Const. L. 461; *Mayor, etc.* v. *Miln*, 11 Pet. 102.

The same power has often been exercised to discriminate betweeen animals and classes of animals, as, stallions and bulls of particular breeds, permitting some and prohibiting others.

2. PRINCIPLE—*police power*. The police power is a part of the law of public necessity, and, abstractly, it is limited only by that law. It is inherent and perpetual in society, and as to the social state stands as the corollary of the natural and inalienable right of personal self-defence. It is also a common law right. When not impaired by organic restraints it may be exercised in its fullest plenitude and vigor. It is commensurate with the sovereignty of the State, and is of necessity despotic, and individual rights of property, beyond express constitutional restraints, must yield to its force. Under it every one having property holds it under the implied liability that its use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. Potter's Dwarris, 444; 2 Kent's Com. 338; *Russell* v. *Mayor of N. Y.* 2 Denio, 461–474; *Mayor of N. Y.* v. *Lord*, 17 Wend. 285; *Stone* v. *Mayor of N. Y.* 25 Wend. 157; *Van*

Wormer v. *Mayor of Albany*, 15 Wend. 264; Puffendorff, B. 2, ch. 6; *Commonwealth* v. *Alger*, 7 Cush. 53–85; *The Saltpetre Case*, 12 Coke, 13; *Wynhamer* v. *The People*, 13 N. Y. 402, id. 451; 4 Blackstone's Com. 162; *Stuyvesant* v. *Mayor of* N. Y. 7 Cow. 604; *Hart* v. *Mayor of Albany*, 9 Wend. 593; *Thorp* v. *R. & B. R. R. Co.* 27 Vt. 149; *Hyeman* v. *West*, 16 Barb. 353, S. C. 13 N. Y. 1; *Mayor, etc.* v. *Miln*, 11 Peters, 102.

3. OBJECTS OF ITS EXERCISE.—Generally these objects are to conserve the comfort, safety and welfare of society; particularly, they are to protect the lives, limbs, health and quiet of persons in the State, and all property therein; to prevent the spreading of conflagrations, even by razing houses to the ground; to abate nuisances; to repair highways; to purge public markets of infectious articles; to cast into the sea merchandize on shipboard infested with pestilence; to prohibit the storage of powder within cities and near to habitations and public highways; to restrain and regulate the erection of wooden buildings within cities and populous towns; to prohibit buildings from being used as hospitals for contagious diseases and the carrying on of noxious or offensive trades; the erection or raising of dams, which may cause stagnant water to stand or spread over lands near inhabited towns, villages or cities, thereby causing unwholesome exhalations dangerous to health and to life; to prohibit railroads from carrying freight, the legislature having first declared the same to be prejudicial to the public interest.

4. POLICE POWER—*distinction.*—This power antedates commerce, and its exercise forms a necessary condition, not only to the development, but the creation of commerce, and is therefore a higher and superior power. Both may be exercised, but when they come in conflict upon a vital point, upon principle the latter must yield. It has been held that State laws establishing quarantine and health laws of every description, carried even to the extent of destroying private

property, when infected with disease, or otherwise dangerous, fall within the proper bounds of State police. In this connection the following authorities are cited: Potter's Dwarris, 458; Cooley Const. Lim. 577, 584, 586; *Vanderbilt* v. *Adams*, 7 Cow. 348; *Mayor, etc.* v. *Miln*, 11 Pet. 102; *Gibbons* v. *Ogden*, 9 Wheat. 203; *Stillwell* v. *Raynor*, 1 Daley, 47; 12 How. U. S. R. 299; *Cisco* v. *Roberts*, 36 N. Y. 292; *Gilmore* v. *Philadelphia*, 3 Wall. 730; *Houston* v. *Moore*, 5 Wheat. 49; *Benedict* v. *Vanderbilt*, 25 How. Pr. R. 209.

5. POLICE POWER—*who to judge of its necessity.*—The State legislature are the sole judges as to the expediency of making police regulations interfering with the rights of persons and property, when such regulations are not prohibited by the constitution. *Varick* v. *Smith*, 5 Paige, 160.

Every sovereign State possesses, within itself, absolute and unlimited power, except so far as it is prohibited by the fundamental law. There is no arbiter of the measures necessary to protect life and property beyond the State itself. Such measures taken by the State must be held to be just and right, and from them, as an emanation of the ultimate power of the State, there can be no appeal. Potter's Dwarris, 455.

"The facts and condition of things which render a law necessary for the public welfare, are generally to be determined by the legislature."

All Texas or Cherokee cattle freshly brought from that State or the Indian country into this State, within the time prohibited, possess a capacity of imparting a deadly disease to native cattle. That being true, the legislature is a constitutionally competent judge of the occasion for such a prohibition and its limitations. There was competent power to impose some restraint, nor was the legislature bound to adjust nicely the character of the restraint. The power carries with it all reasonable means to effectuate it. It is not the province of the courts to supervise the exercise of this power, it being presumed that the legislature acted with wisdom and discretion. *Yeazel* v. *Alexander*, 58 Ill. 254.

6. The record does not show that defendants below were not citizens or residents of this State, owning or possessing the cattle within the State, otherwise than merely incidentally to the transportation of the cattle, as an act of commerce, through the State. On the contrary, the evidence showed that the defendants not only owned, but had the cattle in their possession in the town, county and State alleged in the declaration.

In conclusion, the recognition by the Supreme Court of the United States, in the case cited, of the power of the legislature to provide for a commission to inspect such cattle at the border of the State, in respect to their sanitary condition, preliminary to their admission into, or exclusion from the State, concedes, in principle, the whole question in controversy; for the concession of the power of inquiry is in effect the concession of the power of final determination,—the power of Congress to regulate commerce with foreign nations and between the States to the contrary notwithstanding.

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

This was an action on the case, brought by William Mavis in the circuit court of Sangamon county, against Emanuel Salzenstein and Charles Bois.

The declaration contains three counts. In the first it is averred that plaintiff was the owner of certain native cattle in a certain township in Sangamon county; that defendants unlawfully and wrongfully brought into said county and State certain Texas and Cherokee cattle, and that said Texas and Cherokee cattle communicated to the native cattle a pestilence and disease while the native cattle were lawfully grazing and being in said county, of which disease the native cattle died. The second count differs from the first in averring that the defendants unlawfully and wrongfully owned Texas and Cherokee cattle in the said county of Sangamon; while the third count avers that the defendants unlawfully and wrongfully

were in possession of Texas and Cherokee cattle in the county of Sangamon, in the State of Illinois.

To the declaration the general issue was pleaded, and on a trial of the issue before a jury, the plaintiff recovered a verdict and judgment, to reverse which this writ of error was sued out by defendants, by whom it is claimed that no cause of action is set out in either count of the declaration.

The declaration was, doubtless, framed under the provisions of "An act to amend an act entitled 'an act to prevent the importation of Texas or Cherokee cattle into the State of Illinois,'" (Rev. Stat. 1874, page 141,) the first section of which declares: "That it shall not be lawful for any person or persons, railroad company or other corporation, or any association of persons, to bring into this State any Texas or Cherokee cattle, except between the first day of October and the first day of March following, of each year." The second section provides: "That it shall not be lawful for any person or persons, or railroad company or other corporation, or association of persons whatever, within this State, to own or have in possession or control any Texas or Cherokee cattle, at any time, which may have been brought into this State at any time except between the first day of October and the first day of March following, of each year."

In *Yeazel* v. *Alexander*, 58 Ill. 254, the validity and constitutionality of an act of the legislature, approved February 27, 1867, was considered, which act provided, that it should not be lawful for any one to bring into this State, or own or have in possession, any Texas or Cherokee cattle, and it was there held that the act was a mere exercise of the police power of the State, which has never been delegated to the Federal government, and which it is competent for the State to exercise.

The two sections of the act under which the declaration in this case was drawn, do not differ in principle from the act of 1867, which was held to be constitutional by this court in the case of *Yeazel* v. *Alexander;* and were we not concluded by a higher authority, we would be inclined to adhere to the con-

struction of the statute given by the court in that case. But the question whether a statute of a State violates the constitution of the United States, is one to be settled and determined by the Supreme Court of the United States, and however much a State court might feel disposed to differ from the view of the Federal court, the decision of the Federal court must control, and it is the duty of the State courts to conform to and follow the decision of the Supreme Court of the United States on a question of that character.

The only question, therefore, to be considered is, whether the Supreme Court of the United States has held the act in question to be in conflict with the Federal constitution. If it has, the judgment will have to be reversed.

On the 23d day of January, 1872, the legislature of the State of Missouri passed an act, the first section of which provided: "That no Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State between the first day of March and the first day of November, in each year, by any person or persons whatsoever. * * * *Provided*, that when such cattle shall come across the line of this State loaded upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of such transportation." The second section declares: "If any person or persons shall bring into this State any Texas, Mexican or Indian cattle in violation of the first section of this act, he or she shall be liable in all cases for all damages sustained on account of disease communicated by said cattle."

An action having been brought in the State of Missouri against the Hannibal and St. Joseph Railroad Company for damages claimed to have been caused by a violation of the act, it was contended by the railroad company that the act was

in conflict with sec. 8, art. 1, of the constitution of the United States, which declares that Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. The objection having been overruled in the State courts, the case was taken to the Supreme Court of the United States. It was there held, that the statute was more than a quarantine regulation and not a legitimate exercise of the police power of the State, and that the act was in conflict with the constitution of the United States, which has been heretofore cited. In the opinion it is said: "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while, for the purpose of self-protection, it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. * * * The statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. * * * Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the constitution of the United States was designed to secure. In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. *Yeazel* v. *Alexander*, 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, these courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature, and not for the courts. With this we can not concur. The police power of a State

can not obstruct foreign commerce or inter-State commerce beyond the necessity for its exercise, and, under color of it, objects not within its scope can not be secured at the expense of the protection afforded by the Federal constitution." *Railway Company* v. *Husen*, 5 Otto, 465.

We have quoted quite liberally from the decision, so that it may be seen the decision is broad enough to include the statute of our State, as well as that of the State of Missouri. Indeed, the doctrine of the *Yeazel case*, where our statute was involved and sustained, is expressly condemned in the decision.

It is, however, contended by plaintiff, that the facts averred in the second and third count of the declaration distinguish this case from *Hannibal and St. Joseph Railroad Co.* v. *Husen*, in this: that these counts proceed on the theory that defendants owned or had in possession cattle in this State, the ownership or possession whereof in this State was prohibited by our statute, while in the case cited the Missouri statute prohibited the transportation of cattle from another State through the State of Missouri. We can not, however, understand how the right to transport and bring into this State Texas cattle can be exercised, if the owning or possessing such cattle within the State is prohibited. The right to transport from another State into this State necessarily includes the right of possession and ownership in this State. If the latter is prohibited, the former right must fall with it. If the legislature has the constitutional right to declare that a person shall not possess or own a certain kind of property within the State which may be raised or produced in another State of the Union, it logically follows that all inter-State commerce in such property is both regulated by the legislature and also prohibited. We do not understand that the legislature can do, indirectly, that which the constitution of the United States prohibits to be done, directly. Such, however, would be the case if the theory of the plaintiff in this case was sanctioned.

Under the decision cited, which must control this case, we perceive no tenable ground upon which the judgment can be sustained. It will, therefore, be reversed, and the cause remanded.

Judgment reversed.

PETER FOLSOM

v.

THE SCHOOL DIRECTORS OF DISTRICT NO. 5, ETC.

1. PLEADING—*of the declaration—in suit against school directors.* It is not necessary, in a declaration against a *quasi* corporation of limited powers, such as the school directors of a district, that the cause of action should be specifically set out, so that the court may see affirmatively that the liability sued upon is one authorized by the statute. Where the common counts are used, and there is any case embraced in them for which the defendants under any circumstances could become liable, the allegations contained therein must be held to embrace everything in detail necessary to sustain the action.

2. SCHOOL DIRECTORS—*power to borrow money for school house.* For the purpose of building school houses, purchasing school sites, or for repairing or improving the same, school directors, by a vote of the people of their district, are authorized to borrow money, and give bonds therefor executed by any two of them.

3. SAME—*power to give notes or orders.* The power to borrow money carries with it, at common law, independent of the statute, the power to give evidence of the loan. The power in school directors to give bonds for money borrowed, given by statute, is not a limitation, but an enlargement of their powers. An order given by them on their treasurer, or other simple evidence of indebtedness for money borrowed for school house purposes, is valid, and may be enforced against the district.

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

This is a suit in assumpsit for money borrowed by the defendants of one S. A. Holbrook, who transferred the orders issued therefor by indorsement to the plaintiff. The defendants demurred to plaintiff's declaration, the demurrer was sustained by the court, and plaintiff appeals. The first count is as follows:

Statement of the case.

"In this action Peter Folsom, the plaintiff, by Bloomfield, Pollock & Campbell, his attorneys, complains of the School Directors of District number 5, township 24 north, range 4 east, county of McLean, and State of Illinois, a body corporate by the name and description aforesaid, defendants, in a plea of trespass on the case on promises. For that whereas, heretofore, to-wit, on the 1st day of June, A. D. 1871, at the county aforesaid, the defendants were duly authorized by a majority vote of the electors of said district, at an election then and there called, and conducted in the manner prescribed in the forty-second section of the statute in relation to public schools then and there in full force and effect, to build a school house in and for the district aforesaid, and to borrow money for that purpose. And, in pursuance of the power and authority given by the aforesaid vote, afterwards, to-wit, on the day and year aforesaid, at the county aforesaid, Lewis B. Zoll and William F. Hemstreet, then and there being two of the school directors of the aforesaid district, the former then and there being the president and the latter the clerk of the aforesaid board of school directors, and then and there constituting a majority of the said board of school directors, the defendants in the action, borrowed of one S. A. Holbrook the sum of $309, for the uses and purposes aforesaid, and then and there executed and delivered to the said S. A. Holbrook their certain obligation in writing, in substance as follows, to-wit:

"STATE OF ILLINOIS, } ss.
McLean County. }

Treasurer of township No. 24 north, range No. 4 east, in said county, one year after date, pay to S. A. Holbrook, or bearer, the sum of $309 out of any money belonging to school district No. 5, in said township, for purposes of building school house, with interest at the rate of ten per cent per annum from date till paid, said interest payable semi-annually.

By order of the board of directors of said district.

LEWIS B. ZOLL, *President.*

June 1, 1874. WM. F. HEMSTREET, *Clerk.*

"And the said S. A. Holbrook afterwards, to-wit, on the 15th day of June, A. D. 1871, at the county aforesaid, assigned the said obligation by indorsement thereon under his hand to the plaintiff, by means whereof the defendants then and there became liable to pay to the plaintiff the amount of the said obligation, according to the tenor and effect thereof, and being so liable, the defendants, in consideration thereof, then and there promised the plaintiff to pay him the said amount according to the tenor and effect of the said obligation. And although the plaintiff, long after the maturity of the said obligation, to-wit, on the 15th day of June, A. D. 1872, at the county aforesaid, demanded the payment thereof of the township treasurer, nevertheless the said amount due thereby nor any part thereof hath been paid, but remains due and unpaid."

The second count is in like form, upon a similar order for $318 issued to the same party, and in like manner indorsed to the plaintiff. There are also added the common counts.

The sole question presented by this record is, did the court err in sustaining this demurrer. The plaintiff insists that if he has, by his declaration, properly set forth any cause of action which he is entitled to maintain against the defendants, then the demurrer should have been overruled.

Mr. IRA J. BLOOMFIELD, for the appellant.

Messrs. ROWELL & HAMILTON, for the appellees.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

No objection is perceived to the common counts, and it was plainly error to sustain a demurrer to a declaration containing these counts. The judgment in this case, therefore, must necessarily be reversed.

It is insisted by counsel for appellees, that in declarations against a *quasi* corporation of limited powers, such as the school directors of a district, the cause of action must be specifically set out, so that the court may see affirmatively that

the liability sued upon is one authorized by the statute. No authority is produced in support of this position on the question of pleading. It would seem that if there be any case embraced in the common counts, for which the defendants under any circumstances could become liable, the allegation contained in the common counts must be held to embrace everything in detail necessary to sustain the action.

It is insisted by appellant, that the first count in the declaration is good, and in this we are inclined to think that he is correct.

In the case of *Clark* v. *The School Directors*, 78 Ill. 474, it was held that the purchase by school directors of libraries and apparatus on credit was not authorized by the statute, and that money for that purpose could only be appropriated *generally* when the district had "surplus funds, after all necessary expenses are paid." An examination of the statute which led to that decision shows that the mode of procuring furniture, fuel, libraries and apparatus by the directors, which is authorized by the statute, was to levy an annual tax on the taxable property of the district or to appropriate surplus funds for that purpose. In that case the apparatus was purchased upon a credit, there being no evidence that there was a tax levied to raise a fund for that purpose, or that there were surplus funds in the treasury at the time of the making of the contract. The contract was held to be *ultra vires*.

The statute provisions in relation to the subject matter stated in this declaration are far otherwise. Sec. 47, p. 962, Rev. Stat. 1874, provides that "for the purpose of building school houses or purchasing school sites, or for repairing or improving the same, the directors, by a vote of the people, * * * may borrow money," (issuing bonds executed by two officers, or at least two members of the board.)

The declaration alleges, that the defendants, by a vote of the people, properly held, were authorized to complete the school house and to borrow money for that purpose, and that they did borrow the money of one Holbrook and executed

and delivered to him the orders stated in the declaration for such sum of money.

It is suggested that the use of the words in sec. 47, "issuing bonds by the officers," etc., is a limitation upon the powers of the board of directors. This we think a misconception of the statute. Power to borrow money carries with it, at common law, the power to give evidence of the loan,—usually carries with it the power to execute promissory notes and simple contracts incident to the loan; but mere power to borrow money does not carry with it as an incident the power to execute a bond, or an instrument under seal. These words, therefore, authorizing the school directors to execute bonds for borrowed money, instead of being used as a limitation of the power and a declaration that they were incapable of borrowing money unless a bond be given, when properly construed are an enlargement of the power, authorizing the directors, not only to give those assurances which were necessarily incident to the power of borrowing money, but to go further and execute a higher grade of securities,—to execute bonds under seal by which the directors might be bound.

The majority of the court are of opinion that the first count in the declaration is good.

The judgment must be reversed and the cause remanded.

Judgment reversed.

THE WABASH RAILROAD COMPANY
v.
HENRY HENKS.

1. APPEALS FROM THE APPELLATE COURTS—*what questions to be considered.* The 89th section of the act of 1877 amendatory of the Practice act, expressly limits the power of this court, on appeal or error, to the determination of questions of law, and prohibits the assignment of error which shall call in question the determination of the inferior or Appellate courts upon controverted questions of fact, except in criminal cases, and cases involving a franchise, a freehold, or the validity of a statute.

Syllabus.

2. But in cases not within the exception above stated, this court may consider the facts so far as it may be necessary to determine whether the law has been properly applied to the facts, though for no other purpose.

3. PRACTICE—*as to the mode of bringing the facts before this court.* Upon a record brought to this court in which the Appellate court certifies that there was evidence tending to prove a particular controverted point, this court can determine as accurately whether the law has been properly applied as where all the evidence is given in the transcript;—and in respect to all those cases in which this court is precluded from examining as to the determination of the facts, it is much the better practice to make such a certificate.

4. SAME—*presumption as to existence of facts in reference to instructions.* Where an instruction is given, it will be presumed, unless the certificate of the Appellate Court is to the contrary, that there was evidence upon which to base it;—and when an instruction is refused, it will be presumed the facts did not require it unless the certificate shows a different state of case.

5. NEGLIGENCE—*as to speed in street and public crossings.* Railroad companies in cities and thoroughfares must conduct their trains and regulate their speed with reference to the safety of the public, or they will be liable for damages resulting from their negligence or willfulness in this respect. The running of a train at a street crossing, where many are constantly passing, at a greater speed than is allowed by law, is not only carelessness, but the act is also willful. At such places the engine-driver, as well as persons crossing the railroad, must exercise more care than at other places of less peril.

6. The law which prohibits the running of railroad trains at a greater speed than ten miles an hour in cities, is not a license to run at such speed in all cases. If, in some places within a city, that would be a dangerous rate, it would be negligence to run at that speed. The rate of speed must conform to the safety of the public at all places in a city where persons have an equal right to travel with the railroad company to run its trains.

7. SAME—*rule of comparative.* A person struck and injured by a train of cars within the limits of a city at a street crossing, may recover for the injury, of the company, if at the time of the collision the train was running at an improper rate of speed in reference to the plaintiff's safety, even if he was guilty of slight negligence, provided the negligence of the company was gross when compared with that of the plaintiff.

8. INSTRUCTION—*in respect to negligence—ignoring the rule as to comparative negligence.* In an action to recover for injury resulting from negligence of defendant, where the alleged negligence consisted in running a railway train at too high a rate of speed within a city, the jury were instructed that if it appeared the train was running at a greater rate of speed than was allowed by ordinance, and injury resulted therefrom, it would be presumed the injury was occasioned by the negligence of the defendant, and the defendant would be liable "unless the presumption of negligence is overcome by the evidence."

The question of comparative negligence was in issue in the case, and the evidence was conflicting. There was another instruction given for the plaintiff which stated the rule of contributory and comparative negligence, but in view of the conflicting character of the evidence, and therefore the necessity for accurate instructions, the former instruction was held erroneous because it failed to inform the jury in what manner the presumption of negligence might be rebutted. It should have stated the rule of comparative negligence, or referred to the instruction which did state the rule.

9. SAME—*an instruction erroneous in itself—whether cured by others in the series.* It has been held, in an action to recover for injury resulting from negligence, where there was a conflict in the evidence on the issue of comparative negligence, that an improper instruction, ignoring that question, was not cured by others which did state the rule accurately.

10. SAME—*when strict accuracy is required.* Where the evidence is conflicting, and it is doubtful which way it inclines, the jury should be accurately instructed, or the judgment will be reversed.

APPEAL from the Appellate Court of the Third District; the Hon. CHAUNCEY L. HIGBEE, presiding Justice, and the Hon. OLIVER L. DAVIS, and Hon. LYMAN LACEY, Justices.

This was an action on the case, brought by the appellee against the appellant, to recover damages for a personal injury received by a collision of the defendant's train, on August 31, 1877, with a wagon in which the plaintiff was riding. The collision took place in the city of Springfield, at the intersection of Monroe street with defendant's track, while the wagon was in the act of crossing the track. The trial in the circuit court resulted in a verdict and judgment of $4000 in favor of the plaintiff below, which judgment was affirmed by the Appellate Court.

Messrs. HAY, GREENE & LITTLER, for the appellant.

Messrs. MCCLERNAND & KEYES, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The Appellate Court having determined that the evidence preserved in the record sustains the finding of the jury in this case, we must, under the statute, consider the verdict conclu-

sive of the facts. Regarding the facts as settled we can only, look to ascertain whether the court erred in its rulings and in giving or refusing instructions.

This is the practice established by the act of 1877. The 89th section of that act expressly limits the power of this court, on appeal or error, to the determination of questions of law, and prohibits the assignment of error which shall call in question the determination of the inferior or Appellate courts upon controverted questions of fact, excepting in the cases enumerated in the preceding section. The cases referred to in that section are criminal cases, and cases involving a franchise or a freehold, or the validity of a statute.

This case does not fall within either of the enumerated classes, and it must, therefore, be governed by the 89th section of the act. This legislation has restored the practice as it was before the statute authorized the assignment of error on the verdict of the jury. It takes from this court the consideration of facts, unless it be to determine whether the law has been properly applied to the facts. The finding of the facts by the Appellate Court must be considered, by us, as conclusive. When the evidence is returned to us in a bill of exceptions, we may, no doubt, look into it, for the purpose only of determining whether instructions are properly given, modified or refused. But when the Appellate Court certifies that there was evidence tending to prove a particular controverted point, we can determine as accurately whether the law has been properly applied, as where all of the evidence is brought to this court in the transcript. Such a certificate is greatly preferable, as it does not encumber the record, and reduces the expense of litigation very largely. Thus, it will be seen that it is wholly unnecessary, in a case of this character, to embody the evidence in the transcript brought before us.

Where an instruction is given, we will presume, unless the certificate of the Appellate Court is to the contrary, that there was evidence upon which to base it. And when an instruction is refused, we will presume that the facts did not require

it, unless the certificate shows there was evidence upon which to base it. Where the certificate states there was evidence tending to prove an issue of fact, we can readily determine whether an instruction is properly given, modified or refused, and the Appellate Court can readily certify that there was evidence upon which to base the instructions, or, if not, which were given without such evidence. Or, the certificate can state that the evidence tended to prove specified facts from which legal propositions can be raised on the instructions. Where evidence has been offered, and admitted or rejected, the certificate, with the pleadings, will readily disclose the question as to whether the ruling of the court was correct. In such a case it is unnecessary to present all the evidence, and to do so would be improper practice.

Were the jury properly instructed as to the law on the facts as found by the jury and the Appellate Court? They were told, by the second instruction given for the plaintiff, that the city ordinance restrained the defendant company from running its trains at a greater rate of speed than ten miles an hour in its limits. "And if the jury believe, from the evidence, that defendant did run its train through said limits at a greater rate of speed than ten miles an hour, as charged in plaintiff's declaration, and that, by so running its trains at said rate of speed, the said train struck and hurt plaintiff, then, in such case, such hurt shall be presumed, under the statute of this State, to have been negligence of the defendant, or its agents, and the defendant is liable in damages for such hurt, unless they shall further believe, from the evidence, that the presumption of negligence is overcome by the evidence."

The Appellate Court has not certified that there was evidence tending to prove that both parties were guilty of negligence, but we may, as the evidence is in the transcript, examine it to see whether the evidence raised that issue. But appellee, by his fifth instruction, asked, and the court instructed the jury, that, although plaintiff was guilty of negligence, "yet, if they further believe that defendant's negligence was gross,

and the plaintiff's negligence was slight compared with defendant's negligence, and the plaintiff received injury from the stroke of defendant's train, under these circumstances the defendant is liable for such injury."

From the fact the court below gave this instruction, we must conclude comparative negligence was an issue before the jury, and that there was evidence tending to prove it. If there was no such evidence, the plaintiff would not have asked the instruction, nor would the court have given it, and the evidence does show that it was an issue.

The Appellate Court has certified that the evidence was conflicting, and in such a case it is important that the jury should be accurately instructed. And this second instruction does not require the consideration of comparative negligence by the jury. It is true, it concludes by telling them that the presumption of negligence arising from running the train at a greater rate of speed than ten miles per hour, in the city limits, might be overcome by evidence, but it fails to tell the jury in what manner the presumption may be overcome by evidence,—whether by proving that rate of speed was not negligence, or by the negligence of appellee, or in some other mode. The instruction should have been qualified by stating the rule of comparative negligence, or by referring to the fifth of appellee's instructions.

We have no means of learning whether the jury may not have been controlled by this instruction in finding their verdict, notwithstanding they may have believed the plaintiff's negligence was not slight or that of appellant was not gross. Where the evidence is conflicting and it seems to be doubtful which way it inclines, we will reverse, unless the jury are accurately instructed. The Appellate Court certifies it was conflicting, and we will presume it was, therefore, not free from doubt. This instruction was inaccurate and should have been modified.

It is also insisted, that the fourth of appellee's instructions was wrong, and calculated to and did mislead the jury. It is as follows:

"It is proper for and the duty of the jury, to consider all the circumstances attending the injury received by the plaintiff, and complained of by him in his declaration, and, upon such consideration, to determine whether the train was running at an improper rate of speed, in reference to plaintiff's safety, at the time and when he was hurt."

It was one of the issues made by the pleadings, whether the train was running at an improper rate of speed at the time and place of the accident, and to that extent the instruction was undoubtedly correct.

The averment in the first count of the declaration is, that appellant improperly drove its engine, and, by negligence and carelessness, appellee was injured. Now, this instruction, so far as it directed the jury to consider whether the train was running at an improper rate of speed, was only in accordance with the averment in the declaration, and had it been limited to the safety of the community, there would have been no objection to it. There can be no doubt that railroad companies in cities and thoroughfares, where there is reason to suppose persons will be, are under a legal obligation to regard the safety of such persons. They must conduct their trains and regulate their speed with reference to the safety of the public at such places, or be liable for damages resulting from such negligence or willfulness.

When an engine-driver, at a street crossing, where he knows persons are constantly passing in large numbers, runs at a higher rate of speed than is allowed by law, he must intend the act, and if so, it is willful, and can not be regarded as mere carelessness. Or, where he passes such a place at a high rate of speed, knowing that almost certain injury must be inflicted on some one, it amounts to willfulness, and not mere carelessness. He must have due regard for human life. He is not permitted by any law, human or divine, to thus destroy human beings who are exercising a legal right, as fully as he is, in crossing such places. Even if individuals are negligent in the exercise of their rights, they do not thereby forfeit their

lives, so as to authorize him to destroy them. He knows or should know that all persons are not capable of exercising the utmost degree of diligence, and many not a very high degree of diligence, and others, again, incapable even of an ordinary degree of care. He has no right to presume all persons will exercise the highest degree of diligence possible, as that is not required: for if they did, then he need not observe any, the slightest degree of care. At such places the engine-driver, as well as the person crossing the railroad, must exercise more care than at other places of less peril, because they both know that the danger is greater.

It is urged that the law has licensed these trains to run at a rate of speed not exceeding ten miles an hour in cities.

This is clearly a misapprehension. The law prohibits their running at a greater rate of speed. But if, in some places in a city, that would be a dangerous rate, it would be negligence to run at that speed. They must conform the rate to the safety of the public at all places in the city where persons have an equal right to travel as the company have to run their trains. The legislature had no intention to permit engineers to run at such a rate of speed, where it would necessarily, or even probably, produce the death of individuals.

But the vice of this instruction is, that it required the company to run its trains with reference to appellee's safety, without any regard for his conduct. He was not absolved, as this instruction seems to imply, from all care in crossing the track of the railroad. It would authorize a recovery, although appellee was guilty of even gross negligence. Had it been qualified by informing the jury that they might determine whether the train was running at an improper rate of speed, in reference to plaintiff's safety, at the time he was hurt, if he was even guilty of slight negligence, and that the company was guilty of gross negligence when compared, then there could have been no error in the instruction. But it is not so limited, but is far from it.

On an examination of all the instructions given we fail

to find that these instructions were so qualified as to prevent their misleading the jury. They, for aught we can see, may have acted upon them and disregarded the others, and as the evidence was conflicting, they should have been properly modified or refused.

In the case of *Chicago and Alton Railroad Co.* v. *Murray*, 62 Ill. 326, it was held, that in a case like this, of conflict on the issue of comparative negligence, an improper instruction, ignoring that question, was not cured by others that stated the rule accurately, and the judgment was reversed.

The Appellate Court, for the error in giving these instructions, should have reversed the judgment of the circuit court. The judgment of the Appellate Court is, therefore, reversed, and the cause remanded.

Judgment reversed.

SARAH J. CORNWELL *et al.*

v.

JACOB CORNWELL.

1. PAROL EVIDENCE—*to locate land from description.* Parol testimony is admissible to aid in locating land by the description contained in a deed or mortgage, and that is not, in fact, reforming the deed.

2. SAME—*to show what land grantor owned.* The parol testimony of a witness as to what the records show in relation to the land owned by a party at the time of the execution of a mortgage, is not admissible. The deeds, or the record of the same, where the originals can not be obtained, are the best evidence.

3. DESCRIPTION—*aiding uncertainty therein.* Where land in a mortgage is described as, "a certain tract or parcel of land, containing about seventy acres, being a part of the E. ½ S. E. ¼ sec. 17, T. 21 N., R. 2 W., or however else the same may be bounded or described," the same may be identified and located by proof that the mortgagor, before the execution of the mortgage, owned the east half south-east quarter section 17, containing 80 acres, and had conveyed a part thereof, which, deducted, would leave "about seventy acres."

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

Messrs. PARKS & ALLEN, for the appellants:

The deed of a married woman can not be reformed without her consent. *Trustees, etc.* v. *Davidson,* 65 Ill. 126; *Hutchinson* v. *Huggins,* 59 id. 34; *Moulton* v. *Hurd,* 20 id. 143.

When no particular part of a tract is conveyed, and the evidence only shows how much the grantor owned, while the description is for less than he owned, the description is void for uncertainty. *Colcord* v. *Alexander,* 67 Ill. 584.

When a certain number of acres in a tract are conveyed without designating in what part of the tract they are situated, the deed is void for uncertainty. *Shackleford* v. *Bailey,* 35 Ill. 391.

When the description is ambiguous on its face, that is, where a patent ambiguity exists, no evidence is admissible to explain it, and the deed is void. *Purinton* v. *Northern Illinois Railroad Co.* 46 Ill. 300; *Marshall* v. *Gridley,* 46 id. 252; *Shirley* v. *Spruce,* 4 Gilm. 601; 1 Greenl. Ev. p. 345, sec. 300; 2 Starkie's Ev. part 1, p. 755; Gresley's Eq. Ev. 198.

Messrs. HOBLITT & STOKES, for the appellee:

The number of acres being given and the tract of land embracing them being given, the deed is valid under the authority of *Smith* v. *Crawford,* 81 Ill. 296, and the authorities there cited.

As to the ambiguity of the mortgage, counsel also cited 1 Greenl. Ev. sec. 298; *Clark* v. *Powers,* 45 Ill. 283.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was to foreclose a mortgage, made by Abram Cornwell, since deceased, his wife joining with him in the execution, on premises described as follows: "A certain tract or parcel of land containing about seventy acres, being a part of the E. ½ S. E. ¼ sec. 17, T. 21 N., R. 2 W., or however

else the same may be bounded or described," to complainant to secure the promissory note of Abram Cornwell, bearing date January 20, 1866, payable one year after date, to the order of complainant, with interest at the rate of ten per cent per annum.

Although the bill asks that the mortgage may be "reformed and corrected" so as to show a more accurate and definite description of the premises embraced in the mortgage, it is conceded it can not be reformed as against the wife of the mortgagor. We do not understand it was the purpose, in introducing testimony, to have the mortgage reformed, but it was simply to aid in locating the land by the description contained in the mortgage; and that is allowable, under the decision in *Colcord* v. *Alexander*, 67 Ill. 584. That is not, in fact, reforming the mortgage as to the wife of the mortgagor or any one else.

It was attempted to prove that the mortgagor owned the whole of the east half south-east quarter described, and that, prior to the execution of the mortgage, he had conveyed a part of the tract, which, deducted, would leave "about 70 acres." But the testimony offered to prove that fact we think was not the best evidence accessible for that purpose. The only evidence on that question was the oral testimony of Hahn and the abstract of title made by him. The witness, as we understand the record, was permitted to state what the record showed. That was not allowable under any rule of evidence with which we are familiar. The deeds, or the record of the same if the originals could not be obtained, were the better evidence and ought to have been produced. The description given by the witness Hahn, of the tract which it is said the mortgagor had previously conveyed, does not bound any tract of land. The deed itself, or the record, would show what land was, in fact, conveyed.

On account of the admission of improper evidence over the objection of defendants, the decree will be reversed and the cause remanded.

Decree reversed.

Syllabus.

JAMES A. LOCKE *et al.*

v.

MARY R. CALDWELL.

1. LIMITATION—*when a bar to equity of redemption.* It is a well-settled general rule that twenty years' possession by the mortgagee, without account or acknowledgment of any subsisting mortgage, is a bar to the equity of redemption, unless the mortgagor can bring himself within the proviso in the Statute of Limitations.

2. SAME—*when mortgage is barred.* It is the general rule that if the mortgagor, after forfeiture, has been permitted to retain possession for twenty years, the mortgage will be presumed to have been discharged, unless circumstances can be shown sufficiently strong to repel the presumption, as, payment of interest, a promise to pay, an acknowledgment by the mortgagor, and the like.

3. SAME—*to bar right of redemption from mortgage.* An actual and not a constructive possession by the mortgagee for the period of twenty years is necessary to bar the right to redeem from the mortgage. In general, the respective rights of mortgagee and mortgagor, with regard to foreclosure on the one hand and redemption on the other, are treated as mutual and reciprocal, so that when the one is barred so is the other. A mortgagor or his assignee was allowed to redeem from the mortgage thirty-five years after condition broken, where the land remained wild and vacant until a year before bill filed, and, the right to redeem existing, it was also held that the right to foreclose the mortgage was not barred.

4. SAME—*action on note, when defendant is out of State.* Under the statute, except in the case of real or possessory actions, when the defendant shall be out of the State any time during which a suit may be brought, the action may be brought on his return to the State, and the time of his absence from the State shall not be taken as part of the time limited.

5. PAYMENT—*presumption, from lapse of time.* There can be no presumption of payment of a mortgage debt from lapse of time, so long as the time of limitation provided by statute for the case has not run against the debt.

6. EQUITY—*stale claims—in equity.* A mortgagee will not be barred in equity on the ground of staleness, even after the lapse of thirty-five years, when the mortgagor is out of the State most of that time, and has apparently abandoned his equity of redemption, and the mortgagee has constantly asserted his claim by the sale of a part of the mortgaged premises, and paying the taxes every year on the remainder, and no adverse claim has been asserted.

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

Messrs. WARREN & POGUE, for the appellants.

Mr. HENRY C. WITHERS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in equity, filed in the circuit court of Greene county on January 4, 1875, to foreclose a mortgage given by David Locke to John Caldwell on the 13th day of April, 1839, and duly recorded on the same day, on the east half of the south-east quarter of section 22, and the west half of the south-west quarter of section 23, in township 10 north of range 13 west of the third principal meridian, in the county of Greene, in this State, also, lot 198 in Carrollton, in said county, to secure the payment of a promissory note of even date with the mortgage, made by Locke to Caldwell for $300, payable in twelve months, with interest at the rate of twelve per cent per annum. A decree of foreclosure was granted, and the defendants appealed.

The defence set up was, the bar of the Statute of Limitations, and the staleness of the claim.

The following facts appear: The town lot was vacant and unimproved, and the land was wild, unimproved timber land, and the latter so continued until in April, 1874, when a son of the mortgagee, claiming under him by will, put up a building on one of the tracts. A short time after the giving of the mortgage, David Locke, the mortgagor, departed from the State of Illinois, and has not been within the jurisdiction of the State since, going to the State of Missouri and residing there. Since the year 1845, Caldwell, the mortgagee, and those claiming under him, regularly paid the taxes on the land. In the year 1850, John Wright, having purchased a tax sale certificate to the town lot, purchased the lot from John Caldwell, paying him therefor $50, and received a deed of it from Caldwell, and has been in possession of it ever since, shortly afterward putting up a house on it, and he has improved it otherwise, and paid the taxes on the lot. In the

neighborhood the land was called Caldwell's land. On March 21, 1874, James A. Locke, the son of David Locke, purchased the two timber tracts from David Locke for $1000, receiving a quitclaim deed therefor. Franklin Caldwell, a son of the mortgagee, and one of the devisees of all his real estate, put up a cabin on the land on the 7th of April, 1874, and occupied it, by a tenant, until in November, thereafter. On August 13, 1874, George Darr and John H. Snyder purchased the two timber tracts from James A. Locke for $2000, the latter giving to them a warranty deed, and they immediately afterward went into possession. On the 19th day of May, 1874, David Locke executed to James A. Locke a quitclaim deed for lot 198,—the town lot. John Caldwell died, and the complainant is his widow, and executrix of his will, and one of his devisees.

As respects the town lot, there can be no question that the title is complete in Wright, under the mortgage. He has been in the actual possession of the lot, claiming an estate in fee, under the mortgage, for more than twenty-five years.

It is the well-settled general rule that twenty years' possession by the mortgagee, without account or acknowledgment of any subsisting mortgage, is a bar to the equity of redemption, unless the mortgagor can bring himself within the proviso in the Statute of Limitations. *Demarest* v. *Wynkoop*, 3 Johns. Ch. 129, and other cases.

The equity of redemption being barred as to the town lot, makes the mortgage title to it complete.

In *Harris* v. *Mills*, 28 Ill. 44, this court held, that where the note, for the security of which a mortgage was given, was barred by the Statute of Limitations, the right to foreclose the mortgage was also barred.

The statutory limitation in this case of an action upon the note which the mortgage secured was sixteen years, under the statute in force at the time the note was given, and ten years under the present statute, in force at the time this suit was commenced. But each of the statutes provides, that if the

person against whom was a cause of action, except real or possessory actions, should be out of the State any time during which a suit might be sustained on the cause of action, suit might be brought after his return to the State, and the time of such absence should not be taken as part of the time limited. There was no bar, then, here, of an action upon the mortgage debt, the period of the mortgagor's continued absence from the State preventing it.

The general rule, which has been stated, as to twenty years' possession by the mortgagee barring the equity of redemption, is reciprocal, and the mortgagee may be equally barred by lapse of time, the general rule being, that where the mortgagor, after forfeiture, has been permitted to retain possession for twenty years, the mortgage will be presumed to have been discharged, unless circumstances can be shown sufficiently strong to repel the presumption, as, payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like. *Hughes* v. *Edwards*, 9 Wheat. 648; 4 Kent's Com. (11th ed.) 216.

It is sometimes otherwise expressed that a mortgage is not evidence of a subsisting title, if the mortgagee never entered, and there has been no interest paid or demanded for twenty years; that these facts authorize and require the presumption of payment. *Giles* v. *Baremore*, 5 Johns. Ch. 545. But this, as we understand, presupposed that the mortgagor was in possession, and in the actual possession. In *Moore* v. *Cable*, 1 Johns. Ch. 386–7, Chancellor KENT, in declaring the rule that twenty years' possession by the mortgagee was the period adopted by the courts of equity as sufficient to bar the right of redemption, remarks: "Nor will a mere constructive possession, for twenty years, be sufficient. The courts require an actual possession by the mortgagee during the period that is to form the equitable bar; for as they adopt the rule by analogy to the Statute of Limitations, it requires the same actual and continued possession to form a bar in equity that is requisite to form a bar at law. The idea suggested by the counsel

for the defendant, that as the mortgaged premises were, probably, wild, uncleared lands, possession is to be deemed to have followed the right, and to have been in the mortgagee after default of payment, is not applicable to this case. That fiction was adopted by the courts to preserve the lands of the true owner, while in their uncultivated state, from intrusion and trespass; and it would be a perversion of the rule to make it operate by way of the extinguishment of a right. Nothing short of actual possession for twenty years, will, at law, toll the entry of the true owner; and the equity of redemption, which, in this court, is the same as the fee at law, ought to be equally protected." In *Bollinger* v. *Choteau,* 20 Mo. 89, this same doctrine was applied, and a bill to redeem sustained after the lapse of thirty-six years from the execution of the mortgage, actual possession on the part of the mortgagee not having been taken until within twenty years before the commencement of the proceeding to redeem.

In general, the respective rights of mortgagee and mortgagor, with regard to foreclosure on the one hand, and redemption on the other, are treated as *mutual,* that is, the existence of the former is held to involve that of the latter, and *vice versa;* and the fact that the one can not legally be enforced under the circumstances, is regarded as sufficient to preclude a claim for the other. It is said, "the right to foreclose and the right to redeem are reciprocal and commensurable." 2 Hilliard on Mort. § 2.

The land here being wild, unimproved timber land, and there having been no actual possession by either mortgagee or mortgagor, until within less than one year before the commencement of the suit, there would, under the authorities cited, be no bar, from the lapse of time, of the right to redeem, and the rights being reciprocal, it follows that there is no bar of the right of foreclosure.

There could not well be any presumption from the lapse of time of the payment of the mortgage debt, under the cir-

cumstances, so long as the time of limitation provided by statute for the case had not run against the debt.

Nor do we think the defence should prevail under the doctrine laid down in 2 Story's Eq. Jur. § 1520, that "a defence peculiar to courts of equity is that founded upon mere lapse of time, and the staleness of the claim, in cases where no statute of limitations directly governs the case. In such cases, courts of equity act sometimes by analogy to the law, and sometimes act upon their inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross *laches* in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights." As accounting for not sooner foreclosing, was the removal of the mortgagor from the State, and, so far as appearances showed, the entire abandonment by him of the equity of redemption. There was constant assertion of claim under the mortgage by disposal by sale of a portion of the mortgaged premises, and paying the taxes every year on the remainder. There was no acquiescence in the assertion of adverse rights, for none such were asserted until just before the commencement of the suit.

The decree of foreclosure will be affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* The Illinois Midland Railway Co.

v.

THE SUPERVISOR AND TOWN CLERK OF BARNETT.

1. MANDAMUS—*waiver of defective service.* Appearance and making return to a peremptory writ of *mandamus* is a waiver of any defect in the mode of serving the writ.

2. SAME—*right to use relator's name.* Where township bonds voted in aid of a railway company have been contracted to be paid by the company to another in part payment for work done, such other person will have implied

authority to use the name of the railway company as relator, in the prosecution of a suit against the town to compel the issuing of the bonds.

3. In a proceeding by *mandamus* to compel the issuing of corporate bonds of a town to a railway company, it is no concern of the town for whose use the suit may be prosecuted, or to whom the bonds may go when issued.

4. SAME—*by corporation does not abate by the appointment of a receiver.* The fact that a railway company has gone into the hands of a receiver during the pendency of a proceeding by *mandamus* to compel the issuing of bonds to the company, does not abate the suit, nor furnish any obstacle, so long as the receiver makes no objection to its going on to its termination.

5. SAME—*objections too late after writ granted.* After the final determination of a *mandamus* suit to compel a town to issue its corporate bonds to a railway company, the fraudulent and disastrous management of the affairs of the company to the prejudice of stockholders can not be set up as a reason for not obeying the mandate of the writ.

6. Where a peremptory writ of *mandamus* has been granted and issued for the issuing and delivery of corporate bonds subscribed, it is too late to object to the rate of interest required and the time the bonds are to run. Those questions should have been presented and determined before the issuing of the writ.

7. SAME—*excuse for not obeying writ.* A willingness expressed to execute and deliver corporate bonds of a town in pursuance of a writ of *mandamus*, upon receipt of a certificate of stock, and a refusal to give such certificate, it seems will excuse the respondent from obeying the mandate of the writ until the corporation relator is ready and willing to give the town such certificate; but where no offer is made by the respondent to perform, or any willingness expressed to deliver the bonds, and it is evident he would have refused to deliver them if the stock had been tendered, the failure of the relator to tender the stock will furnish no excuse for not obeying the command of the writ.

8. SAME—*proper return.* The only proper return to a peremptory writ of *mandamus* is a certificate of compliance with its requisitions, without further excuse or delay.

9. CORPORATION — *effect of going into hands of a receiver.* A railway corporation is not dissolved by the road going into the hands of a receiver, but it remains in being, capable of suing and being sued.

10. SUBSCRIPTION—*depreciation of stock no excuse for not paying subscription.* The fact that the stock of a corporation has been depreciated or even destroyed in value through the bad or fraudulent management of any of its officers, forms no ground for resisting payment of a subscription to its stock.

11. MUNICIPAL BONDS—*to whom to be delivered.* Where a writ of *mandamus* commanded the supervisor and town clerk of a town to deliver the bonds of the town, to a certain amount, to the relator, on its order, and the relator filed

in the papers its written order, under the corporate seal, to deliver the bonds to A and B, and also its receipt for the bonds, to be delivered upon the giving of the bonds to A and B, it was *held*, that a delivery to either the relator or to A and B would suffice, and might be done with safety to the town.

This was a proceeding by attachment against the supervisor and town clerk of the town of Barnett, for a contempt of this court in neglecting and refusing to execute and deliver to the relator, the Illinois Midland Railway Company, on its order, certain bonds of the town of Barnett, which had been voted as a subscription to the capital stock of a railway company. The facts of the case appear in the opinion.

Messrs. ROWELL & HAMILTON, for the relator:

The defendants enter their appearance and make return seeking to excuse their refusal to obey the order of this court.

1. They allege that the writ was not properly served. While it is true that, at common law, both the alternative and the peremptory writ of *mandamus* should be served by delivering the writ instead of a copy, it is doubtful, under our statute, whether the service in this case was not the proper one. But whether the service was technically correct or not, the defendants have waived it by making return. *Regina* v. *B. and O. R. R. Co.* 16 Eng. L. and Eq. Rep. 94; *People* v. *Bradley*, 60 Ill. 390.

2. As to the balance of the return, we have only to say: The only proper return to a peremptory writ of *mandamus* is a certificate of compliance with its requirements, without further excuse or delay. Redfield on Railways, 441; *State* v. *Smith*, 9 Iowa, 334.

Messrs. MOORE & WARNER, for the respondents:

1. No writ has ever been delivered to respondents. Delivery of a copy we think no service. The writ runs to the respondents, and how can they make any return on it when it was not delivered to them? The original writ must be deliv-

ered to one of the parties. Tapping on Mandamus, 330, 331, and cases cited in notes K and L.

2. After the return to the first writ, Dills and Dunham, two of the directors of relator, claimed the bonds, and demanded that the same be delivered to them, and not to the relator. This created a question of property, and the right to the possession of the bonds, which respondents must heed at their peril. This material fact was not set out in the petition or return. Rev. Stat. 1874, p. 691, sec. 7. This proceeding is in the nature of a bill in equity. *Comr's of Swan Township* v. *Walden*, 31 Ill. 101; *People et al.* v. *City of Elgin*, 66 id. 507; *Springfield, Illinois and Southeastern Railroad Co.* v. *Clerk Wayne Co.* 74 id. 27; *People* v. *Cline*, 63 id. 304; *Comr's of Highways* v. *People*, 66 id. 339; *Morgan County* v. *Thomas*, 76 id. 120; Kerr on Rescissions, 157, 158 and 161, and cases cited in note 1; *Wilson* v. *Allen*, 6 Barb. 542; *Hoyt* v. *Thompson*, 1 Seld. 320; *Gillett* v. *Fairchild*, 4 Denio, 80.

3. Dills and Dunham, two of the relator's directors, illegally and fraudulently used the name of the relator to enforce a private contract illegally and improperly made between them, on one side, and one Hervey on the other. *People* v. *Supervisors of Winchester*, 15 Barb. 608; *People* v. *Emmett*, 1 Caine, 8; *County of Pike* v. *State*, 11 Ill. 202; *People* v. *Illinois Central Railroad Co.* 62 id. 510.

4. Dills and Dunham, and not the relator, are the real parties in interest in this case, and they are fraudulently and illegally attempting to use the power of this court to carry out a contract fraudulently made by them with said Hervey, for the purpose of wronging and defrauding the relator and its shareholders, by enforcing a most iniquitous contract. We show up this whole contract in all its wastefulness, extravagance and illegality, together with its ruinous effect upon the company and its shareholders, the enormous cost of the property, and its value, and showing that, by these contracts they first made with Hervey, and then by him made

with these directors, five-sixths of the bonds, stock and debts of said relator have been wasted; that by the vote of the said Dills and Dunham, stock, to the amount of $2,000,000, was issued and delivered to said Hervey, without any valuable consideration therefor. Rev. Stat. 1874, p. 79, secs. 1 and 3, 804, sec. 22. *Canal Trustees* v. *The People*, 12 Ill. 248; *Gilman, Clinton and Springfield Railroad Co.* v. *Kelly*, 77 id. 426, and cases cited; *Am. Cent. Railroad Co.* v. *Miles*, 42 id. 177; *Gridley* v. *Lafayette, Bloomington and Mississippi Railway Co.* 71 id. 200.

5. Dills and Dunham, being directors in relator's company, could not make a contract like this and enforce it against their own shareholders. Directors must deal honestly with the property intrusted to them, and can not enforce a contract wrongfully and illegally made with Hervey against their own shareholders. *Gilman, Clinton and Springfield Railroad Co.* v. *Kelly, supra; European and North Am. Railroad Co.* v. *Poor*, 59 Me. 277; *Paine* v. *Lake Erie and Louisville Railroad Co.* 31 Ind. 283; *Richards* v. *New Hampshire Ins. Co.* 43 N. H. 263; *Gaskill* v. *Chambers*, 26 Beav. 360; *Bedford Railroad Co.* v. *Bowser*, 48 Pa. St. 29; 13 Moak's English Rep. 757.

6. No bonds of the town of Barnett should be issued or delivered to Dills and Dunham by these respondents, as they have no right to get the property. *United States* v. *Commission*, 5 Wall. U. S. 563; *Canal Trustees* v. *People*, 12 Ill. 248.

7. No bonds should be issued or delivered to the relator, because it has no right to them, and has not applied for them, and can not be injured if bonds are not delivered. *People* v. *Regents of University*, 4 Mich. 98; High on Extraordinary Remedies, p. 321, sec. 450.

8. By the law, petition and notice in said town of Barnett, a large discretion was given to respondents, both in relation to the length of time said bonds were to run, and the rate of interest they should bear, from their issue. Nor should re-

spondents be compelled to issue bonds, if they prefer to pay the money. *People* v. *Supervisor of Dutchess,* 1 Hill, 50. We think the peremptory writ was improvidently issued upon a concealed state of facts, not known to respondents, and improperly kept from this court by relator and said Dills and Dunham.

9. These respondents have shown good reasons why they should not comply with the order of this court made herein. *Silver* v. *People,* 45 Ill. 225; *Canal Trustees* v. *People, supra.*

Per CURIAM: On the 28th day of January, 1878, a peremptory writ of *mandamus* was issued from this court, in pursuance of its former award of such writ, (85 Ill. 313,) commanding the supervisor and town clerk of the township of Barnett, in the county of DeWitt, in the State of Illinois, forthwith to execute, in the name of said township, to the Illinois Midland Railway Company, or its order, bonds of said township to the amount of $30,000, payable within twenty years from the date thereof, with coupons attached, bearing ten per cent interest per annum, payable annually, in payment of a subscription for that amount to the capital stock of said railway company, theretofore voted by the legal voters of said township, which writ was returned by the sheriff of DeWitt county as served on the said supervisor and town clerk, by the delivery to them of a copy of the writ, on February 12, 1878.

On January —, of the present term, on motion of the relator, service of the writ having been shown and non-obedience to its command, a rule was entered against the supervisor and town clerk, to show cause why an attachment for contempt should not issue against them for not obeying the command of the writ. In answer to this rule they appeared, on the 7th day of January, and filed their return to the peremptory writ of *mandamus,* and excuse for not obeying the same, in substance as follows:

That the service of the writ upon them was not good, it

being by delivery of a copy, and not the original; that they had learned, since the first hearing in this court on the return to the alternative writ first issued, that the bonds did not belong to the railway company, but to two of its directors, Dills and Dunham, to whom they had been requested to deliver the bonds; that the delivery of the bonds to Dills and Dunham would not be a compliance with the writ, or defence for not delivering them to the company; that they should not deliver the bonds to the company, because it has no right or property in them,—that it is insolvent and in the hands of a receiver; that if delivered to the company, then Dills and Dunham will not get them, and will not get the benefit of their contract with the company for the bonds; that Dills and Dunham, as such directors, and one Hervey, a director in the Peoria, Atlanta and Decatur Railroad Company, (one of the three companies which, by consolidation or purchase, became the Illinois Midland Railway Company,) had wrongful and fraudulent dealings with each other, through which, in violation of the rights of the town of Barnett and other stockholders in said railroad company, Dills and Dunham obtained a fraudulent contract for the construction of six miles of the railroad, through the town of Barnett, for a large sum of money, greatly above the cost of the work, a part whereof, $30,000, was to be paid to them in the bonds of the town of Barnett; that large profits were realized from the execution of the contract, which Dills and Dunham should account for as belonging to the railroad company, and that the bonds should not be delivered to them until they have so accounted and paid over such profits; that through their fraudulent dealings and management illegal purchases were made by the Peoria, Atlanta and Decatur Railroad Company of the Decatur and Paris railroad and the Paris and Terre Haute railroad, and that through such management the property of the company was rendered of no value; that the interest on the bonds should not be more than six per cent per annum, and that it should be left with the respondents to fix the time for which the bonds should run,

and that they should not be compelled to deliver the bonds until the relator tenders to the town of Barnett its certificate of stock; and that the suit of *mandamus* was prosecuted by Dills and Dunham for their benefit in the name of the relator, without its consent or procurement.

This return was adjudged not to be a sufficient answer to the rule, and an attachment was ordered to issue against Nathan M. Barnett, the supervisor, which was issued accordingly on the 13th day of January.

On the 22d day of January, the respondent being brought before the court upon the attachment, as the only answer thereto and justification of his conduct, filed his sworn statement, in writing, to the effect that he had not obeyed the peremptory writ of *mandamus* because a purported copy only was served on him without delivery of the original, and that his counsel informed him that such a service did not compel him to comply with the writ, stating, as before, that Dills and Dunham claimed the bonds, and had notified respondent to deliver the same to them, and that he was informed and believed their claim to the bonds was illegal, if not fraudulent, upon which he moved his discharge from the attachment.

The motion was overruled, and it was declared that no sufficient excuse had been shown for the disobedience to the writ of *mandamus*, and further time was given, until the 4th day of February, of the present term, to afford opportunity to comply with the command of the writ of *mandamus*. In the meantime, blank bonds, of the amount and description named in the writ, were prepared by the attorneys for the relator, and presented to the respondent for execution, which he declined to execute.

On the 4th day of February the respondent appeared, and, by his attorneys, filed his petition and declaration for a writ of *audita querela*. This is a well known writ of the ancient common law; but the modern practice of granting summary relief, upon motion, in cases for which the only remedy was formerly by *audita querela*, has occasioned this remedy now

to be rarely resorted to in England. We are not aware of any occasion of its having been resorted to in our practice; but without stopping to inquire whether or not there may be any case where, with us, this form of remedy might be adopted, we shall, for the present purpose, consider the subject matter of the application upon its merits, as cause for purging the alleged contempt, regardless of form as to the mode of presentation.

The petition and declaration filed upon this application contain, essentially, no more than a repetition of the matters set forth in the return made to the peremptory writ of *mandamus*, which we have already adjudged an insufficient excuse, but it may be proper to state the reasons therefor more at large than has heretofore been done.

Whether the service of the writ of *mandamus* was strictly correct or not, the defect has been waived by appearing and making return to the writ. *Regina* v. *B. and O. R. R. Co.* 16 Eng. L. and Eq. Rep. 94. There have been filed herein the written order of the relator, under its corporate seal, for the delivery of the bonds to Dills and Dunham, as also its receipt for the bonds, to be delivered upon the giving of the bonds to Dills and Dunham. The command of the writ is to deliver the bonds to relator, the Illinois Midland Railway Company, or its order. There is, then, no reason for embarrassment as to which of the parties the bonds should be delivered. A delivery to either would suffice, and may be done with safety to the town.

It appears that the bonds had been contracted to be paid by the company to Dills and Dunham, in part payment for their work in building and completing the construction of the railroad through the town of Barnett, and in such case Dills and Dunham would have implied authority to use the name of the railroad company in the prosecution of a suit against the town to compel the issuing of the bonds.

The only question for the respondents is, whether there be a legal duty on the part of the town to issue the bonds to the

railroad company; whether there is a legal right in the railroad company to have the bonds issued; and that has been determined against the town, and it is no concern of the town for whose use the suit may be prosecuted, or to whom the bonds may go after they shall have been issued. Dills and Dunham are not known in the suit, and any rights of theirs can not be made a subject of question in it.

The circumstance of the railroad, during the pendency of the *mandamus* proceeding, having gone into the hands of a receiver, does not abate the proceeding, nor furnish any obstacle—so long at least as the receiver makes no objection—to the suit going on to its termination, and the realization of its fruits, which would then form assets of the company, to be held and disposed of as its other assets, unless there be an adverse equitable claim of Dills and Dunham thereto. The corporation has not been dissolved by the road going into the hands of a receiver, but it remains in being, capable of suing and being sued.

As respects the alleged fraudulent and disastrous management of the affairs of the railroad company, to the prejudice of the interests of the stockholders, charged as having been participated in by Dills and Dunham while directors, if the same were a subject of litigation in this suit, it should have been brought forward and passed upon at some time before the final determination in the *mandamus* suit. If not known, as alleged, before the defence was made, it might have been known by the exercise of reasonable diligence, and so ought to have been known, and should be held as known. A portion of the same matter, at least that which respects the purchase of the Paris and Decatur and Paris and Terre Haute railroads, was before the court and passed upon in the opinion in 85 Ill. 313. But this matter was and is no proper subject of litigation in this *mandamus* suit.

This town of Barnett, in such a proceeding, has no right to demand that an accounting shall be had by Dills and Dunham in respect to alleged illegal profits they have made through

their management of the interests of the railroad company, and that, as is insisted upon, they shall first pay over to the company such profits before the bonds shall be issued. It is for the railroad company to require such an accounting for profits, if there be reason for it, and not this town, as a prerequisite to the payment of its subscription. And that the stock of the company has been depreciated, or even destroyed in value, through the bad or fraudulent management of any of its officers, forms no defence to the non-payment of such subscription to the stock of the company. *Hays* v. *Ottawa, Oswego and Fox River Valley R. R. Co.* 61 Ill. 422; *Ottawa, Oswego and Fox River Valley R. R. Co.* v. *Black*, 79 Ill. 262; *The People* v. *Logan County*, 63 Ill. 387; 85 Ill. 313. In the first cited case, where a similar defence was set up against the payment of a subscription for stock, it was said: "When the plaintiff in error shall have paid his subscription and received his certificate of stock, he then will have equitable rights to be protected by the courts, and may prevent gross mismanagement of the property, and misapplication of the funds of the corporation; but the mere facts of leasing, and probable or even certain loss in the earnings of the company, constitute no defence to the note" (for subscription.) And in the case in 79 Ill., a similar case, it was said: "If the company had no power to lease the road and its franchises, then the lease is void, and appellees can, when they receive their stock, apply to a court of equity and have the lease canceled." And again: "The exercise of any legitimate power granted by the charter can never be held, however disastrous to the enterprise, to constitute a failure of consideration for a subscription to the capital stock."

The objection as to the interest of the bonds, and the time they are to run, should have been presented and been determined before the issuing of the writ. It is too late now to go behind the writ and make such objection.

The only objection made, as we regard, which savors of merit, and being substantial, is, that the bonds should not be

issued until the railroad company offers to deliver to the town its certificates of stock.

Had there been an offer made, or a willingness expressed to execute and deliver the bonds upon the receipt of the certificate of stock, and there had been anything of refusal to give such certificate of stock, we might be inclined to hold the respondents excused, until it should appear that the company was ready and willing to give the certificate upon the delivery of the bonds. But there has been no offer made, or even willingness expressed, to deliver the bonds upon the receiving of the certificate, and from all that appears we can not but be satisfied that the objection that the company has not offered to deliver the stock is but a pretended and not a real ground of excuse, and we have no doubt that if an offer had been made to deliver the certificate of the stock upon the receipt of the bonds, the bonds would not have been delivered. In the opinion in the *mandamus* case it appears it was shown that there was a readiness on the part of the relator to deliver the certificate of stock upon the receipt of the bonds, and it was said that no more than that was required, and we must consider that such readiness still continues, until the contrary is made to appear.

Pending this present proceeding there has also been filed in the case a sworn statement of the supervisor, that the taxpayers of the town of Barnett have notified and requested him not to execute and deliver the bonds to said Dills and Dunham, nor to any person to be delivered to them or either of them. Also, there appears the following letter from the attorney of the supervisor to one of the attorneys of the relator:

"*Clinton, Ill., January* 23, 1879.

CAPT. ROWELL,

Dear Sir:—The town of Barnett have directed me to say to you that it never will issue and deliver to Dills and Dunham the $30,000 in bonds. If you have from your clients any proposition to make in regard to accepting a less amount,

and give the town a receipt in full, I will take it and send it them.

Yours, etc., C. H. MOORE."

The only proper return to a peremptory writ of *mandamus* is a certificate of compliance with its requisitions without further excuse or delay. Redf. on Railways, 441.

As we have once before declared, no sufficient reason has been shown for the refusal to execute the bonds.

The mandates of the writs of the courts of the State are to be obeyed. Where there is plain and defiant disobedience thereto, the outrage upon law must be punished, and the power of the court exercised to enforce obedience.

The judgment of the court, then, is, that Nathan M. Barnett, supervisor of the town of Barnett, make his fine to the people of the State of Illinois, in the sum of five hundred dollars, and that he be committed to the common jail of Sangamon county, and there remain until he shall obey the command of the peremptory writ of *mandamus* aforesaid, and until he shall pay the said fine and the costs of this proceeding.

DAVID S. BLACKBURN *et al.*

v.

SARAH J. BELL.

1. IMPEACHING JUDGMENT—*of the manner thereof, and for what causes.* A record of a court imports a verity and can not be contradicted by parol evidence. It must be taken as showing the absolute truth, and must be tried by itself. What is or is not a record, is a matter of evidence, and any instrument offered as such may be shown to be forged or altered.

2. Where a bill in chancery seeking to enjoin the collection of a judgment at law, on the ground it was rendered by one having no judicial power and not the judge of the court, shows that the judgment is upon the records of the court, and that the record thereof still remains, and that there is no error apparent on the face of the record, and, moreover, its affirmance by the Supreme Court, it shows a valid judgment as tested by the record set out in the bill.

3. To impeach a judgment shown to be valid by the record, the party complaining must make it manifest that the judgment was the result of either fraud, accident or mistake, and that it is unjust, and was not the result of *laches* or misconduct on his part.

4. Where a bill to enjoin a judgment shows by its averments, and the implications flowing therefrom, that the plaintiff and defendant knowingly and willfully engaged in the perpetration of a fraud upon the law and the courts,—that, having a suit pending in the circuit court, they conspired together and had the issue submitted to a trial before one whom they knew to be a mere intruder upon the bench,—that they knowingly and willingly went through the trial before such person, and equally participated in the submission of a motion for a new trial, and in arrest of judgment, and in bringing the record to the Supreme Court showing the trial had been before the lawful judge, when, in fact, the judgment had been entered by such intruder upon the bench, and that they joined in palming off such record as the genuine record, it was *held*, that the complainant, being a party to such fraud, was not entitled to equitable relief. If such judgment was a fabrication, a party assisting in its fabrication and in giving it a standing as a judgment of a court, can have no standing in equity to vacate the same, and be relieved from the consequences of his own act.

5. If the wrongful acts of parties result in harm to the one and profit to the other, equity will not relieve the wrongdoer from the consequences of his own conduct. The court of chancery will close its doors against all who invoke its aid with unclean hands, and will leave them to their naked legal rights as best they may get them, in the courts of law.

6. ESTOPPEL—*admission of judgment by appeal bond.* The recital of a judgment in an appeal bond estops the obligors from denying the existence of such judgment, and if this estoppel is not so broad as to preclude an injunction as to a forged or fraudulent judgment, in equity, yet, if the party seeks in equity to be relieved from such solemn admission, he must not show himself a *particeps criminis* in the fabrication of the judgment, or in the fraud.

APPEAL from the Appellate Court of the Third District; the Hon. C. L. HIGBEE, Presiding Justice, and the Hon. O. L. DAVIS, and Hon. LYMAN LACEY, Justices.

Mr. ANTHONY THORNTON, for the appellants.

Mr. R. N. BISHOP, and Mr. J. B. MANN, for the appellee.

Mr. JUSTICE BAKER delivered the opinion of the Court:

An action of assumpsit was commenced in the Edgar county circuit court, by Sarah Jane Mann, now Sarah Jane Bell,

against David S. Blackburn, and the venue in said cause was afterwards changed to the Vermilion circuit court. At the regular February term, 1875, of the latter court, said suit was pending therein for trial; and in said cause, upon the records of said court for said term, appears the following judgment, which is entered as of the "30th day of February Term, 1875, March 6, 1875:"

"And now again come the parties hereto, by their respective attorneys, and the court having heard argument of attorneys herein on motions for a new trial and in arrest of judgment in vacation, and an agreement of the parties having been filed in this cause that the decision of the court on said motions should be entered of record as of the February term A. D. 1875, aforesaid, and now upon due consideration, the court being fully informed in the premises, said motions for new trial and in arrest of judgment are overruled.

"It is, therefore, ordered by the court, that the said plaintiff have and recover of and from the defendant David S. Blackburn said sum of $15,000 damages found by the jury aforesaid, together with the costs by her in her cause herein expended, with legal interest thereon from the 30th day of the February term A. D. 1875, to-wit, March 6th, 1875, and may have execution therefor against said defendant.

"Whereupon the defendant prays an appeal, which is granted by the court on defendant filing bond in the sum of $30,000, with security to be approved by the clerk of this court, by agreement, and by agreement of parties said bond to be filed within thirty days from July 9th, 1875, and bill of exceptions by agreement to be filed within ninety days from said day."

A copy of said judgment is filed with the bill of complaint hereinafter mentioned, as "exhibit A," and is the only portion of the record, or what purports to be the record in said action of assumpsit, that is set forth in or filed with said bill; the preceding orders, showing the submission of the case, trial by and verdict of the jury, and entry of motions for a

new trial and in arrest of judgment, being wholly omitted in the record now before us.

From this judgment, so appearing of record in the Vermilion circuit court, the appellant David S. Blackburn perfected an appeal to this court, by giving bond within the time limited in and by the foregoing order, in the sum of $30,000, with the co-appellants as securities; which said appeal bond was duly approved by writings indorsed thereon both by the clerk of the Vermilion circuit court and by the Hon. O. L. DAVIS, judge of said court. The condition of said bond, a copy of which is filed with the bill of complaint hereinafter mentioned, as an exhibit, and prayed to be taken as a part of said bill, was as follows:

"The condition of the above obligation is such, that, whereas the said Sarah Jane Mann did, on the 6th day of March, 1875, at a term of circuit court then being holden within and for the county of Vermilion, and State of Illinois, obtain a judgment against the above bounden David S. Blackburn, for the sum of $15,000.00, and costs of suit, from which judgment the said David S. Blackburn has prayed for and obtained an appeal to the Supreme Court of said State:

"Now, if the said David S. Blackburn shall duly prosecute said appeal, and shall, moreover, pay the amount of the said judgment, costs, interest and damages rendered and to be rendered against him, the said David S. Blackburn, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be null and void, otherwise to remain in full force and virtue."

The said judgment, so appealed to this court, was affirmed by us at the January Term, 1877, and a petition for a rehearing was considered and denied at the January term, 1878, and the case is reported in 85 Ill. 222. In the record then filed in this court, as is shown by the bill of complaint now under consideration, there was nothing to indicate otherwise than that the case had been duly tried and the judgment rendered by the legally elected and commissioned judge of the Vermil-

ion circuit court. No point or suggestion to the contrary was made, either in the motion entered for a new trial or in the motion in arrest of judgment, or upon the appeal to this court, or in the petition for a rehearing.

Said judgment having been affirmed by this court and remaining unpaid, the plaintiff in the original suit, who had meantime intermarried with one Bell, brought an action on the appeal bond, in the Edgar circuit court, to the March term, 1878; whereupon Blackburn, the defendant in the original suit, and the securities on the appeal bond, who are co-defendants with him in the action on the bond, filed the bill and amended bill which are now the subjects of controversy.

The bill, as amended, shows, substantially, the facts above stated, and charges there was no judge presiding in the circuit court of Vermilion county when said original suit was tried and the judgment therein rendered; that said circuit court, from the inception of said trial to its close, in the selection of a jury, in determining the admissibility of evidence, in the giving of instructions to the jury, in receiving the verdict of the jury, and in rendering the judgment aforesaid, was held, conducted and presided over, solely, by one E. S. Terry, who had never been, and was not at said time, judge of said circuit court, or of any court in the State of Illinois; that he had never been elected or appointed to the position of judge of any court in the State; that he made no pretence to be a judge, either *de jure* or *de facto;* that he had, at said time, no lawful power or authority to exercise judicial functions; and that he was, in presiding at said trial and holding said court, a mere intruder into the office of judge of said circuit court, in violation of the constitution and laws.

It is further charged, that said record is therefore false and fraudulent; that it purports to be the act of a judge, and the judgment of a court, when there was no judge and no court, and that it was made without any power and authority. It is also stated said pretended judgment was taken by appeal to the Supreme Court of the State, and there being no error

apparent in the record, it was by said Supreme Court affirmed, and that the same now remains in the said circuit court of Vermilion county, in full force, unreversed and unsatisfied, so far as the records of said court show, and that there is no error apparent in the record of said pretended judgment. The bill, as amended, prayed for a temporary injunction upon the proceedings in the case at law, pending in the Edgar circuit court, upon the appeal bond; and that the judgment appearing upon the records of the circuit court in Vermilion county, for $15,000, might be set aside, canceled, and for naught held, and adjudged and decreed to be void and of no effect; and that all proceedings in the suit on the appeal bond might, on the final hearing, be perpetually enjoined; and for general relief.

A demurrer to this bill, as amended, was sustained by the circuit court of Edgar county, and the bill was dismissed. An appeal was perfected to the Appellate Court of the Third District, and the decree of the circuit court, sustaining the demurrer and dismissing the bill, was there affirmed.

A further appeal was then taken to this court, and it is here urged the Appellate Court erred in affirming the decree of the circuit court, and in not reversing the same.

The case of *Hoagland* v. *Creed et al.* 81 Ill. 506, is not necessarily decisive of this case. There, the question arose upon a writ of error to the Morgan circuit court, and the record filed affirmatively showed a trial before a member of the bar, and what purported to be a judgment rendered by him as judge of the circuit court of Morgan county. That which purported to be a bill of exceptions was signed by him. The record expressly showed the case was tried by a member of the bar, and that his authority for assuming to act as judge was the agreement of the parties. The record did not purport to be a record made by a circuit judge. We there said: "It is impossible for us to close our eyes to the fact, however strongly we might be inclined to do so, that the record sought to be reviewed is one made by Edward P. Kirby, Esq., a

member of the bar, and not by any one commissioned to act as circuit judge." The subject of contradicting a record, or what purported to be a record of a court, did not arise in that case.

A record imports a verity; it can not be contradicted by parol evidence; it must be taken as absolute truth, and must be tried by itself. What is or is not a record is matter of evidence, and any instrument offered as such may be shown to be forged or altered. The bill avers, and the record exhibited with the bill shows, "the judgment is upon the records of the circuit court of Vermilion county, and the record thereof still remains in the said circuit court," and that "there is no error apparent on the face of the record," and, moreover, it has been affirmed by this court, and declared to be a valid and binding judgment. So, tested by itself, and by the whole record as it remains in the court, it is a valid judgment and a verity.

The court of chancery in the county of Edgar is called upon to enjoin the collection of a judgment of the law court rendered in Vermilion county, while that judgment remains of record in the latter court unreversed, affirmed by the supreme tribunal of the State, and with no error apparent upon its face. We will waive the question whether a court of equity may, under the law and statute of this State, expunge the record of a judgment appearing upon the records of another county.

It is clear the judgment proves itself a valid judgment, unless it can be impeached in the court of chancery. The latter court will not attempt to do this without it is made manifest the alleged judgment was the result of either fraud, accident, or mistake. There is no claim this judgment has been altered since it was entered upon the records of the court, nor is it even suggested there was any accident or mistake on the part of any body in the rendering of the judgment, or in the entry thereof upon the record. The case must be tested by the pleading, and the pleading must be taken most strongly

against the pleader. The theory of the bill and claim of appellants is, there was fraud in the entry of the judgment. Whoever come into the court of equity must come with clean hands, and must not come asking the court of conscience to aid them in getting relief from their own fraud or wrongful act, or a fraud in the perpetration of which they knowingly participated.

Admit the allegations of the bill to be true. They, with the necessary implications that legally flow therefrom, show that appellee and the appellant Blackburn knowingly and willfully engaged in the perpetration of a fraud upon the law and the courts of the country; that having a suit pending, the one against the other, in the circuit court, they conspired together and had the issues joined therein submitted to a trial before one whom they knew to be a mere intruder upon the judicial bench; that they knowingly and willingly went through with a trial before a jury impannelled by this intruder; equally participated in the trial; equally participated in the submission of the motions for a new trial and in arrest of judgment, and equally participated in having a record of this trial and its results entered up in the records of the court, not as it really was and according to the facts of the case, but as though, in fact and in truth, the trial had been before the lawful judge of the court, and as though the judgment had really been entered by such judge. Not only this, but they joined in palming off this record upon this court as the genuine record of the Vermilion circuit court. Only after we had carefully examined, and upon petition for rehearing had re-examined the record of the trial, and the alleged errors therein, and had found and announced there was no error in the proceedings, and that the trial had been fair, and a correct conclusion reached, and a just judgment rendered, did said appellant desist from aiding and abetting in the perpetration of the fraud. Grant the court of equity may enjoin or set aside the judgment of a court of law for fraud—yet it will

not do so at the suggestion of one of the perpetrators of the fraud.

In *Owens* v. *Ranstead*, 22 Ill. 162, where a bill had been filed to vacate a judgment and enjoin its collection, on the ground of a want of jurisdiction of the person of the defendant, this court said: "The power of a court of chancery to afford relief, in a case like this, properly made out, can not be questioned; but it must appear to the court that the party complaining has been guilty of no *laches* on his part, and that he has been deprived of the opportunity of asserting his rights, or making his defence, through some accident, or mistake, not of his own procurement, and to which he was not a willing party; for a party has no claim to come into a court of equity to ask to be saved from his own culpable misconduct." We then quoted with approval the language of the Supreme Court of the United States, in the case of the *Marine Insurance Co. of Alexandria* v. *Hodgson*, 7 Cranch, 332, to the effect that the fraud or accident must be unmixed with any fault or negligence in the complainant himself, in order to justify an application to a court of chancery.

In *Higgins* v. *Bullock*, 73 Ill. 206, it was said: "A court of chancery has the undoubted power to afford relief in a proper case against a judgment at law, but it must appear that the party complaining has been guilty of no negligence or *laches*, and that he has been prevented from interposing a defence through accident, fraud or mistake, without fault or blame on his part."

The appellants all joined in solemnly averring by their deed, under their hands and seals, the existence of the judgment in the Vermilion circuit court, and agreed to pay the amount due on said judgment in case the same should be affirmed in the Supreme Court. The bill filed by them is to be taken most strongly against them, and it must be presumed, in the absence of any allegations to the contrary, that they all well knew the case had been tried before one who was not the judge,—that the judgment had been entered by one who had no judicial

authority to enter it, and had been entered upon the records of the court as though rendered by the rightful judge. Appellants were all thus parties to the fraud upon the law, and knowingly and willfully assisted, by their own act and admission, in imposing upon this court as a judgment of the circuit court that which they knew to be a forgery or a fabrication. As the appellants made their bed, they must lie in it. If the judgment was a fabrication, appellants assisted in its fabrication and in giving it a standing as a judgment of a court. If a fraud has been perpetrated on the law and on the courts of the State, they assisted in its perpetration. Equity will leave them just where they have placed themselves. Appellants and appellee went hand in hand in the commission of a fraud. They must abide the result, for if the wrongful acts have resulted in harm to one party and profit to the other, then equity will not relieve the wrongdoers from the consequences of their own conduct, even against their fellow wrongdoer. The court of chancery will touch nothing that is impure, but will close its doors against all who seek to come within its portals with unclean hands, and will leave them to their naked legal rights, as best they may be able to get them, in the court of law.

Appellants have stated their own case for themselves. They have stated it as strongly as they truthfully can. They virtually admit the justice and equity of the claim of appellee. They do not allege there either was or is a defence to the suit in which the judgment was rendered. In *Owens* v. *Ranstead*, *supra*, it was shown the judgment was unjust and inequitable, and that the defendant in the suit at law was not indebted to the plaintiff therein in any sum whatever. In *Weaver* v. *Poyer et al.* 70 Ill. 570, the bill showed, by a detailed statement of facts, that the defendant had a complete and meritorious defence to the action at law in which the judgment was rendered. In the case of *Stokes* v. *Knarr*, 11 Wis. 391, the court said: "We do not deem it necessary to decide whether the justice of the peace lost jurisdiction of the case and power to enter any judgment by neglecting to make any minute of the

verdict, or to enter it in his docket until the day after it was received. It may be conceded, for the purpose of this case, that he did, and we still think it does not follow that a court of equity will interfere merely for a defect of jurisdiction in the court where the judgment is rendered. 2 Story Eq. Jur. sec. 898. On the contrary, they only interfere to prevent injustice. And if a party can say nothing against the justice of a judgment, can give no reason why, in equity, he ought not to pay it, a court of equity will not interfere, but will leave him to contend against it at law, in the best way he can."

Then, there is the matter of an estoppel. In the case of *Herrick* v. *Swartwout*, 72 Ill. 341, we said: "It was unnecessary to introduce a copy of the record appealed from, as it is recited in the condition of the bond, and the defendants were estopped from denying its existence." And in *George* v. *Bischoff et al.* 68 Ill. 237, it was said: "Defendants are estopped, by the recitals in the bond, to deny what they solemnly admit to be true, viz, the existence of a decree against Bischoff; and the legal effect of the engagement is, to pay it, in case it shall be affirmed on appeal, or be liable for the penalty of the bond." There are numerous other cases in this State where the same doctrine is announced. It is unnecessary here to say the principle of estoppel, as announced in the decisions referred to, has so broad an effect as would preclude an injunction as to all forged and fraudulent judgments, if appeals had been taken from them. Suffice it to say, that if complainants come within the precincts of a court of equity, and ask to be relieved from the results of a solemn admission, by deed, that there is a judgment of a court of competent jurisdiction, they must not show themselves to be *particeps criminis* in the fabrication of the judgment and in the fraud upon the law and the courts. Appellants, by their own showing, are in no position to raise, in the court of chancery, the questions they here seek to raise, and they show no grounds for equitable interference with that which, at law, must now be regarded as the judgment of a court of law.

We know of no instance where a court of equity has presumed to vacate or enjoin the collection of that which, upon the face of the record, was a valid judgment of a competent court of law, unless it was upon some established principle of equitable jurisdiction, and where such judgment was the result of either fraud, accident or mistake; nor do we know of any such interference where the party asking the assistance of the court was a party to the fabrication and fraud charged in his bill, or where there was no pretence that the claim or demand, from the payment of which it was sought to be relieved, was unjust, inequitable, unconscionable, or even a hardship.

We may well here go even farther than this. Under the circumstances of this case, as appellants had full knowledge of all the facts, which is the fair and legal presumption arising from their own statements, when they averred and covenanted in their deed that said judgment was 'a judgment of the Vermilion circuit court, they are now estopped from denying the existence of such judgment.

We are of opinion the demurrer to the original and amended bills of complaint was properly sustained, and the bills properly dismissed by the circuit court, and that the Appellate Court was right in affirming the decree.

The judgment of the Appellate Court is here affirmed.

Judgment affirmed.

Mr. JUSTICE SCHOLFIELD took no part in the decision of this case, having, at one time, been of counsel for appellee in the original subject matter of litigation.

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

v.

JOHN G. HOLDEN *et al.*

1. MUNICIPAL SUBSCRIPTION—*may be upon conditions which must be performed.* In submitting the question to vote whether a township will take stock in a railroad company, the township has the right to impose such conditions in regard thereto as it deems proper, and such conditions, when imposed, are binding, and the company will have no right to the subscription or to compel the issue of the bonds until the conditions are fully performed on its part.

2. Where a petition for a *mandamus* to compel township officers to subscribe to the capital stock of a railway company and issue corporate bonds, sets out the conditions upon which the township voted the subscription, and avers performance of them, if the answer of the defendants substantially denies the performance of such conditions, stating wherein they have not been performed, it will be good on general demurrer, although it may contain unnecessary averments and irrelevant matter.

3. MANDAMUS—*when officers may answer separately.* Where it is sought, by *mandamus* against the supervisor and town clerk of a township, to compel them to perform an alleged official act, enjoined on them by statute, no good reason is perceived why they may not as well answer the petition separately as to file a joint answer. Such a case is not a suit against a municipal corporation, where officers are required to answer for and in the name of the corporation.

4. PLEADING—*formal defects reached only by special demurrer.* If an answer to a petition for a *mandamus* contains irrelevant matter, or is evasive and argumentative, the defects can only be reached by special demurrer, in which the defects are required to be minutely set forth.

WRIT OF ERROR to the Appellate Court of the Third District; the Hon. CHAUNCEY L. HIGBEE, presiding Justice, and the Hon. O. L. DAVIS, and Hon. LYMAN LACEY, Justices.

Messrs. HENRY & DOVE, for the plaintiff in error.

Mr. D. D. EVANS, and Mr. H. W. BECKWITH, for the defendants in error.

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

On the 11th day of December, 1869, a proposition was submitted to the voters of the township of Danville, in Vermilion

county, to decide, by ballot, whether the township would subscribe $25,000 to the capital stock of the Paris and Danville Railroad Company, upon certain conditions named in the petition and notice for the election.

The election resulted in favor of the subscription. The subscription was never, however, made, nor were the bonds issued.

On the 30th day of December, 1875, a petition for a peremptory writ of *mandamus* was filed in the circuit court of Vermilion county, against the supervisor and town clerk of the town, to compel them to make the subscription and issue the bonds.

A demurrer was interposed to the petition, which the court sustained. An appeal having been taken by the railroad company, the judgment of the circuit court was reversed and the cause remanded, a majority of the court holding that the petition was sufficient. (82 Ill. 93.)

After the cause was remanded and placed upon the docket in the circuit court, the supervisor, John G. Holden, and the town clerk, John Lane, filed their separate answers to the petition, which were demurred to by the relator. The demurrer having been overruled, the railroad company sued out a writ of error from the Appellate Court of the Third District, in which court the judgment of the circuit court was affirmed. The cause was thereupon brought to this court on error.

Several questions of practice in a case of this character have been argued, but the important and controlling question presented by the record is, whether the facts set up in the answers constitute a defence to the averments of the petition.

The conditions upon which the township of Danville agreed to take stock in the railroad company, as appears from the petition for the election, notice of election, and the ballot used at the election, copies of which are attached to the petition for *mandamus*, are the following:

The bonds are not to bear date, nor to be delivered or to bear interest, until the said 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 other 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 shall be completed and in successful operation from Paris to Danville aforesaid, within five years from this date, November 6, 1869.

It is not controverted, that if the railroad company had complied with the terms and conditions upon which the township, by a vote of the people, agreed to become a stockholder in the company and issue bonds, the respondents are bound to issue the bonds. The respondents do, however, contend that the conditions have never been complied with on the part of the railroad company, and on that account, alone, they are under no obligation to issue the bonds.

As to the first condition, that the bonds are not to be delivered until the railroad is completed, equipped with rolling stock, and running in successful operation from Paris in and to Danville, the averment of compliance in the petition is fully met by the answer of Holden, in these words:

"The defendant further avers, that it was not true that the said Paris and Danville Railroad Company, relying upon the said vote and subscription, had, within five years from the date of the petition for an election, as aforesaid, built and completed its railroad track from Paris, in Edgar county, to a point in the said township on the line of the Toledo, Wabash and Western railway, about one mile from the city of Danville; that it is not true that it, the said Paris and Danville Railroad Company, had made an arrangement with and leased from the said Toledo, Wabash and Western Railway Company whereby the said Paris and Danville Railroad Company had the right to run its cars on the track of the said Toledo, Wabash and Western Railway Company in and to the city of Danville, but, on the contrary thereof, defendant avers the truth and fact to be that the said Paris and Danville Railroad

Company had then and there only partially built and completed its track to the point aforesaid, and only had a temporary arrangement with the said Toledo, Wabash and Western Railway Company."

The answer, after setting out in detail the character of the temporary arrangement, concludes as follows:

"And the defendant further avers, that the said Paris and Danville Railroad Company did not then, nor at any time prior to the filing of the petition herein, have its railroad completed, equipped with rolling stock, and running in successful operation from Paris, in Edgar county, in and to the city of Danville, Vermilion county. And defendant further avers, that the said point on the line of the track aforesaid is much more than one mile west of the city of Danville."

In regard to the first condition, which the relator was bound to fulfill before it was entitled to the bonds, we are aware of no language which could be used which would negative the averments contained in the petition more appropriately than the language employed by respondents. It may be true that the answer contained some statements upon this point which might have been omitted; but if it was desired to present an issue whether relator had performed the condition named within the time required, certainly the answer fully and completely traversed the averments of the petition, which was all that could be required.

In regard to the second condition, that no part of the said railroad should be located or built west of the north fork of the Vermilion river, in said city of Danville, the answer of Holden avers, that "it is not true that no part of the said Paris and Danville railroad is located or built west of the north fork of the Vermilion river, in said city of Danville; on the contrary thereof, the defendant avers, that before the petition herein was filed, and before a request was ever made to subscribe or take stock therein, a part of the railroad of the said Paris and Danville Railroad Company was located and built west of the north fork of the Vermilion river in said

city of Danville, and is now so located and built in violation of the condition aforesaid."

This denial in the answer presented a direct issue, whether relator had complied with a condition upon which the bonds were to be issued, and we perceive no objection which can be urged against the mode in which the issue was presented.

In regard to the other condition, that the railroad should be completed and in successful operation from Paris to Danville within five years, the answer is full and explicit. It declares:

"The defendant further avers, that the said railroad was not at the time of filing the petition herein, and is not now, in full and successful operation over any track of its own or over any track from Paris to Danville aforesaid."

The answer of Lane, the town clerk, in clear and emphatic language, expressly denies that the relator complied with any or either of the conditions upon which the bonds were to be issued.

While it may be true that the answers contained some irrelevant statements or some averments that might be reached by special demurrer, yet the answers are, in substance, sufficient. The facts set up therein, if true, and their truth is admitted by the demurrer, constitute a complete defence to the case made by the petitioner.

In the submission of the question, whether the township would take stock in the railroad company, the township had the right to impose such conditions in regard thereto as it thought proper, and these conditions, when imposed, were binding, and the railroad company had no right to the bonds until the conditions were fully performed on its part. *The People* v. *Dutcher*, 56 Ill. 144.

The relator objects to the sufficiency of the answers, because the defendants answered separately. If the objection was well taken, it may be regarded as obviated from the fact that the supervisor adopts the answer of the town clerk as a part of his

answer, but it may well be doubted whether, under our statute, the practice required the two defendants to join in a single answer. This is not a suit against a municipal corporation, where the officers might be required to answer for, in the name of and on behalf of the corporation, where there would necessarily be but one answer, but this proceeding is against two officers of a township to compel each of them to perform an alleged official act, enjoined upon them by the statute, and in such a case no good reason is perceived why they may not as well answer separately as file a joint answer.

It is also urged, that the answers contain irrelevant matter; that the two answers are repugnant; that they are evasive and argumentative.

There is no substantial repugnancy or inconsistency between the two answers. The substance of each, when properly analyzed, although expressed in a different form, is, that the railroad company did not comply with the terms and conditions upon which the bonds were to be issued, in the time and in the manner required by the contract between the township and the company. If the answers contained irrelevant matter, or if they were evasive and argumentative, these defects could only be reached by special demurrer, in which the defects are required to be minutely set forth. *Bogardus* v. *Trial*, 1 Scam. 63. This was not done; the irrelevant matter is not pointed out by the demurrer, nor is it shown by the demurrer wherein the answers are evasive or argumentative. If these objectionable features existed in the answers it was the duty of the relator to point them out by the demurrer, and if this course had been pursued, the answers would no doubt have been amended at once, and relieved of all obnoxious matter. It may be that the answers might have been drawn in a more skillful manner, but however that may be, the facts set up in the answers clearly show a substantial defence to the case made by the relator in the petition, and as the answers were good in substance, the court properly overruled the demurrer.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

The Indianapolis and St. Louis Railroad Company

v.

The People, use, etc.

1. Justice of the peace—*jurisdiction in penal action.* A justice of the peace has jurisdiction in an action to recover the penalty imposed upon railway companies for not stopping their trains before crossing another railroad upon the same level, debt being a proper form of action to recover a statutory penalty.

2. Consolidation *of causes of action—where two penalties are incurred.* Where the evidence, in a suit by the people to recover the penalty given by law against a railway company for not coming to a full stop before crossing another railroad track, showed a similar violation of the statute at another and different road about a quarter of a mile distant, it was *held*, that the people were not compelled to unite the two causes of action, and thereby defeat the justice's jurisdiction.

3. Party plaintiff—*in penal action.* A suit brought in the name of the people of the State of Illinois, for the use of C D, against a railroad company, to recover the penalty given by sections 50 and 51 of the Railroad law, will not be dismissed because it is brought for the use of an individual. Such a suit is brought in the name of the people, who are the plaintiffs, and the words, "for the use," etc., may be treated as surplusage. In such a case, whether the penalty goes to the people or to C D, does not arise, but that is a matter between him and the people, afterwards to be settled.

4. Where such a suit is so brought, the whole penalty is recoverable, and it is a matter of no concern to the defendant what disposition is made of the money when collected. The recovery will operate as a bar to any future action for the same penalty.

5. Railroads—*neglect of servants to obey orders—no defence.* In an action against a railway company, to recover the penalty for neglecting to stop its train before crossing another railroad on the same level, there is no error in not allowing the defendant to prove that the company had rules requiring the engine-driver to comply with the law in stopping at all railroad crossings, and that the rules were in his hands, and this constitutes no defence. A railroad company must see that its servants obey the law, and is liable for neglect to do so.

6. Costs—*in penal action.* Where suit is brought in the name of the people for the recovery of a statutory penalty, if the people recover judgment, they are entitled to judgment for costs the same as any other person in like case. The rule, under the statute, is different in popular and *qui tam* actions.

Appeal from the Appellate Court of the Third District; the Hon. C. L. Higbee, presiding Justice, and the Hon. Oliver L. Davis, and Hon. Lyman Lacey, Justices.

This was a suit, brought to recover a penalty, under sections 50 and 51, chapter 114, Revised Statutes 1874, and comes to this court on an appeal from the Appellate Court.

Section 50 provides, among other things, "that all trains run upon any railroad which crosses or is crossed by any other railroad upon the same level, shall be brought to a full stop at a distance, not less than 200 feet, nor more than 800 feet from the point of intersection or crossing of such road, and in plain sight of the same, before such crossing is passed by such train."

Sec. 51. "Every engineer violating the provisions of the preceding section, shall, for each offence, forfeit $100, to be recovered in an action of debt in the name of the people of the State of Illinois, or by any person who may sue for the same, and the corporation on whose road such offence is committed shall forfeit the sum of $200, to be recovered in like manner."

Mr. George Hunt, and Mr. C. V. Jaquith, for the appellant.

Messrs. Bishop & McKinley, for the People.

Mr. Justice Walker delivered the opinion of the Court:

This was an action, before a justice of the peace, to recover a penalty under sections 50 and 51 of the Railroad law. (Rev. Stat. 1874, p. 809.) It is claimed that the statute was violated by the company, and that does not seem to be contested.

It is urged, that as section 51 does not state what courts may take jurisdiction, a justice of the peace could not try the cause; that where the statute fails to name the court which shall have jurisdiction, the implication is that it is intended to be conferred on a court of general jurisdiction. Where the statute does not specify the court which shall take cognizance

of the cause, and there is no general provision as to other courts, the presumption may possibly be the legislative design is that the penalty shall be sued for and recovered in a court of general jurisdiction.

Section 13 of the Justice of the Peace act provides, that justices of the peace, amongst other cases, shall have jurisdiction "in all cases where the action of debt or assumpsit will lie, if the damages claimed do not exceed $200."

No one will claim that an action of debt will not lie to recover a penalty given by statute, unless otherwise provided. It being an action of debt, and the penalty being $200, it would violate the language of the statute to hold a justice of the peace has no jurisdiction of the case. It is a case where an action of debt will lie, and, therefore, is embraced in the statute.

It is urged, that as the evidence shows the company crossed another road without coming to a full stop, as required by the statute, within a fourth of a mile of the place where the penalty sued for occurred, the two forfeitures could not be separated, and if united, a justice of the peace would not have jurisdiction. The offences were separate and distinct as though the roads thus crossed were miles apart. The roads thus crossed belonged to different companies, and the fact that they were only a quarter of a mile apart did not make it one offence. But there were two forfeitures, and the other may no doubt be sued for by any person. We are clearly of opinion the people in suing for this were not required to unite the two causes of action.

The court below did not err in refusing to dismiss the suit. The suit was brought against appellant in the name of the "People of the State of Illinois for the use of Maurice L. Whiteside."

Section 51 provides, that the suit for the recovery of the penalty shall be by action of debt, "in the name of the people of the State of Illinois, or by any person who may sue for the same." This suit was in the name of the people. They were

the plaintiffs, as all know. The words, for the use of Maurice L. Whiteside, add nothing to or detract nothing from the right of recovery. Whiteside is not the legal, but the beneficial plaintiff. All after the name of the real plaintiff may be rejected as surplusage. When a recovery is had, the question may then arise whether the people or Whiteside shall have the money. The suit is, by the summons, declared to be for the use of Whiteside, and he is thereby *prima facie* entitled to it, unless resisted. He might have sued in his own name for himself as well as for the people, but failed to do so, and not being the plaintiff, his bond for costs, if otherwise unobjectionable, was a sufficient compliance with the statute.

It is urged, that under this statute, the whole penalty can not be recovered by the informer, and, therefore, this suit was improperly brought. We are unable to see that it is a matter of any concern of appellant as to the disposition the people shall make of the money when recovered. Whether it shall all or only a half of it go to Whiteside, can make no difference to them. Whether he shall have, when collected, all, a portion or none of the money recovered, in nowise affects the rights of appellant. A recovery in this case would operate as a bar to a future recovery for the same penalty, and that would seem to be all they have a right to claim. If Whiteside has used the name of the people in suing, and if he has wrongfully declared the use for himself, the attorney for the people may contest his right and claim the money for the people. But that is a question between him and the people, and not between him and appellant.

There was no error in rejecting evidence that the company had rules requiring the engine-driver to comply with the law in stopping at all railroad crossings, and the rules were in his hands. This evidence would have constituted no defence. The General Assembly, in adopting this police regulation, must have known that the officers having the control of the corporation would not operate it, but would do so by employees, and that body must have intended to and did require these

companies to employ men who would obey orders or be responsible for the neglect or refusal. These companies know the legal requirement, and must, by such rules as may be necessary, compel their employees to observe the law, or respond to the penalty imposed by the statute. The safety of the traveling community demands that these police regulations shall be enforced, and the General Assembly thought necessary, not only to render the engineer liable for a penalty, but also the company for a penalty for double the amount imposed on the engineer.

We now come to the only plausible question presented by appellant. That is, whether the people were entitled to recover costs.

Section 17 of the Costs act, (Rev. Stat. 1874, p. 299,) provides that: "In all suits and actions commenced or to be commenced for or on behalf of the people of this State, or the Governor thereof, or for or on behalf of any county of this State, or in the name of any person for the use of the people of this State or any county, then, and in every such case, if the plaintiff shall recover any debt or damages, in such action or suit, the plaintiff shall recover costs as any other person in like cases. * * * Nothing in this section contained shall extend to any popular action, nor to any action to be prosecuted by any person in behalf of himself and the people or a county upon any penal statute."

Now, this action is prosecuted by the people in their name, and it falls within the provision of this section authorizing them to recover costs. This is, in no sense, a popular action. That is defined to be "an action given by statute to any one who will sue for the penalty, a *qui tam* action." Had Whiteside sued for the people as well as for himself, then this provision would have applied.

No error is perceived in this record, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

Brief for the Appellant.

THE PEOPLE'S BANK OF BLOOMINGTON

v.

ASAHEL GRIDLEY *et al.*

1. CORPORATION—*transfer of shares of stock as between the immediate parties, and as to third persons.* Where the board of directors of a corporation are expressly empowered by the charter to provide for the mode of transfer of shares of stock, and the board does by a by-law provide that such transfer shall only be made upon the books of the secretary on the presentation of the stock certificates properly indorsed, a transfer by indorsement and delivery only, will not be valid as against a creditor of the assignor who levies his execution upon such shares without notice of the transfer.

2. As between the vendor and vendee of shares of stock in a corporation whose charter or by-laws require transfers of stock upon the books of the corporation, a sale and transfer will be good without being entered upon the company's books, and will be enforced in equity, and the vendee required to pay subsequent assessments or indemnify the vendor against their payment.

3. The provisions of the statute making shares of stock in a private corporation subject to levy and sale on execution, contemplate that, as against a judgment creditor, the title to stock in such corporation can only pass by transfer on the books of the company.

APPEAL from the Appellate Court of the Third District; the Hon. CHAUNCEY L. HIGBEE, presiding Justice, and the Hon. OLIVER L. DAVIS, and Hon. LYMAN LACEY, Justices.

This was a bill in equity brought by the appellant against the appellees, to enjoin the sale of stock referred to in the opinion, and praying to have the stock transferred to the bank on the books of the railway company. The bank, after the levy upon the stock, applied to the officers of the railway company for a transfer of the stock, which was refused on account of the prior levy. The other material facts appear in the opinion.

Messrs. WILLIAMS, BURR & CAPEN, for the appellant:

1. Although the charter of an incorporated company provides that all transfers of its capital stock, to be valid, shall be made on the books of the company, this provision is one

between the company and its stockholders exclusively, and does not affect third parties. *Kellogg* v. *Stockwell et al.* 75 Ill. 68; *Broadway Bank* v. *McElrath,* 2 Beasley (N. J.), 24; *Bank of Utica* v. *Smalley,* 2 Cow. 770; *Gilbert* v. *Manchester Iron Manufac. Co.* 11 Wend. 628; *Commercial Bank of Buffalo* v. *Kortright,* 22 id. 348; *Kortright* v. *Commercial Bank of Buffalo,* 20 id. 91; *Black* v. *Zacharie,* 3 How. 483; *Bruce* v. *Smith,* 44 Ind. 1; *McNeil* v. *Tenth National Bank,* 46 N. Y. 325; *Liech* v. *Wells,* 48 Barb. 637; *Isham* v. *Buckingham,* 49 N. Y. 216; *Boatman's Ins. and Trust Co.* v. *Abel,* 48 Mo. 136; *Choteau Spring Co.* v. *Harris,* 20 Mo. 283; *People* v. *Elmore,* 35 Cal. 653; *Weaver* v. *Barden,* 49 N. Y. 286.

2. The authority in a charter to regulate the transfer of stock by by-laws, can not confer the power to prohibit all equitable transfers, nor to provide what shall be evidence of an equitable transfer. *United States* v. *Vaughan,* 3 Binney (Pa.), 402.

3. An incorporated company may provide as to what shall be evidence of a transfer of its stock between itself and its stockholders, but beyond this it can not go. Cases cited above.

4. Even where a charter provides that no transfer of stock shall be valid except on the books of the company, an assignment and delivery of the stock for a valuable consideration by a stockholder passes a good title in equity to the stock. See above cases.

5. An assignment of the equitable title before a levy or lien acquired by a creditor, gives a court of equity jurisdiction to enjoin a sale under a levy and to compel an assignment of the stock. *Broadway Bank* v. *McElrath,* 2 Beasley, 24.

6. A judgment creditor is not an innocent purchaser for value. *Bassett* v. *Nosworthy,* Leading Cases in Equity, with Hare & Wallace's note, vol. 2, p. 75, 79, where the authorities will be found collected.

7. If a judgment creditor have a right to sell the equity of redemption of mortgaged property, but claims the right to,

and attempts to sell the property discharged from the lien of the mortgage, his sale will be enjoined at the suit of the mortgagee. *Christee* v. *Hale,* 46 Ill. 117.

8. Where the charter or by-laws of a corporation provides that its stock is only transferable by assignment on the books of the corporation on the presentation of the certificate duly indorsed, and the corporation permits an assignment to be made on its books without presentation of the certificate so assigned, it is liable to the owner of the certificate by indorsement for the value of such stock. *Bank* v. *Lanier,* 11 Wall. 369.

9. Nothing but the interest of the defendant in execution can be sold by a levy on capital stock. Rev. Stat. 1874, p. 628, sec. 52.

Mr. W. S. COY, and Messrs. STEVENSON & EWING, for the appellees, made the following points:

1. The stock in question is personal property. 3 Parsons' Contracts, 34; Walker's Am. Law, 233; Angell & Ames on Corp. 554; Proffatt on Corp. 70; *Arnold* v. *Ruggles,* 1 R. I. 165; *Bligh* v. *Brent,* 1 Y. & Coll. 268; *Tippetts* v. *Walker,* 4 Mass. 595.

2. The appellant did not take possession of the stock by the assignment of the certificates. *Fisher* v. *Essex Bank,* 5 Gray, 377; *Ex parte Wilcox,* 7 Cow. 411; *Colt* v. *Ives,* 31 Conn. 35; Proffatt on Corp. sec. 323; Angell on Private Corp. 70; Angell & Ames on Corp. sec. 557.

3. The stock was not mortgaged to appellant by appellees. Angell & Ames on Corp. sec. 580.

4. The lien on the stock, acquired by the assignment of the certificate, was void as to the execution of the appellees. Rev. Stat. 1874, p. 711. sec. 1.

5. The stock in question was subject to mortgage. *Colt* v. *Ives,* 31 Conn. 35; *Durkee* v. *Stringham,* 8 Wis. 124.

6. Where the charter of a corporation provides that the stock shall be transferable only on the books of the corpora-

tion, no transfer, except it be made on said books, will convey the title to the stock of said corporation, as against third persons. *Dutton* v. *Connecticut Bank*, 3 Conn. 498; *Skowhegan Bank* v. *Cutler*, 49 Maine, 317; *Sabin* v. *Bank of Woodstock*, 21 Vt. 360; *The People ex rel.* v. *Devin*, 17 Ill. 86; *Wilson* v. *Little*, 2 N. Y. 447; *Brown* v. *Kneeland*, 5 Bissell, 181; *Heath* v. *Erie Railroad Co.* 8 Blatchford, 347; *Fisher* v. *Essex Bank*, 6 Gray, 373; *Oxford Turnpike Co.* v. *Bunnell*, 6 Conn. 552; *Strout* v. *Natoma Co.* 9 Cal. 78; *Blanchard* v. *Dedham Gas Co.* 12 Gray, 213; *Agricultural Bank* v. *Burr*, 24 Maine, 263; *Williams* v. *Mechanics' Bank*, 5 Blatchford, 59; *Shipman* v. *Ætna Ins. Co.* 29 Conn. 251; *Bank* v. *N. Y. & N. H. R. R. Co.* 13 N. Y. 621; *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 38 Barb. 440; 1 Redfield's American Railway Cases, 136; *Bowden* v. *F. & M. Bank of Baltimore*, 1 Hughes, 307; 1 Schouler on Personal Property, 635; 1 Redfield's Am. Railway Cases, 110; *Boyd* v. *Rockport Steam Cotton Mills*, 7 Gray, 406.

7. Where the charter of a corporation gives authority to the board of directors to select the mode of the transfer of stock, a by-law passed by said board has the same effect as if the by-law was a part of the charter. Proffatt on Corp. sec. 301; *Oxford Turnpike Co.* v. *Bunnell*, 6 Conn. 558; *Lockwood* v. *Mechanics' Bank*, 9 R. I. 308.

8. Where certificates of stock issued by a corporation show on their face the mode of transfer required by the corporation, such notice has the same effect as if the mode of transfer so stated was incorporated into the charter. *Townsend* v. *McIver*, 2 Richardson, 43; *Williams* v. *Mechanics' Bank*, 5 Blatch. 50.

9. If a person takes an assignment of certificates of stock, it is his duty to immediately cause the stock to be transferred to him on the books of the company, and if he does not do so, the assignment is void as to a creditor of the assignor, who levies an execution on the same as the property of the assignor.

Pinkerton v. *Lawrence and Manchester Railroad Co.* 42 N. H. 415; *Colt* v. *Ives*, 31 Conn. 35; *Boyd* v. *Rockport Steam Cotton Mills*, 7 Gray, 406.

10. Where stock stands in the name of a person on the books of a corporation, a levy on the same and a sale thereof will convey a perfect title to the purchaser as against a person who has an assignment of the certificate but no transfer on the books. *Agricultural Bank* v. *Burr*, 24 Maine, 263; *Fisher* v. *Essex Bank*, 5 Gray, 373; *Blanchard* v. *Dedham Gas Co.* 12 id. 215; *Strout* v. *Natoma Co.* 9 Cal. 78; *Shipman* v. *Ætna Ins. Co.* 29 Conn. 253; *Cady* v. *Potter*, 55 Barbour, 467.

11. An execution creditor stands, in regard to the property levied on, as a *bona fide* purchaser for value. And a purchaser of stock, where the mode of transfer prescribed is, on the books of the company, will hold the same against an assignment which is not recorded on the books. *Massy* v. *Walcott*, 40 Ill. 163; *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 80; *N. Y. & N. H. R. R. Co.* v. *Ketchem*, 3 Keyes, 363; *N. Y. & N. H. R. R. Co.* v. *Schuyler*, 38 Barb. 534.

12. When the legislature of the State enacts a statute of another State, it is presumed to adopt the construction which that statute has received by judicial decision in the courts of the State from which it is taken. *Campbell* v. *Quinlan*, 3 Scam. 288; *Rigg et al.* v. *Welton et al.* 13 Ill. 15; *Tyler* v. *Tyler et al.* 19 id. 151.

13. The statute of this State in regard to the levy and sale of capital stock on execution, is a substantial copy of the statute of New Hampshire, which has been construed to require a transfer on the books in order to protect the stock from sale on execution, even when the charter and by-laws were silent on that question, long before the statute in this State was passed. Rev. Stat. 1874, 628; Comp. Stat. of N. H. 1868, pp. 470, 499; *Pinkerton* v. *Manchester and Lawrence Railroad Co.* 42 N. H. 445.

14. Under the statutes of Illinois capital stock in an incorporated company is personal property, and its transfer must be governed by the rules of law applicable to that kind of property. Rev. Stat. 1874, p. 287, sec. 7.

15. The assignment of the certificates of stock by Pennell to the People's Bank, was only a chattel mortgage of the stock. Herman on Chattel Mortgages, 40, 56; *Huntington* v. *Mather*, 2 Barbour, 528; Schouler on Personal Property, 536; *Wilson* v. *Little*, 2 Comstock, 443; *City Fire Ins. Co.* v. *Olmstead*, 33 Conn. 476; *Nevan* v. *Roupe*, 8 Clarke (Iowa), 207.

16. In order to make the assignment valid as against judgment creditors, it should have been acknowledged and recorded, or the property should have been delivered to the assignee. Rev. Stat. 1874, p. 711; *Gregg* v. *Sandford*, 24 Ill. 17; *Forrest* v. *Tinkham*, 29 id. 141; *Henderson* v. *Morgan*, 26 id. 431; *Duke* v. *Jones*, 6 Jones Law, 14; *Loffan* v. *Garnett*, 9 Dana, 389.

17. A symbolical delivery will not preserve the lien of the assignment. Herman on Chattel Mortgages, 199; *Frey* v. *Miller*, 45 Pa. St. 441; *Morse* v. *Powers*, 17 N. H. 286; *Bank* v. *Nelson*, 38 Geo. 391; *Beeman* v. *Lawler*, 37 Maine, 543; *Walcutt* v. *Keith*, 22 N. H. 196.

18. A certificate of stock is not a negotiable instrument. *Shaw* v. *Spencer*, 100 Mass. 382; *Sewall* v. *Water Power Co.* 4 Allen, 277; *Bank* v. *Railroad Co.* 3 Kernan, 599; *Life Ins. Society* v. *Pooley*, 3 De Gex & Jones, 294; *Rex* v. *Capper*, 5 Price, 217; *Arnold* v. *Ruggles*, 1 R. I. 165; *Allen* v. *Pegram*, 16 Iowa, 163; *Bank* v. *Tennessee*, 9 Yerger, 490.

19. The assignment of the stock was void, because it was not made on the books of the company. *Pittsburg Railroad Co.* v. *Clarke*, 29 Pa. St. 146; *City Fire Ins. Co.* v. *Olmstead*, 33 Conn. 476.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This case comes before us by appeal from the Appellate Court of the Third District.

The facts are: The fourth section of the charter of the Bloomington and Normal Horse Railway Company provides that the capital stock of that company "shall be divided into shares of $100 each, and shall be issued and transferred in such manner and upon such conditions as the board of directors may direct." And the sixth section provides, that "The said corporation, by its board of directors, shall have power to make, ordain and establish all such by-laws, rules and regulations as said directors shall deem needful and expedient to carry into effect the purposes of this act, and for the well ordering, regulation and management of the affairs, business and interests of said corporation: *Provided,* the same be not repugnant to this act, or to the laws or constitution of the State or the United States."

Under the authority of these provisions, on the 28th of March, 1867, the board of directors of that company adopted the following by-law: "The transfer of stock shall only be made upon the books of the secretary, on the presentation of the stock certificates properly indorsed."

In the summer of 1867, William A. Pennell became the owner of 100 shares of stock in that company, and ten certificates, each representing ten shares of stock of the par value of $1000, were issued to him. In the body of each certificate was this language: "Subject to the by-laws of said company—transferable only on the books of the company, on the surrender of this certificate."

On the 10th of November, 1873, Pennell and the Ruttan Heating and Ventilating Company being indebted to the appellant for $7400, borrowed money, Pennell assigned and delivered these certificates of stock to the appellant to secure that indebtedness, and also to procure subsequent advances to be

made. The appellant has since held possession of the certificates, but no transfer of the stock of which they evidence ownership has been made on the books of the company. Of the indebtedness existing when they were assigned and delivered, there remains due $2650; and there has also been advanced $1400 since, which remains due and unpaid.

On the 7th of May, 1877, in vacation of the McLean circuit court, the appellees, Asahel and Edward B. Gridley, as "A. Gridley & Son," recovered a judgment, by confession, against William A. Pennell and others for $1000, and costs of suit. On the same day execution was issued on the judgment, and the sheriff of McLean county, by virtue thereof, levied upon Pennell's shares of stock in the horse railway company, making his levy in conformity with the directions of the statute relating to levies of that description.

The appellees, Asahel and Edward B. Gridley, and the horse railway company had no actual notice that the certificates of stock had been assigned and delivered to appellant until after the levy of the execution.

The Appellate Court held that, the stock not having been transferred on the books of the horse railway company before the levy was made, the levy is entitled to priority over any claim in behalf of appellant, and this ruling presents the only question to be now determined.

Appellant insists that *Kellogg* v. *Stockwell et al.* 75 Ill. 68, settles that the ruling below was erroneous. That was a bill in equity to protect the original owner of corporate stock from assessments made by the corporation after he had sold his stock, filed by such owner against his vendee. There had been no transfer of the stock upon the books of the corporation, and there was a clause in the charter providing that shares of stock should be transferable only on the books of the corporation. It was said that this provision in the charter was designed for the protection of the company, and, perhaps, a purchaser without notice; but, it was held, as between the vendor and vendee, a sale and transfer will be good without

being entered upon the company's books, and will be enforced in equity, and a decree requiring the vendee of the stock to pay or indemnify the vendor, on account of the assessments, was affirmed.

But there is no question, here, between vendor and vendee, or pledgor and pledgee. The question is between two parties having equally meritorious claims against the original owner of the stock, each claiming a prior lien over the other,—the one by virtue of the pledge, the other by virtue of the levy of the execution.

Our statute provides, (Rev. Stat. 1874, p. 628, chap. 77,):

"§ 52. The shares or interest of a stockholder in any corporation may be taken on execution, and sold as hereinafter provided.

"§ 53. If the property has not been attached in the same suit, the officer shall leave an attested copy of the execution with the clerk, treasurer or cashier of the company, if there is any such officer, otherwise with any officer or person having the custody of the books and papers of the corporation; and the property shall be considered as seized on execution when the copy is so left, and shall be sold in like manner as goods and chattels." * * *

"§ 55. The officer of the company who keeps a record or account of the shares or interest of the stockholders therein, shall, upon the exhibiting to him of the execution, be bound to give a certificate of the number of shares or amount of the interest held by the judgment debtor. If he refuses to do so, or if he willfully gives a false certificate thereof, he shall be liable for double the amount of all damages occasioned by such refusal or false certificate, to be recovered in any proper action, unless the judgment is satisfied by the original defendant.

"§ 56. An attested copy of the execution and of the return thereon shall, within fifteen days after the sale, be left with the officer of the company whose duty it is to record transfers of shares; and the purchaser shall thereupon be entitled to a

certificate or certificates of the shares bought by him, upon paying the fees therefor and for recording the transfer." * * *

It is too obvious to justify extended comment, that these provisions contemplate that, as against a judgment creditor, title to the stock can only pass by transfer on the books of the company, for if it might be otherwise transferred, as, by indorsement and delivery of the certificates alone, these provisions could have no practical operation.

If the mere transfer of the certificate, under contract of sale, shall sufficiently pass title, of what worth can the certificate required by § 55 be?

How can a certificate of shares purchased on execution, as provided by § 56, be of any avail, if the original certificate be out and be transferable from hand to hand, by indorsement and delivery?

Unless the books of the company is the proper place to ascertain the title of the purchaser or assignee of stock, what possible end can be subserved by requiring a copy of the execution to be left with the clerk, treasurer or cashier of the company, etc., and with what sense could it be said this should be regarded as a seizure of the stock on execution, etc.?

What we regard as the correct doctrine is well stated by the late Judge REDFIELD in his note to *Fisher et al.* v. *President, Directors, etc., of the Essex Bank,* 1 Am. Railway cases, 127. He says: "It seems to be agreed, upon all hands, that in the case of a mere pledge of shares for the security of a debt, a formal delivery will be required to create or to consummate the contract, since it is of the very essence of a pledge that the possession be transferred to the pledgee; for as the general title of the thing still remains in the pledgor, unless the possession were transferred, there would be nothing to uphold the contract. Redfield on Bailm. §§ 659–674, and cases cited. This may be effected by a formal or even a blank indorsement or assignment of the certificate, and delivery of the same to the assignee. Nothing more is ordinarily required to complete the contract as between the immediate parties. But, as

to third parties, something more is commonly required. Some such visible or ascertainable index of the change of ownership as will naturally put those interested in the question upon inquiry, and thus lead them to correct information upon the subject, must exist. 1 Story Eq. Jur. § 421 b, and cases cited in note. Some of the American States have attempted to maintain a different rule, as, that the assignment, being complete between the parties, will be held good as to third parties whose rights are subsequently acquired and perfected by actual possession, without knowledge of the prior transfer. *Muir* v. *Schenck*, 3 Hill (N. Y.), 228, and cases cited by COWEN, J., in the opinion of the court. But this rule has never obtained in England, and only to a very limited extent in this country, and is repudiated by all the best authorities. 1 Story Eq. Jur. § 412 c, and cases cited. But we think there can be no fair question that where the law of the State, as applicable to corporations, whether it be by a provision in the charter of the particular company or by a general statute, or settled course of decisions in the courts, requires that shares shall be transferred in a particular mode, as, in the present case, that they shall be 'transferable only at its banking house and on its books,' there must be a substantial compliance with the requirement, in order to protect the property against future assignments or levies."

These views are sustained by *Fisher et al.* v. *President, etc., of the Essex Bank*, 5 Gray, 373; *Sabin* v. *Bank of Woodstock*, 21 Vt. 353; *Oxford Turnpike* v. *Bunnell*, 6 Conn. 558; *Pinkerton* v. *Manchester and Lawrence Railroad Co.* 42 N. H. 424; *Pittsburgh and Connellsville Railroad Co.* v. *Clarke*, 29 Penn. St. 146; *Dutton* v. *Connecticut Bank*, 13 Conn. 498; *Skowhegan Bank* v. *Cutter*, 49 Maine, 315; *Lockwood* v. *Mechanics' National Bank*, 9 R. I. 308; *Agricultural Bank* v. *Burr*, 24 Maine, 256; *Blanchard* v. *Dedham Gas Co.* 12 Gray, 213. And in *People ex rel.* v. *Devin et al.* 17 Ill. 86, this court, by implication, indorses the doctrine.

No point is made, nor is any tenable, that the resolution of

the board of directors, and not the express declaration of the charter, prohibits a transfer of stock otherwise than on the books of the company. The board of directors were expressly empowered, by the charter, to provide for the mode of transfer, and that was all that was necessary. *Lockwood* v. *Mechanics' National Bank, supra.*

The cases in New York and New Jersey, relied upon by counsel for appellant, recognizing a doctrine not in harmony with that above indorsed, do not commend themselves to our approval.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

WILLIAM NOECKER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. CRIMINAL LAW—*selling intoxicating liquor.* Proof that the defendant sold intoxicating liquors in less quantities than one gallon is *prima facie* sufficient to warrant a conviction under the statute. If the defendant has a license to keep a dram-shop or a permit from the city or village authorities as a druggist to sell liquors for medicinal, mechanical, sacramental and chemical purposes, he must show it.

2. SAME—*sale of liquor by physician.* A prescription for intoxicating liquor by a physician, will not authorize the sale of such liquor by one not having a license or permit to sell, where there is no proof the persons obtaining the same were sick at all or needed medicine of any kind. In such case the prescription may be a mere device to avoid the statutory prohibition against the sale of intoxicating liquor.

WRIT OF ERROR to the Circuit Court of Piatt county; the Hon. C. B. SMITH, Judge, presiding.

The proof in this case shows that the defendant sold whisky and other liquors to various parties upon the prescriptions of physicians, the defendant or clerk retaining the prescriptions,

and that he also sold the same for culinary purposes to one Frank Ater three times, the liquor being used for that purpose. James Glass testified he bought intoxicating liquor of the defendant twice for medical use. "He was my family physician and prescribed it for me."

The defendant testified that he never sold any liquor, except on the prescription of a physician, to the witnesses, and for purely medical use, and that his instructions to his clerk were to sell to no one except on a physician's prescription and for medical use.

Messrs. REED & BARRINGER, for the plaintiff in error.

Mr. JAS. K. EDSALL, Attorney General, for the People.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Plaintiff in error was indicted for selling intoxicating liquors in a less quantity than one gallon, and on the trial was found guilty and sentenced to pay six several fines, amounting in the aggregate to $120.

The second section of the "Dram-shop" act makes it unlawful for any person not having a license to keep a dram-shop, to sell intoxicating liquors for any purpose, in a less quantity than one gallon, or in any quantity to be drank on the premises or in or upon any place adjacent thereto. It is not claimed that defendant had any license to keep a "dram-shop," or any permit from the authorities of any village or city, as a druggist, to sell liquors for "medicinal, mechanical, sacramental and chemical purposes." On proof being made, as was done, that defendant had sold intoxicating liquors in less quantities than one gallon, *prima facie* the conviction was warranted by the law and the evidence.

Whether a druggist, not having a permit to do so, may lawfully sell intoxicating liquors on a physician's prescription, if the same were done in good faith, and the person for whose use the prescription was made was, in fact, sick, is a question that can not arise on this record, as there is not a particle of testi-

mony that shows or tends to show that defendant, at the time he sold the liquors, or ever, was a druggist. The only testimony that indicates, in the remotest degree, the occupation of defendant is, that one of the witnesses says he was his "family physician," and, as such, prescribed for him. So far as this record discloses, the prescriptions introduced in evidence may have been a mere device to avoid the statute prohibiting the sale of intoxicating liquors. It does not appear that any of the witnesses who obtained the prescription were at all sick or needed medicine of any kind.

The testimony so fully sustains the verdict that we need not remark upon the instructions, except to say that under the evidence they were far more liberal to the defence than defendant had any right to ask.

The judgment must be affirmed.

Judgment affirmed.

BENJAMIN L. T. BOURLAND

v.

GEORGE L. GIBSON *et al.*

FAILURE OF CONSIDERATION—*retaining deed until payment.* Where a purchase of land was made through an agent for $6000, of which sum $2000 was to be paid down, and the balance secured by note and deed of trust, the conveyance of the land being left with the agent for delivery upon a compliance with the terms of the sale, and the purchaser being unable to make the cash payment, the agent agreed to take his note, with personal security, for $2100, the $100 being the agent's commissions, it was *held*, that the non-delivery of the deed for the land could not constitute a failure of the consideration of the note given to the agent, as it was not to be delivered until after payment of such note.

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

Messrs. DONAHUE & KELLY, and Messrs. MOORE & WARNER, and Mr. J. H. SEDGWICK, for the appellant.

Messrs. WELDON & MCNULTA, and Messrs. ROWELL & HAMILTON, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit growing out of the following facts:

Bourland, as trustee for Patterson, had, under a trust deed from Gibson, made a sale of Gibson's homestead property in El Paso, which Patterson bid in, and had a deed for it. Afterward, Gibson, through Bourland, made an arrangement for the re-purchase of the property from Patterson, on the following terms:

Gibson was to pay cash $2000, and give his note for $4000, due in five years with ten per cent interest, secured by his trust deed on the property, Bourland to be the trustee.

Bourland procured a deed from Patterson to Gibson, and held the same in his hands ready for delivery to Gibson upon his compliance with the terms. He addressed to Gibson a letter notifying him of the fact, inclosing in the letter, for execution by Gibson, the note and trust deed which were to be given by the latter. Gibson was not able to raise the $2000, cash payment, and it was afterwards agreed with Bourland that instead of the cash payment of $2000, Gibson should give his note to Bourland, with Thomas Snell as surety, for $2100, payable in one year, with ten per cent interest; the $100 being for commissions due Bourland. Accordingly, Gibson executed the $4000 note and trust deed on the property to secure it, and Gibson, with Snell as surety, executed the $2100 note, it bearing date February 22, 1875.

This suit was by Bourland against Gibson and Snell upon this note given by them.

As Bourland had not delivered to Gibson the deed from Patterson to the latter, but still retained the same in his hands, the defendants pleaded a failure of consideration of the note,

in the non-delivery of this deed. The jury found the issue upon the plea in favor of the defendants, and the court, after overruling a motion for a new trial, rendered judgment upon the verdict in favor of the defendants, and the plaintiff appealed.

The verdict in this case was manifestly against the evidence. There could not be said to be any failure of consideration of the note. Bourland held the deed from Patterson to Gibson, already executed, in his hands, ready to be delivered to Gibson upon the payment of this $2100 note. Without entering upon a discussion of the evidence, we think it enough to state our conclusion, that the circumstances proved clearly show that the deed was only to be delivered upon payment of this note for $2100.

The judgment will be reversed and the cause remanded.

Judgment reversed.

JAMES T. SNELL

v.

JOHN WARNER *et al.*

1. COSTS—*when error is cured by remittitur.* Where an appeal is taken from a judgment for more than was due and the error is cured by the entry in the court in which the appeal is pending, of a *remittitur* of the sum in excess of what it should have been, the judgment will be affirmed as reduced, but the appellee or defendant in error will be required to pay all the costs incurred on the appeal up to and including the entering of the *remittitur.*

2. PRACTICE IN THE SUPREME COURT—*of a partial reversal.* Where the appeal in such case was to the Appellate Court, and that court affirmed the judgment of the circuit court, but erroneously entered judgment for costs against the appellant, on appeal to this court, it being considered the judgment of affirmance in the Appellate Court was correct, that part of the judgment was affirmed here, and only the judgment for costs reversed.

APPEAL from the Appellate Court of the Third District; the Hon. CHAUNCEY L. HIGBEE, presiding Justice, and the Hon. OLIVER L. DAVIS and Hon. LYMAN LACEY, Justices.

Mr. E. H. PALMER, for the appellant.

Messrs. MOORE & WARNER, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This is an appeal from the Appellate Court of the Third District.

The suit was upon a promissory note, and judgment was rendered in the circuit court for $1,195.33, when in fact, as the evidence showed, the amount of the judgment should have been only for $1,185.22.

In the Appellate Court a *remittitur* was entered for $10.11, and thereupon the judgment of the circuit court was affirmed for the residue, and the costs of the appeal were taxed to the appellant in that court, who is also the appellant here.

There can, on the authority of the previous decisions of this court, be no question but that judgment was erroneous. We have repeatedly held, where a judgment is taken for too large an amount in the court below, and the excess is cured by a *remittitur* in this court, the party entering the *remittitur* must pay all costs incurred in this court up to the time of entering the *remittitur*. *Lowman* v. *Aubery et al.* 72 Ill. 619; *Pixley et al.* v. *Boynton et al.* 79 id. 351; *Nixon* v. *Halley*, 78 id. 611. This, however, affects only so much of the judgment as relates to the question of the costs of the appeal in the Appellate Court. The balance of the judgment is correct, and should not be disturbed. It will therefore be affirmed, and the judgment for costs alone will be reversed, and the cause will be remanded to the Appellate Court, with directions to enter judgment for all costs made by the appeal to that court, up to and including the entering of the *remittitur*, against the appellee in that court.

Judgment affirmed in part, and in part reversed.

INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY CO.

v.

JOHN I. TOY, Admr.

1. MASTER AND SERVANT—*liability of master to servant for injury from defective machinery.* Employers are only required to provide machinery of good material, and to have it constructed in a good and workmanlike manner. They, whether as individuals or corporations, are not insurers of their employees against injury from its use.

2. Where an engineer of a railway company was killed by the explosion of a boiler of a locomotive, and it appeared the boiler was made of the best material, and by first-class manufacturers, and had not been used long enough to create any suspicion of its unsafe condition, and the defect was not of such character as could have been discovered by any of the tests usually employed for the purpose, and there was no sign or indication of its unsafety, it was *held*, that the company was not liable for the injury.

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

Messrs. FAIRBANK & GERE, for the appellant.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that about the 17th day of January, 1875, one Wm. F. Hiller, a fireman of an engine used on the Indianapolis, Bloomington and Western railroad, was killed by an explosion of the boiler of the engine. Appellee, as administrator of Hiller's estate, brought an action against the company, averring negligence on its part in not providing suitable, safe and properly constructed machinery, whereby Hiller was killed, and sought to recover damages therefor. A trial was had, resulting in a verdict against the company for $1950, upon which, after overruling a motion for a new trial, the court rendered judgment, and the company appeals.

It is claimed that the recovery is wrong, because it is not supported by the evidence, and, in the next place, because the railroad was, at the time the explosion occurred, in the hands, under the control, and being operated by, a receiver, and that

proper evidence offered by appellant was rejected, and the court erred in giving and refusing instructions.

We are clearly of opinion that the evidence fails to show a cause of action. It appears, from the evidence, that the engine which caused the injury was at the time employed in the yard for switching purposes; that a portion of the left-hand side sheet of the boiler gave way, which caused Hiller's death. Witnesses of intelligence, and who are unimpeached, testified that the engine was of first-class manufacture, built by a manufactory having reputation for constructing good and reliable machinery. The fire-box was constructed of copper, the best and most expensive material used for the purpose. The average time such a box lasts, in use, is seven or eight years, and is not regarded as being dangerous under five years. This had been in use only about three and a half years. The stay-bolts had leaked some, but that was not regarded as indicating the slightest danger. They and side sheets frequently leak, but that does not indicate weakness or want of safety. All leakage in the fire-bolts had been reported, and properly repaired. Experts testified they could not see how it was possible, with the prudence and care ordinarily used in the management of railroads, to discover the danger in this engine, as was shown by the explosion; that the employees in charge of the locomotive were careful and prudent men.

On the part of appellee, witnesses testified that they did not consider the engine safe; but their opinions seem to be based principally on examinations made after the boiler bursted. Webb, an engineer, testified, that he examined the boiler after the explosion, and it did not look very safe. He says, the thickness of the sheet could not be determined, by examination, without cutting through, but if the heads of the bolts were worn, that could be seen. Harvey, an engineer who used this locomotive half the time, says the heads of the bolts had leaked; that he reported, and they were repaired; that he did not regard it very safe, and did not use much steam. He was on the engine at 7 o'clock in the morning of the day

of the accident, but did not, on leaving it, report to the other engineer who took charge that he regarded it unsafe. Brash, a relative of the deceased, and the engineer in charge at the time, testified that he could not say he, at the time, regarded the engine as unsafe. Brash used it, he says, without protest, and was unable to say he was afraid of anything happening. He had reported leakage, and repairs were promptly made.

From this evidence we are wholly unable to see how appellant can be held liable, unless it was an insurer of the safety of its employees. If only the evidence of appellee was considered, it wholly fails to make a case. There is nothing in it showing the slightest neglect of duty on the part of appellant. Ordinary means of detecting the unsafety of the engine were entirely inadequate for the purpose, nor does the evidence of any witness show that there was any sign of unsafety. The result showed it was unsafe, and after the boiler had opened all could then see its defects, but none could before. The engineer in charge points out nothing to indicate its unsafe condition before the explosion, nor does his predecessor. Their opinions, manifestly, are based on an examination made after the accident, or they would have specified the defects upon which to conclude it was unsafe. We have searched the evidence in vain to find any fault on the part of the company, but none is found. No one of the witnesses has suggested any fault or the omission of any duty on the part of the company.

Employers are only required to provide machinery of good material, and to have it constructed in a good and workmanlike manner. They, whether as individuals or corporations, are not insurers of their employees against injury from its use. In this case the locomotive was made of the best material, and by first-class manufacturers, and had not been used a sufficient length of time to create any suspicion of its unsafe condition, which could have been discovered by any of the tests usually employed for the purpose, and its appearance did not indicate its unsafe condition. To have detected it, the boiler would have been greatly injured, by cutting through its walls.

We are unable to see that those having charge of the road and its machinery omitted any duty, and the company can not be held liable for the loss.

This view of the case renders it unnecessary to discuss the other questions presented by appellant.

The evidence being wholly insufficient to support a recovery, the judgment of the court below is reversed.

Judgment reversed.

CLEMENT L. SHINN *et al.*

v.

HORACE B. SHINN *et al.*

1. PARTY—*bill to foreclose.* On bill to foreclose a mortgage where the mortgaged premises have been sold under a prior mortgage, and a deed made to the assignee of the certificate of purchase, who gives a deed of trust to secure a loan of money to him, the bill seeking to enforce the second mortgage against such assignee, on the ground that he purchased with money furnished by the mortgagor, the person loaning the money to such assignee, and who is secured by the deed of trust, is not only a proper, but a necessary party.

2. PLEADING AND EVIDENCE. On a bill to foreclose a mortgage, wherein two persons are made defendants who have acquired the legal title under a foreclosure of a prior mortgage, and a sale and assignment of the certificate of purchase, it being charged that the mortgagor furnished them the means to purchase the certificate of sale, and that they hold the legal title in trust for the mortgagor, in which the court finds that one of said persons is a *bona fide* innocent purchaser, and that the other is not, but holds in trust for the mortgagor, the court can not proceed and find the proportion of the land each of said persons holds under their joint purchase where there is no such prayer in the bill, and without proper averments in the bill no such prayer would be appropriate, and such relief could not be granted under the general prayer.

3. JOINT OWNERS—*relative interests.* Where a certificate of purchase is assigned to two persons jointly, upon which a master's deed is executed to them both, so far as third persons are concerned they are to be regarded as joint owners of an equal share, without regard to the amount paid by each for the certificate of purchase.

Statement of the case.

4. SUBROGATION—*to rights of mortgagee.* If one of two mortgagors, after selling out his interest in the mortgaged premises to the other, the latter assuming to pay the mortgage debt, is compelled to pay the debt, or any part of it, he may be subrogated to the rights of the mortgagee or his assignee.

5. FRAUD—*must be clearly proved.* Something more than suspicions are required to prove an allegation of fraud. The evidence must be clear and cogent, and must leave the mind well satisfied that the charge is true.

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

The appellee Horace B. Shinn filed his bill in the circuit court of Moultrie county, at its October term, 1872, to foreclose a mortgage alleged to have been executed to him by the appellant Clement L. Shinn, on the 6th of January, 1865, conveying certain land lying in the county of Moultrie, described in the bill.

The bill alleged that on the 6th of January, 1865, appellant Clement L. Shinn became indebted to complainant in the sum of $5000, secured by three promissory notes, one for $2000, due May 1, 1865, one for $1500, due September 1, 1867, and one for $1500, due September 1, 1868. That the first note for $2000 was paid at maturity, but that the other two, with the interest, remained due and unpaid at the filing of the bill. That for the better security of said notes the appellant Clement L. Shinn, at the said date, executed a mortgage to the complainant of the tract of land described therein, which mortgage remained still unsatisfied.

The bill further stated, that the appellants William H. Shinn, Mary Ann Kenny, and the appellee Albert C. Burnham have some claim as mortgagees, or judgment creditors, or in some form, but subsequent to the mortgage of complainant, and subject to its lien. That William H. and Mary Ann are the children of C. L. Shinn, and that they acquired their interest by a purchase of a certificate of sale from one Thomas B. Trower, who held as purchaser from Ebenezer Noyes of a certain mortgage, which was foreclosed by Trower when he purchased. That the purchase by the said William

and Mary Ann was in fraud of complainant's rights, and asking account of the indebtedness and foreclosure. Thereafter the complainant amended his bill by making the defendant Albert C. Burnham a defendant as the trustee of Austin M. Ward, and Hezekiah M. Ashmore and Jacob Zimmerman defendants, as administrators of H. I. Ashmore, deceased.

The defendants Clement L. Shinn, William H. Shinn and Mary Kenny answer, but the other defendants make default, and there was a decree *pro confesso* as to them.

By his answer the defendant (now appellant) Clement L. Shinn alleges that about the 1st of September, 1864, he formed a partnership with the complainant Horace B. Shinn, for the purpose of buying a sheep farm. That in the execution of this purpose they purchased the tract of land in controversy from one Ebenezer Noyes for $10,800; that of the purchase money $7800 was paid in cash, of which the said Clement L. paid $4300, and the said complainant paid $3500, and for the balance a joint note of $3000, secured by a mortgage on the land, was executed by them to the vendor, Noyes. That by the agreement between them, the appellant Clement L. was to have a two-thirds interest in the land, and the appellee Horace B. was to have one-third; but the deed was made to them jointly. That in pursuance of the partnership agreement the said Clement L. bought about five or six hundred head of sheep to stock the farm, paying therefor, out of his own funds, $2227. That by the mismanagement of the said Horace the sheep depreciated and became a total loss. That he laid out other sums, and lost altogether, by the venture, about $6000, of which he insists Horace ought to bear half the burden.

He admits that on the 6th of January, 1865, he and Horace had a settlement of the land transaction, when he purchased the interest of Horace, giving him therefor three notes, the $2000 note stated in the bill, and the two notes for $1500; but he alleges that one of the notes of $1500 was given to secure the said Horace on his liability upon the joint note of

$3000 held by Noyes, and that by the sale by Trower, and satisfaction of that debt, he is discharged from liability. He also alleges that this transaction related to the land only, and that the partnership transaction as to the stock, etc., did not enter into it, but that the said Horace is still liable to him in an account of those transactions. He admits that on the execution of the three notes and mortgage, the said Horace gave him a quitclaim deed of his interest in the land.

He denies that Horace ever offered to furnish him money to pay off the Noyes mortgage assigned to Trower, as is alleged in the bill, although he appealed to him for assistance, and he then made arrangements with his son, the appellant William H. Shinn, and his daughter, Mary Ann Kenny, wife of Robert M. Kenny, the other appellant, who paid off the purchase money advanced by Trower at the foreclosure sale, and took for it an assignment of his certificate of sale, and when the time of redemption expired they received the master's deed, which they now hold. He denies that he furnished any of the money by which they paid the Trower claim, or that he was able to redeem or pay off the Noyes mortgage, and denies all fraud and all indebtedness to complainant.

The appellants William H. Shinn and Mary Ann Kenny answer, alleging that their co-defendant, C. L. Shinn, on a fair settlement, does not owe complainant anything; but that said complainant is indebted to him. They admit the purchase of the certificate of sale from Trower, but say they paid full consideration, in good faith, out of their own money, and took a deed after the expiration of fifteen months from the date of sale; and they insist that when they purchased the complainant had not any interest in the land.

To these answers there was a replication. Thereafter the appellant Clement L. Shinn filed an amended answer, in which he alleged the joint purchase by him and complainant of the land from Noyes, the execution of the $3000 note and mortgage to Noyes, and the partnership. He alleges also the sale by Noyes of the debt and mortgage to Trower, the fore-

closure by Trower, and his purchase at the foreclosure sale; that there was no redemption within the time by him or Horace, or any one, but that the title legal and equitable vested in Trower. That afterwards Trower sold and assigned the certificate to William H. Shinn and Mary Ann Kenny for a valuable consideration. He alleges the sheep partnership, the loss, and the liability of Horace to account. He denies that within the twelve months Horace offered to aid in discharging the mortgage. He disclaims all title to the land, and denies all fraud.

To which there was a replication.

The appellant Clement L. then filed a cross-bill, setting up the facts alleged in his answer, and claiming to be discharged of the $1500 note, given, as he alleges, to secure Horace against the Noyes liability, and claiming to have account of the whole partnership transaction, and that on such account Horace will be indebted to him.

Horace B. answers this cross-bill, denying that the settlement of 6th January, 1865, related only to the land, but alleging that the contract was that Clement L. would give him the sum of $5300 for all his interest in the partnership, and would pay off all the indebtedness; that he did pay him the three hundred dollars soon after, and at the time gave him the three notes, of which the two notes of $1500 each remain unpaid; and he reiterates that the Trower certificate was bought with the money of Clement L., and that the assignment of the certificate to William H. and Mary Ann was in fraud of his rights.

On the hearing the court below, decree *pro confesso* having been taken against Albert C. Burnham, trustee of Austin M. Ward, and against Hezekiah M. Ashmore and Jacob Zimmerman, administrators of H. I. Ashmore, found the equities of the cause to be with complainant; that the defendant C. L. Shinn is indebted to complainant in the sum of $6267.50; that the purchase of the certificate of sale, in so far as Wm. H. Shinn is concerned, is fraudulent as against complainant;

that said Wm. H. Shinn holds the title by him acquired in the land in trust for the defendant C. L. Shinn, and subject to the lien of complainant's mortgage; that Mary A. Kenny is an innocent purchaser, and holds her proportion of the land, and the court proceeds to ascertain the several proportions of the said Mary Ann and William H., assigning to the former one hundred and twenty acres, and to the latter two hundred and eighty, undivided each. And the court further proceeds to find that the mortgage given to Albert C. Burnham as trustee of Austin M. Ward, is junior to complainant's and that complainant's is a prior lien.

And it was decreed that the appellant Mary Ann have title in the 120 acres, undivided, discharged of complainant's mortgage; that the cross-bill of Clement L. Shinn be dismissed at his costs; that Clement L. or W. H. Shinn pay to complainant the amount set forth within sixty days, or that the land be sold for satisfaction, etc.

Messrs. CRAIG & LEITCH, for the appellants.

Mr. JOHN R. EDEN, and Messrs. A. C. & I. J. MOUSER, for the appellees.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

There are two errors, we think, in the finding and decree of the court below, for which the decree must be reversed and the cause remanded for further proceedings.

It appears that there was a mortgage executed by William H. Shinn and Mary A. Kenny to Albert C. Burnham, as trustee for Austin M. Ward, of a date subsequent to the mortgage by Clement L. Shinn to Horace B., and subsequent to the purchase by the said William H. and Mary Ann, and to the execution by the master of his deed to them, for a loan of five thousand dollars made to them by Ward. Ward has, then, an equitable interest in the lands, derived from those holding the legal title, and this equitable interest is adverse

to the complainant's, and well might have been the subject of a cross-bill by Ward. The decree directly affects his security, for it subordinates him to the demand of Horace on two hundred and eighty acres, if it does not entirely throw him upon the one hundred and twenty acres assigned to Mrs. Kenny. We think he was not only a proper but a necessary party, and is entitled to be heard before a final decree.

We are at a loss to see how the court below could assign the proportionate interests of William H. Shinn and Mary Ann Kenny at all under the pleadings. There is no prayer for such a proceeding, and no allegation in the pleadings out of which a prayer of this kind would be appropriate, and under a prayer for general relief the proceeding is not pertinent.

Nor do we see the basis proper for such an allotment as the court has made on its finding. By the deed of the master, and by the assignment of the certificate, she is a joint owner of an equal share. If she was an innocent purchaser, her title must be maintained to the undivided moiety. Her title is not dependent upon the amount she paid, nor is it to be measured in value by this amount. If *bona fide*, it is good in the entirety, as the deed fixes it; and the court, having found it to be a *bona fide* title, held by an innocent purchaser, free of fraud, could not proceed to alter and diminish the estate it confers.

But there are yet grave questions in the case, and as it is desirable to have a full and final disposition of it when reached again in the court below, we must proceed to consider them.

The cross-bill of Clement L. Shinn presents the question of the partnership between him and Horace B., the complainant in the original bill.

There is no doubt there was a co-partnership, commencing in September, 1864, and continuing to January 6, 1865, when it was terminated, by the consent of parties, and on an express agreement. This partnership not only extended to the land in question and its purchase, but to its use as a sheep farm, and to the purchase of sheep for stocking it; and there is no

doubt that the appellee Horace was a one-half owner of the interests in this undertaking, and was jointly liable for the losses, and is so still, unless discharged. It is equally clear that a flock of sheep, numbering over 500, was purchased by the partners, in 1864, for about $2227, which purchase money was paid by appellant Clement L. Shinn, and that there was a substantial loss by this purchase, as well as outlays, by said appellant. But appellee alleges that all this was settled by the agreement of the 6th of January, 1865, whereby he sold to appellant his interests in the partnership, quitclaimed the land, and took the notes and the mortgage. He says it was part of this agreement that the appellant should assume all the indebtedness of the partnership, and he should be discharged. Appellant denies this, and says that settlement related only to the land.

It is true that Clement L. Shinn swears to the truth of his statement, and he is fortified by the statement, under oath, of his son, the appellant Wm. H. Shinn, who details the conversations as he heard them between the parties; but the circumstances so strongly sustain the contrary statement by Horace, that we think the weight of evidence is with him. It is not likely that, with such losses already incurred in a joint adventure, Clement L. Shinn would have put an additional mortgage of $5000 on his farm, leaving open to future ascertainment and settlement the partnership in other matters, with no security for these losses, and no mention of any liability. Clement L. Shinn is also clearly mistaken in his statement that $3500 was given to cover the price paid by Horace on the land, and the other $1500 to secure him against his liability on the $3000 mortgage.

In the first place, $5000 was not the sum actually passed between the parties. There was, undoubtedly, $300 more, for this amount appears to have been shortly thereafter paid. Besides, the note of Clement L., merely secured by a second mortgage on the same land, would be no additional guaranty against the payment by Horace of the $3000 note, or of his

share of it, since, if Horace had, at any time, been called to pay the whole or part, he might have been subrogated at once to the rights of the mortgagee or assignee.

Again, the quitclaim deed of Horace of all his interests in the land, his return to his home, the several interviews between him and appellant Clement, when he never made mention of any partnership claim as far as we can see, the silence of appellant in all his letters in relation thereto, the language of his appeals for aid concerning the land, his offers to allow Horace the last cent,—all these circumstances contradict, potentially, any idea that there yet remained any settlement to be made of other partnership transactions, or any further liability thereon of the appellee Horace B. Shinn.

We think, therefore, the cross-bill of Clement L. Shinn was properly dismissed.

We come, now, to the question of the purchase of the certificate of sale by William H. Shinn and Mary A. Kenny, the assignment to them, and the deed of the master, whereby they are made tenants in common of the legal title in the land in controversy.

We are satisfied with the finding of the court as to the title of Mary A. Kenny, in so far as the matter of fraud is concerned. It is proved that her husband paid a valuable consideration for her benefit for the land, on an agreement between her and William H., out of his own funds; and the evidence justifies the finding that she is an innocent holder. There is evidence of other payments by her, and we think her title to the undivided moiety has not been impeached. About the title of Wm. H. Shinn to the other moiety there is more doubt.

It appears that Ebenezer Noyes assigned the notes and mortgage of Clement L. and Horace B. Shinn, and about the 11th of December, 1867, the land was sold at foreclosure sale, when the assignee of the mortgage, Thomas B. Trower, became the highest bidder, and received a certificate of purchase. The effect of this sale was to cut out the subsequent mortgage of Horace B. Shinn, and to leave him, as other creditors, only

the right of redemption. This is fortified by the fact that he had been made a party to the foreclosure proceeding, and had suffered default.

The premises sold for $4702.76. It is proved that, after this, Wm. H. Shinn and Mary A. Kenny bought of Trower this certificate of purchase, and paid therefor $5140.70, and the certificate was assigned to them as joint owners. But it is said that the money paid by Wm. H. Shinn was furnished by the appellant Clement L. Shinn, who is his father, and was the mortgagor in the deed to the appellee Horace B.,—in other words, that the payment by William was a cover, and amounted to no more than a redemption by Clement L. to that extent, William H. becoming his trustee of the legal title; and there are many suspicious circumstances which, taken alone, would seem to justify this allegation.

But something more than suspicions are required to prove an allegation of fraud. The evidence must be clear and cogent, and must leave the mind well satisfied that the allegation is true.

In the face of all the evidence in this case, we can not say that we are so satisfied. William H. Shinn appears to have been an enterprising and industrious young man. His business engagements are proved to have been numerous and important,—in various enterprises. He is proved, also, to have had credit, and neither his character for integrity nor that of his father is impeached. Both of them swear, whenever interrogated thereto, that none of the money of the father entered into this purchase; that although the deposits were made in the Bank of Mattoon in the name of the father, the money was really the property of the son, and explanation is given of the sources from which these sums were derived. That the father gave him five hundred dollars' worth of property in February, 1869, was no evidence of fraud, as touching this matter. He had the right to rent from his father, as he did in 1869 and 1870, and he was entitled to the profits of his labor. The sale of the personal property was openly made,

and the sale notes were taken by him, held by him without question of any body, and were by him deposited with Walker as collateral security for the $1500 loan, and their proceeds were applied by him towards the payment of the Hinton debt, and it appears that the proceeds of the Hinton loan were applied in replacing money borrowed by him with which to pay Trower. He had, also, the corn at Summit, which was applied in like manner. It is quite manifest that the Shelly loan was replaced by him, and, as he swears, all the money borrowed by himself and Mary A. Kenny had been repaid by them, except a small balance still due.

As we said, there is the positive testimony of both father and son that the former did not furnish any money, but the latter, out of his own means, did furnish it, and this sworn statement is corroborated by the unimpeached character of the witnesses, and by the many circumstances which we have stated, and only assailed by certain other circumstances to which we have alluded, which, though in themselves suspicious, are not sufficient as we think to establish the allegation that the purchase of the land by Wm. H. Shinn was fraudulent; and we therefore reverse the decree below for error in this particular, and remand the cause for further proceedings in consonance with this opinion.

Decree reversed.

WILLIAM M. JAFFERS

v.

FRANCIS A. ANEALS.

1. FRAUDULENT CONVEYANCE—*what constitutes.* After the service of process in a suit at law against a debtor, she, being a widow and residing on a farm owned by her, conveyed the same to her son, who was residing with her on the farm. The expressed consideration in the deed was $2000. It was claimed the son bought the farm subject to a prior mortgage for $1300, and gave his note on long time and without interest for the balance, $700. The

Statement of the case.

farm was worth $3000. Prior to this transaction, on the son attaining his majority, it was alleged that in consideration of his services on the farm for several years, and to induce him to remain with his mother on the farm, she gave to him all the personal property thereon. The suit at law resulted in a judgment against the defendant therein, and execution issued. Upon the execution being returned no property found, the judgment creditor filed his bill in chancery to set aside the deed as intended to hinder and delay creditors, and therefore fraudulent. Under the facts above set forth and other circumstances disclosed, the court below found the conveyance to be fraudulent, and set the same aside and subjected the land to the payment of the judgment. This was held to be a proper disposition of the case. The fact the debt upon which the judgment at law was founded was a mere security debt made no difference as to the result.

2. HOMESTEAD. It was held that in such case, as the judgment debtor remained in possession of the farm as her homestead, and that of her minor children residing with her, it was just and proper, after cancelling the deed, to decree that a homestead should be first assigned to her in the premises.

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

This was a bill in chancery exhibited in the court below, by Francis A. Aneals, against William M. Jaffers, Margaret Jaffers, and others, to set aside a conveyance of land from the said Margaret to the said William, on the allegation such conveyance was intended to hinder, delay and defraud the complainant as a creditor of the said Margaret. The principal facts connected with the transaction are set forth in the opinion of the court. The decree rendered in the court was as follows:

It finds that the complainant, on the 1st day of November, 1875, recovered a judgment in the Adams circuit court against William McClellan, Joseph McClellan and Margaret Jaffers, in the sum of $618.15, and costs taxed at $9.60; that execution issued on said judgment directed to the sheriff of Adams county, and that the same was returned January 5, 1876, "no property found;" that the said judgment still remains unsatisfied; that the indebtedness upon which said judgment was recovered was a promissory note, executed by the defendants in said judgment, on the 21st day of June, 1873, and payable

to the complainant in two years from date, with interest at ten per cent per annum; that suit on said note was commenced August 12, 1875, and summons was served on the defendants August 22, 1875; that at the time of the execution of said note, Margaret Jaffers was the owner in fee of the premises described in the bill herein; that on the 8th day of January, 1875, Margaret Jaffers conveyed said real estate to John C. Palmer, in trust, to secure two notes of that date, each in the sum of $650, payable in one year from said date, with interest at ten per cent per annum; that said notes are due and unpaid, except as to the interest, which is paid to January 8, 1877; that said deed of trust is a lien superior to complainant's judgment; that the tract of land in the bill first described is the homestead of Margaret Jaffers, and that she is entitled to hold such homestead as against the judgment of complainant to the value and extent of $1000; that after service of summons upon Margaret Jaffers in said suit, she, for the purpose and with the intent of hindering and delaying the complainant in the collection of his said debt, on the 21st day of September, 1875, fraudulently conveyed all her said real estate to her son, William Jaffers, without any adequate consideration, and that William Jaffers took such conveyance with full knowledge of such indebtedness of Margaret Jaffers to complainant, in pursuance of a fraudulent combination to delay complainant in the collection of his debt; that William and Joseph McClellan are wholly insolvent, and that Margaret Jaffers has no other property.

It is ordered and decreed that the conveyance executed by Margaret Jaffers to William Jaffers, on the 21st day of September, 1875, be and is set aside, as against complainant, and that the land thereby conveyed be subjected to the lien of complainant's judgment; that the sheriff of said county, when an execution shall come into his hands, issued on said judgment, do proceed to set off, or have appraised, the homestead of Margaret Jaffers in said land, and that he sell the same under his execution in the manner provided by law for sale

of real estate wherein defendants have homestead rights; that complainant may, at any time before a sale of said premises under the deed of trust executed by Margaret Jaffers to John C. Palmer, tender and pay, or offer to pay, to said William L. Palmer, the sum of $1300, with interest at ten per cent from January 8, 1877; that thereupon complainant shall become subrogated to all the rights of said Palmer.

It is further ordered, that said William L. Palmer shall not assign said notes to any other person than complainant, and that John C. Palmer shall not convey, or in any way cancel the lien of said deed of trust; that Margaret and William Jaffers pay all the costs in this case incurred by complainant, and that complainant have execution therefor.

The defendant William Jaffers appealed.

Mr. WILLIAM W. BERRY, for the appellant:

Our Statute of Frauds only renders conveyances made to hinder and delay creditors and purchasers void as to persons thus defrauded. It leaves the conveyance perfectly valid and binding as to the parties to it. *Rawson* v. *Fox et al.* 65 Ill. 200.

A voluntary conveyance, though void as to existing creditors, is valid and effectual as between the parties. A conveyance of this sort is void only as against creditors, and then only to the extent it may be necessary to deal with the conveyed estate for their satisfaction. 1 Story's Eq. Jur. sec. 371; *Campbell et al.* v. *Whitson et al.* 68 Ill. 240.

The fact that a grantor is indebted at the time of making a voluntary conveyance, is of itself merely an argument of fraud, and will not alone vacate such conveyance in favor of creditors. *Hitt* v. *Ormsby et al.* 12 Ill. 166; *Hickey* v. *Ryan*, 15 Mo. 62; *Winchester* v. *Charter*, 12 Allen (Mass.), 606.

A fraudulent intent on the part of the grantor alone is not sufficient to vitiate and vacate a sale as to creditors. *Ewing* v. *Runkle*, 20 Ill. 448; *Hessing* v. *McCloskey*, 37 Ill. 441; *Herkelrath* v. *Stookey*, 63 Ill. 486.

Relatives may trade with each other as well as strangers; and, though a price grossly inadequate will, as against creditors, prove a fraudulent intention on the part of the purchaser, mere inadequacy will not. *Waterman* v. *Donaldson*, 43 Ill. 19.

It matters not how much a man may be indebted, he may sell his property for a fair price or even for a price below the market value, if done honestly and with no view to delay, hinder or defraud his creditors. *Waddams* v. *Humphrey et al.* 22 Ill. 661.

A judgment is not a lien upon homestead premises. The owner may sell or mortgage the same free from the lien of the judgment, and no liability can attach to the land in the hands of the purchaser, for the previous judgment debt of his grantor. *Hartwell* v. *McDonald*, 69 Ill. 293, and cases there cited.

Mr. JOHN H. WILLIAMS, for the appellee:

A voluntary conveyance by one who is indebted is presumptive evidence of fraud, and a fraudulent intent will be presumed from the fact of indebtedness. *Mixwell* v. *Lutz*, 34 Ill. 382; *Moritz* v. *Hoffman*, 35 Ill. 553; *Gridley* v. *Watson*, 53 Ill. 386; *Jones* v. *Henry*, 3 Littell, 433; *Doyle* v. *Sleeper*, 1 Dana, 532; *Rucker* v. *Abell*, 8 B. Monroe, 566; *Trimble* v. *Ratcliffe*, 9 id. 514.

A conveyance made for the purpose of hindering, delaying and defrauding creditors, and accepted by the grantee with knowledge of such intent, is void as to creditors even if a full and adequate consideration is paid. *Ward* v. *Trotter*, 3 Monroe, 3; *Vernon* v. *Morton*, 8 Dana, 263; *Ratcliffe* v. *Trimble*, 12 B. Monroe, 38.

Where a parent whose debts are pressing her conveys all her property to her son for a consideration greatly less than its value, and retains the right to remain and have a home on the place, a strong presumption of fraud arises. *Halbert* v. *Grant*, 4 Monroe, 583; *Trimble* v. *Ratcliffe*, *supra*; *Monell* v. *Sherrick*, 54 Ill. 269.

A sale of all his property, by one whose debts are pressing

him, made to his son, upon long credit, with no provision for the payment of his debts, and with a reservation to himself of a right to have a home on the premises, is certainly calculated to hinder and delay creditors, and the presumption is almost irresistible that such was the intention. *Nesbit* v. *Digby*, 13 Ill. 387.

Where there are a great number of circumstances, all tending to prove a conveyance fraudulent, although no one of them may be sufficient, disconnected from the others, to establish fraud, yet, if there is no sufficient explanation given, the court will find from such circumstances, considered together, that the transaction was fraudulent. *Swift* v. *Lee*, 65 Ill. 343; *Henen* v. *Morford*, 9 Dana, 450; *Sands* v. *Hildreth*, 14 Johns. 493.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This bill was to set aside a conveyance, made by Margaret Jaffers to William Jaffers, of the land described, which conveyance, it is alleged, was fraudulent as to creditors, and to subject the lands to the payment of a judgment which complainant recovered against the grantor in an action at law. The deed was made after service of process in the case, but before the judgment was in fact rendered. The circuit court found the conveyance was fraudulent as to complainant, set the same aside, and decreed that the property be sold to pay the common law judgment, and we can not say the decree is not warranted by the evidence.

The property was of the full value of $3000. It belonged to the judgment debtor, and was conveyed by her to her son, William Jaffers, for the nominal consideration of $2000. The property at the time was subject to a previous mortgage of $1300. It is claimed it was sold by Mrs. Jaffers to her son subject to the mortgage and for the balance of the purchase money. She took his notes at long time without interest.

Previous to reaching his majority her son had worked on the farm for his mother, who was a widow, for two or three

years, and in consideration of such services, it is alleged, his mother gave him, on his becoming of age, all the personal property on the farm to induce him to remain with her. The $700 note was not due, and no part of it was ever paid except a sum in property and money, amounting in the aggregate to about $500. Most, if not all, the property and money paid were derived from the farm. Such payments as were made, were made after the bill in this case was filed.

When it is considered in connection with other facts proven, that the conveyance was made after the service of process in the case, when it was certain a judgment would soon be rendered against the grantor, it might well be concluded the conveyance was colorable and made with a view to hinder and delay creditors. The evidence, taken together, warrants such a conclusion.

Although the judgment was rendered against the grantor for a security debt, it was a claim she was legally bound to pay. The grantee must have known when he took the deed a judgment would soon be rendered against the grantor. Conceding the transaction was in good faith, he could not be injured if the conveyance was set aside, as there still remained enough unpaid of the purchase money to secure him against loss in case the judgment should be decreed to be a lien on the land. Whatever, if anything, he paid after the bill was filed, was paid in his own wrong, and he can not be heard to complain on that score.

As Mrs. Jaffers still remained in possession of the lands as her homestead and that of her minor children, residing with her, it was just and proper, after canceling the deed, that the court should decree that homestead should be first assigned to her in the premises.

The decree must be affirmed.

Decree affirmed.

Statement of the case.

WILLIAM NOECKER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. CHANGE OF VENUE—*transmitting original indictment.* On a change of venue from the circuit to the county court, the clerk of the circuit court certified to the transcript sent, "that the within and foregoing is a true transcript of the record and proceedings, including the notice, petition, affidavits and order for a change of venue in the case, etc., as the same appears of record," etc. There was an indictment sent, but it was not shown to be the one found by the grand jury: *Held,* that it sufficiently appeared by the certificate of the clerk to be the same one by comparing it with the description of it as contained in the several orders of the circuit court.

2. INTOXICATING LIQUORS—*instructions to clerk not admissible.* Where a defendant keeps intoxicating liquors for sale, he will be responsible for sales thereof by his clerk, no matter what may have been his instructions to him, and therefore such instructions are not admissible in evidence on his part when indicted for selling such liquors.

3. SAME—*sale on prescription of physician.* The 46th clause of sec. 62, ch. 24, Rev. Stat. 1874, authorizes permits by the authorities of cities and villages to druggists for the sale of intoxicating liquors for medicinal, mechanical, sacramental and chemical purposes, and without such a permit, or a license, sales of such liquors by a druggist, even upon the prescriptions of physicians, and the representations of the purchasers that the liquors are wanted for medical purposes only, are without justification, at least without proof that the representations made were true.

WRIT OF ERROR to the County Court of Piatt county; the Hon. WILLIAM MCREYNOLDS, Judge, presiding.

On the trial of this cause the evidence showed that the defendant was a practicing physician and a druggist. The sales of liquor made by the defendant and his clerk were all upon the written prescriptions of some other practicing physicians, or upon representations by the purchasers to the defendant of sickness.

The jury found the defendant guilty on the second and fifth counts, upon which the court assessed a fine of twenty dollars, and, overruling motions for a new trial and in arrest of judgment, rendered judgment for the fine and costs.

Messrs. REED & BARRINGER, for the plaintiff in error.

Mr. ALBERT EMERSON, State's Attorney, for the People.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an indictment for selling intoxicating liquor in a less quantity than one gallon without a license, found at the September term, 1878, of the circuit court of Piatt county, upon which, on a change of venue to the county court of said county, the defendant was tried, convicted and fined at the November term, 1878, of the court last named.

It is insisted that the county court erred in sustaining a demurrer to a plea to the jurisdiction of that court, on the ground that there was no indictment transmitted to that court, as required by law. The certificate of the clerk of the circuit court following a transcript of the proceedings in the circuit court of the impannelling of the grand jury, the finding of an indictment, purporting as above, against the defendant, and of the notice, petition, affidavits, and order for the change of venue to the county court, is, "that the within and foregoing is a true transcript of the record and proceedings, including the notice, petition, affidavits, and order for change of venue in the case of, etc., as the same appears of record in my office." Then, (in the transcript sent to this court,) following the certificate, is an indictment of the above purport, and a statement of the proceedings in the county court. It is said there was no evidence before the county court that the indictment preferred against the defendant was transmitted to that court as required. It is true the certificate of the circuit clerk does not show that. Counsel for plaintiff in error admit, in argument, that there was an indictment sent to the county court, but insist there is no evidence that the indictment was the one found by the grand jury.

We think it sufficiently appears from description to be the same one, comparing the indictment which appears, with the description of the indictment found in the circuit court, as

contained in the several orders of that court in relation to such indictment.

Some of the sales testified to were made by clerks of the defendant. The court rejected testimony offered by the defendant, as to what instructions he gave his clerks in relation to the sale of intoxicating liquors. This is assigned for error. We think the testimony was properly excluded. The language of the statute is, whoever, by himself, clerk or servant, shall sell, etc., shall be liable. The testimony was uncontradicted that the defendant kept intoxicating liquors for sale, and the defendant would be responsible for the acts of selling by his clerks, no matter what might have been his instructions to them.

It was a ground of defence, that the sales were made on the prescription of a physician; and it is complained that the court refused to give an instruction asked by the defendant, to the effect, that if the sales of the liquor were made upon a prescription of a practicing physician, and at the time of such sales the purchaser represented to the defendant that the liquor was wanted to be used as a medicine in case of actual sickness, and that the defendant made the sales upon such prescription and representation, in good faith, to be used as a medicine only, then the defendant would not be liable, and should not be found guilty in respect of such sales. We do not perceive how the prescription of a physician and the representations of the purchaser can be admitted as a justification for making sale of intoxicating liquors contrary to the statute, at least without proof that the representations made were true.

The words of the statute are unqualified, "whoever, not having a license, etc., shall sell," without any exception or limitation whatever as to any class of persons or cases. By the 46th clause of section 62, ch. 24, p. 220, Rev. Stat. 1874, provision is made for the granting of permits by the authorities of a city or village to druggists for the sale of intoxicating liquors for medicinal, mechanical, sacramental and chemical purposes.

Without such a permit, or a license, the sales made by the defendant stand without justification. We find no error in the refusal of the instruction.

We see no reason for disturbing the verdict upon the evidence.

The judgment is affirmed.

Judgment affirmed.

SAMUEL WETSEL

v.

WILLIAM C. MAYERS *et al.*

1. LANDLORD'S LIEN—*not dependent upon levy of distress.* The lien given a landlord upon the crops grown or growing upon the demised premises, by the statute, does not grow out of the levy of a distress warrant, but is a paramount lien, of which every person must take notice, and can only be lost by waiver, or failing to enforce it within the proper time. The abandonment of proceedings by distress is not a waiver of the lien.

2. A landlord having a lien upon the crops grown upon the demised premises prior to that of an execution, is entitled to the possession of the crops to enforce the same, and if the property is taken on the execution, may maintain replevin against the officer seizing the same, without regard to any proceedings by distress.

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

This was replevin, by appellees against appellant, for 100 acres of corn. The declaration contains two counts. The first is for taking and detaining, and the second for detaining. The pleas were, *non cepit, non detinet,* property in John W. Saulsman, and special plea "that Durfee & Bro. caused two executions to be issued from a justice of the peace on the 27th day of November, 1876, the first against John W. Saulsman and William H. Saulsman for $132.39 damages, and $1.85 costs on judgment, in favor of Durfee & Bro. against John W. Saulsman and William H. Saulsman, with interest from Sep-

tember 30, 1876, returnable in seventy days; second, execution against John W. Saulsman for $150.51 damages, and interest from October 2, 1876, and $1.85 costs on judgment, in favor of Durfee & Bro., returnable seventy days from November 27, 1876; that said writs came to defendant's hands upon the 27th day of November, 1876, at two o'clock P. M; that he was then, and from thence hitherto has continued to be, constable of Macon county; that by virtue of these writs the defendant, as constable, levied on the property in the declaration described, on the 9th day of January, 1877, the writs being then unsatisfied and in full force; that this taking and detention are the same as complained of in the declaration, and said property was the property of John W. Saulsman and subject to execution."

There were replications to the 3d and 4th pleas traversing property in John W. Saulsman, and a joint replication to both pleas averring "that plaintiffs, on the first day of March, A. D. 1876, leased to John W. Saulsman and Jesse F. Saulsman, for one year, the west half of section three, town fourteen, range three east of 3d P. M., in Macon county, for $925, due October 10, 1876; that J. W. and J. F. Saulsman farmed the same during 1876, raising a crop of corn, part of which is the corn in the declaration mentioned; that plaintiffs, by virtue of the statute, had a lien upon said corn for the sum of $925; that the tenants failed to pay the rent at the time agreed upon, and that on October 16, 1876, plaintiffs executed their distress warrant as landlords and delivered the same to a bailiff to execute; that said bailiff, on the 17th day of November, 1876, distrained all corn standing in the field on the leased premises to make said rent; that afterwards plaintiffs caused a copy of said warrant, with an inventory of property levied upon, to be filed with the circuit clerk of said county, and a summons to be issued in said proceeding against the tenants, returnable to the December term, 1876, of the circuit court, which summons was duly served and returned; that before the amount of rent due had been ascertained and certified by said court, on the 27th day of December, 1876, plaintiffs and said

tenants settled said distress proceeding, the tenants selling and transferring to plaintiffs the corn in the declaration described, on which plaintiffs' lien as landlords was then in full force, in payment of $625, parcel of said $925 due as rent, and plaintiffs accepted said corn as payment of that sum; that said corn so sold and accepted was then standing in the field, and was not worth more than $200; that, on said 27th day of December, they accepted as payment of the difference between $650 and $925, the promissory note of Jesse F. Saulsman, and released to said tenants all claim as landlords upon the corn raised on said premises; that the corn raised by said tenants on said premises, other than corn in the declaration described, was not worth $200; that after said acceptance of said corn, and on the 9th day of January, A. D. 1877, defendant levied executions in the fourth plea mentioned, on said corn, as the property of John W. Saulsman."

There was a general demurrer to this replication, which the court overruled,—and, appellant refusing to further rejoin, judgment was given for appellees.

The errors assigned question this ruling of the court.

Mr. W. C. JOHNS, for the appellant.

Messrs. CREA & EWING, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Whether appellant would have been entitled to the possession of the corn, had he, before the levy of the execution or the commencement of this suit, tendered appellees the amount of rent due, is a question not before us. Nor is it now material to inquire whether, in any case, the tenant can, by contract alone with the landlord, invest him with an absolute title to the property upon which he has a lien for rent, as against the claims of judgment creditors of the tenant.

The statute (Rev. Stat. 1874, p. 661, § 31,) provides, that "every landlord shall have a lien upon the crops grown or

growing upon the demised premises for the rent thereof, whether the same is payable wholly or in part in money or specific articles of property or products of the premises, or labor, and also for the faithful performance of the terms of the lease. Such lien shall continue for the period of six months after the expiration of the term for which the premises were demised."

We have held that this lien does not grow out of the levy of a distress warrant—that it is a paramount lien, of which every person must take notice, and which can be lost only by waiver or failing to enforce it at the proper time. *Thompson* v. *Mead et al.* 67 Ill.395; *Prettyman* v. *Unland et al.* 77 id. 206.

We are aware of no principle upon which it can be asserted that the abandonment of the proceedings by distress can be held to be a waiver of the lien, it not being dependent, in any degree, upon those proceedings for vitality. Suppose it be conceded the parties could not, by their mutual agreement, vest the landlord with the absolute title to the corn, to the exclusion of the claim of appellant—what follows? Simply that that agreement was nugatory, and the rights of the parties are to be determined as if it had not been made.

Then the appellees have a prior lien upon the property to secure them in the rent due them, and they are entitled to its possession to enforce their lien.

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

Judgment affirmed.

The Jacksonville, Northwestern and Southeastern Railroad Company

v.

John Cox.

1. Surface waters—*diversion to injury of adjacent owner.* A railroad company has no right to stop, by its embankment, the natural and customary flow of the surface water from higher grounds, and by its ditch along its track convey the same upon the premises of another over whose land its road is con-

structed, without providing some sufficient outlet for it to pass off; and where such person's land is injured in consequence of the accumulation of such surface water on his land, the company will be liable to him for all the damages occasioned thereby.

2. In such case the party so injured is under no legal obligation to permit the servants of the company to dig a ditch, to his detriment, across his tillable land, wide and deep enough to carry off the accumulation of foreign surface water so thrown upon his premises. The company should provide for the egress of such water without damage or injury to such party, or prevent its flow upon his land.

3. And in such case the fact that the owner of the land gives the company permission to dig a ditch along a wagon road on his premises to carry off such surplus foreign surface water, which proves ineffectual for the purpose, will not preclude him from a recovery for the original wrongful act.

4. Same—*land owner, when not estopped by his deed for right of way.* Where a party over whose land is constructed a railroad track, which, by its embankments and ditch, has caused the surface water from other lands to be diverted from its natural course and thrown upon his land, gives the company a deed for right of way over his premises, in pursuance of a written agreement made before the construction of the road, he will not thereby be estopped from recovering damages occasioned by the wrongful construction of the road. Such a deed gives the company no right to flood his remaining land with water brought by it from other lands, the natural flow of which would have carried it another way, when the consideration of the deed is only for the land conveyed.

5. It is one of the maxims of the law, that every man must so use his own as not to injure another in the use and enjoyment of his property.

Appeal from the Circuit Court of Sangamon county; the Hon. Charles S. Zane, Judge, presiding.

Messrs. Dummer, Brown & Russell, and Messrs. Patton & Lanphier, for the appellant.

Messrs. Bradley & Bradley, for the appellee.

Mr. Justice Baker delivered the opinion of the Court:

In the fall of 1871, appellant constructed its railroad track from Jacksonville to Virden, running through the farm of appellee. In February, 1876, appellee brought suit in the Sangamon circuit court, alleging damages by reason of the loss

of rents and profits for the years 1872, 1873, 1874 and 1875, occasioned by the wrongful and negligent manner in which appellant had constructed its road, whereby his farm had been flooded. A trial before a jury, at the February term, 1877, of the court, resulted in a verdict and judgment in favor of appellee for $400.

We think the evidence sufficiently sustains the verdict. There was some conflict in the testimony, but this conflict was settled by the jury in favor of appellee. One Watson entered the eighty acres of land in question in 1840, and commenced improving it, and sold it in 1857. The land has ever since been in cultivation. It was purchased by appellee about 1867, and he has continued to live there until now, with his family, farming. He appears to have made good crops until after the building of the railroad of appellant. The land was originally low and wet, and it has continued to be troubled with water, to some extent, in wet seasons or after hard rains. The surface of the ground had been raised, however, by many years of cultivation; and the water that fell on the land, or ran on to it from adjoining premises, escaped to the southwest through a small ditch that had been plowed there, and there was also a drainage from part of the land to the north. The premises had become, to say the very least, reasonably good tillable land.

The railroad embankment was constructed through the north forty acre tract of the farm, from south-east to north-west, and a ditch was dug by the railroad company on the south side of the railroad, extending from the farm a considerable distance to the south-east. The lands, for a mile or more to the south-east of appellee's premises, fell off to the north, and the water from these lands, lying south of the railroad, drained, before the building of the railroad, off to the north into Devore's branch. By the construction of the embankment and excavation of the ditch this water was cut off from its natural course to the north, and was turned west to the premises of appellee. The natural drainage and the ditch

that had been plowed by appellee were wholly insufficient to carry off the accumulated surface water that was precipitated by the railroad embankment and ditch upon his lands. The consequence was he lost the crops on some twenty-five or thirty-five acres of his land, in the years 1873, 1874 and 1875. These were, it is true, wet years; yet the evidence shows it was principally the additional surface water turned on the land by the company that flooded it and destroyed the crops, and that without this surplus water appellee could, with the means of drainage he theretofore had, have cultivated, even in those years, all or the most of his farm.

The railroad company had no right to stop, by its embankment, the natural and customary flow of the water from the high grounds south of the railroad to the north and thence into Devore's branch, and by its ditch on the south side of the road to carry this water on to the premises of appellee, without providing some sufficient outlet for it to pass off. When it undertook to divert and change the usual and customary flow of the water, it was bound to provide sufficient means to carry it away from the farm of appellee, upon which it had caused it to accumulate. By conducting this surface water, which otherwise would have gone elsewhere, on to the farm, it virtually entered upon the farm and deprived the owner of the profits which he otherwise would have derived from its cultivation. Even if his farm was on low ground and in a depression, that did not license the company to increase the difficulties to which the owner was already subjected, by throwing an additional burden of water upon him by diverting it from the natural channel. *Nevins* v. *City of Peoria*, 41 Ill. 502; *Gillham* v. *Madison County Railroad Co.* 49 id. 484.

Appellant having brought this body of unaccustomed water upon the farm, it was its duty to provide ample and sufficient means for its egress therefrom, without injury or damage to appellee. The latter was under no legal obligation to permit the servants of the corporation to dig a ditch to his detriment diagonally to the south-west through his tillable land, wide

enough and deep enough to carry off this accumulation of foreign surface water. Appellant should have performed the duty imposed upon it either by ditching along its right of way, or by getting the privilege, by purchase or otherwise, from appellee or some adjacent land owner, to drain the water through lands not its own, or else it should have filled up the ditch it had dug, and, by necessary openings in its embankment, have restored the water to its ancient and natural flow across to the north side of the railroad track, whence it would have found its old way north to Devore's branch.

The fact appellee gave the company permission to dig a ditch alongside of the wagon road through his premises, and that this ditch proved ineffectual to accomplish the purposes for which it was intended, does not prevent a recovery in this case. It was incumbent, at all events, upon the company to provide egress for the water it had wrongfully brought upon the land. The injury was done, not by the ineffectual ditch that was afterwards dug for draining the water off, but by bringing the water there. A party may not recover for an injury to which he himself has materially contributed, or for the consequences of an act, the performance of which was requested by himself; but here the acts that caused the damage were the stopping of the natural outlet of the water that fell on large tracts of land east of appellee and south of the railroad, and the digging of the ditch along the right of way that conducted the water down on to the premises of appellee. The most that can be said of appellee's conduct is that, being anxious to get rid of the flood that had been brought upon him, he materially contributed in providing a supposed remedy for the existing evil, which remedy proved a failure.

On the 4th day of October, 1871, appellee entered into a written agreement by which he contracted, for a consideration named therein and to be afterwards paid, to convey to the company, on demand, by deed, for right of way, a strip of ground thirty feet wide on each side of the line of the company's railroad, as the same might be located across his lands.

The railroad was constructed that fall. On the 6th day of the following March, appellee conveyed the strip of ground to the company for the consideration of $181.

It is urged that this deed, it having been made after the railroad of appellant was constructed, estops appellee from recovering damages occasioned by the wrongful construction of the road, and that it was error in the court below to refuse giving this instruction:

"The court instructs the jury, for the defendant, that if they shall believe, from the evidence, that the defendant purchased of the plaintiff the land on which the railroad is located through the plaintiff's farm, and, at the time of the execution and delivery of the deed therefor, the road was made, and no changes have since been made by the defendant in said road to cause the water to overflow the plaintiff's land, then the plaintiff is estopped from claiming or recovering any damages in this suit, and the jury will find for the defendant."

The deed was the mere performance of the contract appellee had made prior to the building of the road, for the conveyance of the land. It may be he was estopped by the deed from complaining of the manner in which the railroad was located through his land, but it gave the company no right to flood his remaining lands with water brought by it from lands other than his, the natural drain of which would have carried it far from his premises. Although the deed was an absolute conveyance and granted the strip of ground as it actually existed, yet it granted nothing more. The consideration is expressed in the deed to have been paid for the land conveyed, and there is no pretence for saying part of it was paid for the privilege of overflowing the lands still retained by appellee with water conducted by the company from other lands, some of them distant a mile or more therefrom. There might be merit in the claim of appellant if the water complained of had been water that fell on the ground deeded to the company or that had naturally flowed there without the artificial aid and

affirmative act of appellant. But the damages here grew out of the improper construction of the road south and east of the strip deeded and extending for more than a mile therefrom. Appellee was not bound, before making a deed to the sixty feet of ground through his farm for the use of the railroad, to make a survey of the track of the road for miles either way from his lands for the purpose of ascertaining whether, owing to the manner of the construction of the road beyond his land, additional surface water would be conducted on to his premises. He had a right to presume that appellant, in building its road, either had not changed the natural and customary flow of water from other lands so as to throw it upon his farm, or, if it had done so, that it had made all necessary provision for its egress therefrom, without inundating his premises. It is one of the maxims of the law, that every man must so use his own property as not to injure another in the use and enjoyment of his property. The instruction, the refusal of which is complained of, was properly refused by the circuit court.

We find no substantial error in the record, and the judgment of the court below is affirmed.

Judgment affirmed.

ZERA BROWN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

CONFESSION—*made under advice and promises, not sufficient to convict.* Where a party is induced to make a confession of the commission of a crime by himself and others, under both promises and threats, and makes several different statements, all of which are shown to be untrue, and he is convicted, there being no other testimony sufficient to warrant a conviction, the judgment will be reversed.

WRIT OF ERROR to the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

This was an indictment against Zera Brown for burglary. The record shows that the defendant was a weak, simple minded person, and the only evidence against him was his admissions and statements, induced after various threats and promises had been made to him.

Mr. B. D. LUCAS, and Mr. JAMES R. BROOKS, for the plaintiff in error:

A confession can never be received in evidence where the prisoner has been influenced by any threat or promise. *Gates* v. *The People*, 14 Ill. 437; *Austin* v. *The People*, 51 Ill. 239.

Per CURIAM: The accused was indicted for burglary, and on the trial he was found guilty, and sentenced to the penitentiary for the period of one year. On looking into the testimony found in the record we are satisfied it does not warrant the conviction. Much of the testimony admitted against the objections of defendant was incompetent. The accused was advised to make a confession, and in attempting to do so he made several different statements, all of which are shown by other testimony to be absolutely untrue.

The verdict is so much against the weight of the evidence it ought not to be permitted to stand, and for that reason we have not deemed it necessary to consider the instructions given at the trial.

The judgment will be reversed and the cause remanded.

Judgment reversed.

Syllabus.

THE MISSISSIPPI RIVER BRIDGE COMPANY

v.

PATRICK LONERGAN.

1. FERRY FRANCHISE *across navigable river—paramount authority of Congress to erect bridges and provide for improving the navigation.* The legislature of the State, in granting a charter for a ferry across the Mississippi river, can not give the grantee any right which will hinder or in any manner obstruct the free navigation of the river, or impede the commerce of the country along or across the river.

2. Where a bridge was built across the Mississippi river, and a dike constructed, under and in pursuance of an act of Congress, the bridge connecting two great thoroughfares by rail and promoting the commercial interests of the country, and the dike improving the navigation of the river by throwing more water into the main channel, it was *held*, that the owner of a ferry franchise could not recover damages against the bridge company for any injury he might sustain in consequence of the making of the dike preventing him, at times, from landing his ferry on certain lands used by him for a landing.

3. A party receiving a grant of a ferry privilege across a navigable river, accepts the right to cross the stream and land on its banks with the implied understanding that Congress may, at any time when the public good and the commercial interests of the country require it, in the exercise of the power to regulate commerce, authorize a bridge to be erected and dikes to be placed in the river to change the current, and thus facilitate the navigation of the river; and although the owner of the ferry franchise may be somewhat damaged in his franchise by the exercise of this power, he can maintain no action to recover such damages.

4. TITLE—*to enable one to recover for injury to land.* Where a person sues for an injury to land of which he alleges he is owner, proof of the averment of ownership is essential to his right of recovery.

5. SAME—*in respect to injury to ferry franchise.* A ferry franchise being an incorporeal hereditament, the legal title can only be transferred by deed. But where a ferry franchise, including the boat and all appurtenances, is sold, without a conveyance by deed, the price paid, and the purchaser put in possession by the owner, the purchaser will have an equitable title, and he may recover, at law, for an injury to the property, caused by the unauthorized act of a stranger.

6. LIMITATIONS—*possession of land—what constitutes, and of its extent.* Where the owner of a ferry franchise upon a river, in suing for an injury thereto, and to lands adjacent, claimed under an adverse possession of the land for twenty years, it was *held*, the fact that ferry boats landed along the shore of

the land at such points as convenience or the condition of the river might render most suitable, where no improvements of any character had been made, for a landing or otherwise, could not be regarded as such evidence of possession of the land as would, if held for the requisite period, ripen into a title adverse to the true owner.

7. The occupation of a part of an uninclosed tract of land, by building a house thereon, without any deed or paper title, is a possession only of the part actually occupied, and not of the whole, as would be the case if the occupant had a paper title.

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

Mr. C. BECKWITH, Mr. A. C. MATTHEWS, and Mr. W. A. GRIMSHAW, for the appellant.

Messrs. WAGNER, DYER & EMMONS, for the appellee.

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

This was an action on the case, brought by Patrick Lonergan against the Mississippi River Bridge Company, to recover damages claimed to have been sustained to certain lands on the east bank of the Mississippi river, opposite the city of Louisiana, and to a ferry franchise, which conferred the right to the use of the river from the lands to the city. The lands claimed to be owned by the plaintiff were known as the "Hewed Log House tract," the "McPike tract," and a ferry landing in part of the "Jones tract."

It is claimed that the lands and ferry franchise were damaged by the erection of a certain dike by the bridge company, commencing on the bank of the river, on the McPike tract, and extending into the river 2500 feet, in the direction of a sand bar Z, shown on a plat in evidence in the case. The dike was constructed for the purpose of forcing the flow of the water in the direction of a draw span of a railroad bridge, which was erected by the bridge company across the river. It is claimed that ice would be drifted across the river and

would accumulate above the dike, which would interfere with the landing of ferry boats, and the channel below would be filled with sand, which might wash over the dike in high water, and thus the landing below the dike would be injured. The plaintiff, in his declaration, averred that he was the owner of the lands which he claimed had been damaged by the erection of the dike, and on the trial he attempted to establish, by evidence, the truth of the averment. If he was not the owner of the lands, although they may have been damaged, he would not be entitled to recover such damages.

The first question, therefore, that demands consideration is, whether the evidence established title in the plaintiff.

In regard to the Hewed Log House tract the following deeds were offered: First, a deed dated June 8, 1865, made by Silas W. Furber and Frank Burnett to Joel K. Shaw; second, a deed dated June 16, 1866, from Joel K. Shaw to James B. Thurman; third, a deed dated March 4, 1873, from James B. Thurman to plaintiff. This was the only paper title shown to the tract in question.

To establish title to the McPike tract, the following were the only deeds offered in evidence: First, a deed dated September 14, 1866, made by A. McPike, administrator of the estate of Wm. McPike, deceased, to James B. Thurman; second, a deed dated March 4, 1873, from James B. Thurman to plaintiff.

That the deeds read in evidence can not be regarded as sufficient to establish title to the lands in the plaintiff is so evident, that a mere statement of the facts is sufficient.

But, it is said the lands were in the possession of McPike and Burnett, and those claiming under them, for more than twenty years before the commencement of the suit, and possession is relied upon as proof of title. The lands were never inclosed, nor were they ever in cultivation or adapted to farming purposes. The only evidence of possession we find in the record is, the landing of a ferry boat along the shore, at such places as might, from time to time, be most suitable or conve-

nient, and the further fact that some thirty years ago a log house stood on each tract, which houses were occupied by the Burnetts and McPike. There is no evidence that the houses are still standing, and, for aught that appears, they had gone to decay long before the plaintiff acquired any claim to the property. It does not appear that McPike or Burnett occupied either tract under a deed or paper title. The possession would not, therefore, embrace any portion of the land except that actually occupied. Had they built a house on a part, under a deed for each tract, then the possession would have been coextensive with the description of the land embraced in the deed, and the claim of twenty years' possession might have been availing. But such was not the case.

The first deed conveying the Hewed Log House tract was made in 1865, and the first deed executed conveying the McPike tract was made in 1866. Now, if it be conceded that the grantees in those deeds, and their grantors, have, from the time the first deed was executed, been in possession of a part of the land, claiming title to the whole, as twenty years have not expired, the evidence is not sufficient to establish title by possession.

In the declaration it was alleged, that plaintiff was the owner of the right and privilege of using, for ferry purposes, the front of the James (or White House) tract. No chain of title was established to this land. No improvement of any description had been made on the bank of the river, on this or either of the other tracts, to facilitate the landing of boats. The fact that boats landed along the shore, at such points as convenience or the condition of the river might make most suitable, where no improvements of any character had been made, can not be regarded as such evidence of possession of the lands as would, if held for the requisite period, ripen into a title adverse to the true owner.

Our conclusion on this branch of the case, therefore, is, as the plaintiff failed to establish title to the lands described in the declaration, the court erred in instructing the jury, in sub-

stance, that plaintiff might recover for damages sustained to the lands on account of the erection of the dike.

We now come to the main question in the case: whether plaintiff, under the evidence, was entitled to recover such damages as he may have sustained to the ferry franchise, on account of the erection of the dike.

On the 2d day of March, 1855, the legislature of Missouri granted a ferry franchise to B. F. and W. Burnett, across the Mississippi river, at Louisiana, for twenty years. On the 10th day of February, 1859, the General Assembly of the State of Illinois granted a ferry franchise to the same parties to maintain a ferry across the Mississippi river, from sec. 13, township 7 south, range 6 west, in Pike county. The first section of the act contains this provision: "They shall have the exclusive right to ferry across said river from said section, and within three miles above and below said section, in said river, for the term of twenty years." On the 8th day of June, 1865, the ferry franchise was conveyed to Joel K. Shaw, who, on the 16th day of January, 1866, conveyed to James B. Thurman. Afterwards, and on the 16th of February, 1867, the General Assembly of this State passed an act reciting that the rights formerly granted to W. and F. Burnett, in and to the ferry, belonged to James B. Thurman, and extended the franchise to him for a period of twenty years. In March, 1873, James B. Thurman sold the ferry boat "City of Louisiana," with her appurtenances, to the plaintiff, who went into the possession and use of the ferry under his purchase, but no deed was made.

It was contended in the argument, that the plaintiff failed to establish title to the ferry franchise, and on this ground, regardless of other questions, could not recover. A ferry franchise being an incorporeal hereditament, the legal title can only be transferred by deed, as held in *Dundy* v. *Chambers*, 23 Ill. 369. But here the plaintiff bought and paid for the property, and was placed in the full possession of the same by the owner, under such purchase, and while he did

not have the legal title, he had the equitable title to the property. He was, in fact, the owner, and if his property was damaged by the unauthorized act of a stranger, we are inclined to the opinion the laws would afford him a remedy, to the extent of all damages sustained. This was the view taken by the circuit court, and we think it is correct.

But the important question in the case is, whether plaintiff has been disturbed in the exercise of any right conferred by the act of the legislature which granted the ferry franchise. The act of 1859, from which plaintiff derived all the rights which he can exercise, conferred the power to cross the Mississippi river at a certain point, land ferry boats on a certain section and within three miles above and below the section, to collect fare for the transportation of persons and property over the river, and the right of ferriage was made exclusive at this point for a definite period. These were the rights and the powers conferred, and no others.

In *Mills* v. *County of St. Clair*, 2 Gilm. 197, where the nature and extent of a ferry franchise were considered, it was said: "A ferry franchise is neither more nor less than a right conferred to land at a particular point, and secure toll for the transportation of passengers and property from that point across a stream."

The right seems to be a limited one, and it can not be extended beyond the plain import of the language contained in the grant. The plaintiff does not contend that the exclusive power conferred upon him to cross the river and land with passengers and property has been interfered with by another engaged in the same business; nor does he claim that his right to cross the river or land upon the shore has been challenged, but his position, as we understand it, is, that in consequence of the erection of a certain dike in a part of the river where he had the right to cross, the flow of the water has been changed, and in consequence of this change in the flow of the waters in the river, sand and ice accumulate in certain parts of the channel, which obstruct

the landing of his boats in certain seasons of the year. It appears, from the evidence introduced by the defendant, that on the 3d day of March, 1871, an act of Congress was passed, the first section of which empowered the Louisiana and Missouri River Railroad Company, a corporation existing under the laws of the State of Missouri, to construct and maintain a bridge over the Mississippi river at the city of Louisiana. The second section provides, that the bridge shall be a lawful structure, and shall be recognized and known as a post route, upon which no higher rate shall be charged for the transmission over the same of the mails, the troops and the munitions of war of the United States, than the rate per mile for the transportation over the railroad or public highways leading to the bridge; and it shall enjoy the rights and privileges of other post roads in the United States.

The fifth section provides, that the structure shall be built and located under and subject to such regulations for the security of navigation of the river as the Secretary of War shall prescribe. See 16 U. S. Stat. at Large, 473.

On the 10th of May, 1873, application was made under the act, by the L. and M. Railroad Company, to the Secretary of War, for an approval of the location and plans for the bridge. A board of officers was appointed, and after an examination of the location and plan, a report was made approving of the location, but required the erection of the dike in question for the better improvement of the navigation of the river. The report was approved, and the bridge and dike erected in accordance with the report of the board and sanction of the Secretary of War. The bridge is but a connecting link uniting two great thoroughfares by rail from the east to the west.

These are the circumstances under which the dike was constructed in the river, which it is claimed violates the chartered rights of the plaintiff. The Mississippi river is a navigable stream of water, and while the plaintiff had the right, under the act of the legislature, to run his boats across it and land upon the shore, he had no right conferred upon him, nor

could the legislature give him any right, which would hinder or in any manner obstruct the free navigation of the river or impede the commerce of the country along or across the river.

Section 4 of the treaty between the King of Spain and the United States, made in 1795, provides, "That the navigation of the Mississippi river in its whole breadth, from its source to the ocean, shall be free only to his subjects and the citizens of the United States, unless he shall extend the privilege to the subjects of other powers by special convention." 8 U. S. Stat. at Large, 141. And by the ordinance of 1787, it is provided, "That the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other State that may be admitted into the confederacy, without any tax, impost, or duty therefor."

Reference is made to these provisions not so much for the purpose of showing that the navigation of the Mississippi river can not be obstructed, but rather to determine the object to be attained by the guaranty that the navigation of the river should remain forever free, and an appropriate answer to this will be found in what was said in *The People* v. *City of St. Louis*, 5 Gilman, 351, in these words: "The object to be attained was the promotion of commerce, and the rights secured are purely commercial."

Now, if the great object was to promote, facilitate and advance the commercial interests of the country, and if that object can be advanced by connecting two great thoroughfares by the erection of a bridge over which persons, property and the products of the country can be transported by rail,— is a great commercial enterprise of that character to be impeded or stopped for the reason some one may have a ferry franchise where the bridge is to be located, or is the power

vested in Congress to regulate commerce to be regarded as paramount?

The erection of a railroad bridge over a navigable stream in no manner conflicts with the guaranty that free navigation shall exist; but on the other hand the building of a bridge is in perfect harmony and entirely consistent with the free navigation of the river. In *The Illinois River Packet Company* v. *The Peoria Bridge Association*, 38 Ill. 467, which was an action brought to recover damages sustained by a boat, on the ground that a bridge was an obstruction of a navigable stream, it was held, that "The right to a free navigation of our western rivers, and the right of the State to provide means for crossing them by bridges or otherwise, are co-existent, and neither can be permitted to destroy or essentially impair the other." It was also held, that the authority to construct a bridge across a navigable stream wholly in this State should be exercised in such a manner that while it gives full effect to the power itself, it should interfere as little as possible with the right of free navigation. And this is the true test whether a particular structure is such an obstruction as is contrary to law.

In the case cited the bridge was erected across the Illinois river, a stream wholly within this State, while here, the bridge was built over a river which is a boundary line between two States, and built under the authority of an act of Congress; but this does not change the principle announced, that the right of free navigation, and the right to provide means for crossing by bridges, are co-existent.

Suppose Congress had passed an act to improve the river opposite Louisiana, for the purpose of facilitating navigation, and in making the improvement the current of the river was so changed that the place of landing for the ferry boats became so filled up with sand or drift as to render it practically impossible to use the landing, we apprehend it would not be claimed that damages could be recovered, and yet in principle

there is no substantial difference between the supposed case and the one under consideration.

The building of the dike, which changed the flow of water, and caused the accumulation of ice, sand and drift, was done under an act of Congress, enacted for the purpose of advancing the commercial interests of the country, and at the same time improving the navigation of the river.

In *South Carolina* v. *Georgia*, 3 Otto, 4, it was held, that the right to regulate commerce includes the right to regulate navigation, and hence to regulate and improve navigable rivers and ports on such rivers. It was also held, that Congress had power to close one of several channels, and to declare that an actual obstruction is not in view of the law an illegal one. It is there said, "It is not to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction, by forcing it into one channel of a river rather than the other." See also, case of *Clinton Bridge*, 10 Wall. 454. The question involved might be rested entirely on the case of *State of Pennsylvania* v. *The Wheeling and Belmont Bridge Company*, 18 Howard, 421, where it was held, that the power to regulate commerce includes the authority to license and authorize the erection of bridges across navigable streams, and to prescribe their height, location, and other circumstances affecting them relative to navigation.

The plaintiff in this case accepted the right to ferry across the river and land on the banks from the State, with the implied understanding that Congress might at any time, when the public good and commercial interests of the country required it, in the exercise of the power to regulate commerce, authorize a bridge to be erected, dikes to be placed in the river to change the current, and thus facilitate the navigation of the river, and although the plaintiff may have been somewhat damaged in his franchise, no action can be maintained for the recovery of such damages.

The act of the legislature of this State which established

the ferry gave the plaintiff no right or interest whatever in the flow of the river. The sole power to change the current of the river, when the commerce of the country demanded it, rested in Congress, and the legislature had no authority, if it had so desired, to confer upon the plaintiff any right to the use of the river which would prohibit the general government from authorizing the construction of bridges, dikes, or other improvements to meet the demands of the commercial interests of the country.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

JOSEPH D. ROPER *et al.*

v.

THE TRUSTEES OF SANGAMON LODGE NO. 6, I. O. O. F.

1. FRAUD—*by failure to give information.* There is no fraud in failing to give information to another of a fact of which he is ignorant, when the information is as accessible to one person as to the other. One person is not required to act as the agent of another when the latter, by reasonable diligence, may acquire the information necessary to protect himself.

2. SAME—*by payee in neglecting to inform surety.* If a person, knowing another to be utterly insolvent, proposes to credit him if he will procure sureties, he can not be held guilty of a fraud by failing to apprise the surety of the insolvency of his principal; but if the person giving the credit makes use of any artifice to throw the surety off his guard and lull him into a false security, and he is thereby deceived, this will amount to a fraud.

3. Where a party becomes surety upon the bond of a treasurer of a secret society, for the faithful application of moneys in his hands, payable to the society, the fact that the officers and members of the society knew of his previous mis-appropriations of the funds entrusted to him during the prior year, and with such knowledge re-elected him, and failed to communicate such fact to his sureties, no inquiry being made of them by the sureties, and they doing no act to put the sureties off their guard or preventing them from ascertaining the facts, no fraud can be imputed to the society which can be set up in avoidance of the sureties' liability on the bond.

4. SURETY—*when can not show defalcation of officer occurred in previous term.* Where an officer is re-elected and becomes his own successor, and at the com-

mencement of his second term reports a certain sum in his hands, and gives bond with sureties to account for and pay over the moneys coming to his hands during the term, his sureties, when sued, will be responsible for the sum so reported in his hands, and will not be allowed to show that the defalcation, in fact, occurred during the previous term, and throw the liability on his sureties for that term.

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

Messrs. ROBINSON, KNAPP & SHUTT, for the appellants.

Messrs. PALMER, PALMER & ROSS, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that John A. Hughes was elected treasurer of appellees' lodge. He so acted from the first day of January, 1875, until the 30th of June following. It is agreed by the parties that at the commencement of this term of office he reported to the lodge that he had the sum of $436, money of the lodge; that on the 30th of June, the end of his term, he should have had in his hands $561, which he had received and failed to pay over to his successor. The suit was on the bond given by Hughes, as such treasurer, and service was had on the sureties but not on Hughes.

The sureties pleaded *non est factum*, and a special plea, that for two terms preceding the term commencing on the 1st of January, 1875, Hughes, the principal, was treasurer, and, at that time, was a defaulter to the lodge for moneys previously received and misapplied; that it was then known to the officers and members of the lodge that he was a defaulter, and the sureties were ignorant of the fact; that the lodge is a secret organization, of which defendants were not members, and were ignorant of its business; that it was the duty of the officers and members of the lodge, when the bond was executed, to inform defendants that Hughes was a defaulter, and defendants were misled by the lodge having re-elected him, and thereby induced them to believe he had acted faithfully, but the offi-

cers or members gave to defendants no such notice. The plea concludes by insisting the bond is void. The court sustained a demurrer to this plea, and that decision is assigned for error.

It is also urged, that the court erred in refusing to permit appellants to prove that the default accrued and the mis-appropriation of the money was during the term previous to this election on the first of January, 1875, when other persons were his sureties, for the purpose of fixing the liability for the default on the sureties on the bond covering the previous term.

It is urged that the special plea presented a complete defence to the action; that the officers and members of the lodge, knowing of the defalcation, and re-electing Hughes treasurer, operated as a recommendation of his honesty to all persons not members of the lodge; that such conduct on the part of the lodge was calculated to and did mislead appellants and operated as a fraud upon them, and the concealment by the officers and members of the fact that Hughes was a defaulter when they signed his bond, was a positive fraud.

There is a class of cases in which it is held that it is fraud to fail to disclose defects on the sale of property, and silently stand by and permit another to act upon the supposition that he is purchasing a good title, when the person claiming an adverse title or interest, knowing the fact and having the opportunity, fails to assert his claim. So, of many other transactions it is held to be a fraud to fail to disclose facts that would prevent the other party from acting. But the rule does not apply when the defect or important information is as accessible to one person as the other. One person is not required to act as the agent of another when the latter, by reasonable diligence, may acquire the information.

If a person knowing another to be utterly insolvent, proposed to credit him if he would procure sureties, he can not be held to have acted in bad faith by failing to apprise the surety that his principal is utterly insolvent. We presume no one would regard such a failure to apprise the surety of the fact of the insolvency of the principal, as a fraud, and yet had the surety

known the fact, he would probably not have indorsed for the principal. And this is held not to be a fraud, because it was the folly of the surety not to have learned the financial standing of the principal. The avenues of information were open to him, and it was his duty to have used the means to inform himself, and failing to do so, he must suffer the consequences of his inaction. In such a case, however, if the person extending the credit were to use any artifice to throw the surety off of his guard and to lull him into a false security, and he was thereby deceived, that would amount to a fraud. But mere failure to communicate the fact in such a case does not amount to bad faith.

In this case, it is urged, that, as this was a secret organization, information as to Hughes' integrity was not accessible to appellants, as they were not members of the order. We apprehend that Hughes' account books were not under the seal of secrecy. If appellants had requested, he could, if disposed, have shown his books to them. Or had they inquired of the officers of the lodge, or even of its members, they would, if within their knowledge, have been required to communicate correct information. It is thus apparent that the sources of information were open to appellants had they been disposed to pursue them. But the officers and members were asked nothing, nor did they say anything, and we can not hold they were guilty of a fraud.

It is likewise urged, that the court should have admitted evidence to prove that the defalcation occurred the term before appellants became sureties on this bond, and thus show that the sureties on his bond for the preceding term were liable. In the case of *Morley* v. *Town of Metamora*, 78 Ill. 395, the same defence was interposed. In that case, as in this, the supervisor was his own successor and his sureties interposed the same defence, but it was held not to be good. In that case it was said, "It is not made to appear very clearly that whatever default occurred, took place in the first year the supervisor was in office; but conceding that fact, we do not think

it relieves the sureties on the bond upon which this action is brought, from liability. The supervisor was his own successor in office. He had made his annual report, in which he charged himself with having a certain amount of money in his hands. The report was approved, and we must presume it was true. * * * In contemplation of law, the money mentioned in his report was in the hands of the supervisor, and the undertaking of the sureties on his bond was that he should account for it. It was as much his duty to account for whatever funds were in his hands at the end of the first year, as it was to account for whatever should be received during the second year. The law made the sureties responsible for any default in that regard. There could be no action maintained against the sureties on the first bond at the expiration of that year, for there was no one who could make demand for the money the supervisor reported as having in his hands, so as to establish a default." And the case of *Pinkstaff* v. *The People*, 59 Ill. 148, is referred to as sustaining the decision in that case.

We think the case of *Morley* v. *Metamora, supra,* is decisive of this question. We are unable to distinguish this from that in any essential particular. Appellants undertook that Hughes should account for and pay the money, on orders from proper authority, when required, and this he failed to do, and appellants must make his default good.

We perceive no error in the record and the judgment must be affirmed.

Judgment affirmed.

WILLIAM J. BROWNELL *et al.*

v.

CHARLES W. WELCH.

1. APPEAL—*from Appellate Court—facts found not open to review.* The finding of facts by the Appellate Court is conclusive in all appeals to this court, and the affirmance of a judgment by the Appellate Court is equivalent to finding the facts the same as the jury did.

2. LANDLORD AND TENANT—*lease by the month, how terminated.* Where, after a lease for one year has expired, a new lease is made by the month, the landlord has the undoubted right to terminate the lease at the end of any month, by giving the proper notice.

3. SAME—*when tenancy is from month to month.* Where a party enters into possession of premises under a verbal letting which is voidable under the Statute of Frauds, agreeing to pay rent monthly, which he pays as it accrues, he becomes a tenant from month to month.

APPEAL from the Appellate Court of the Third District; the Hon. CHAUNCEY L. HIGBEE, presiding Justice, and the Hon. OLIVER L. DAVIS and Hon. LYMAN LACEY, Justices.

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

Messrs. WILLIAMS, BURR & CAPEN, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an action of forcible detainer, commenced by Charles W. Welch against William J. Brownell and Elisha B. Steere, before a justice of the peace, to recover possession of a store room, described in the complaint. From the judgment rendered against them by the justice, defendants appealed to the circuit court, where the cause was tried *de novo*, before a jury, who found defendants guilty of withholding the premises from plaintiff, in the manner charged. On appeal to the Appellate Court that judgment was affirmed, and defendants bring the case to this court on their appeal.

It appears, from the record, that defendants occupied the premises during the year 1877, at a rental of $900, payable

monthly. That term expired on the 4th day of January, 1878. Previous to the expiration of that term there were some negotiations between defendants and the agent of plaintiff, as to the time defendants might continue to occupy the premises. Whatever the agreement was, it was not reduced to writing.

There is a direct conflict in the testimony as to the terms of the second leasing. One of defendants testified it was for the full period of one year, at a rent of $1000, payable in monthly installments; but the agent, in his testimony, is equally distinct that the renting was by the month, at $83.33⅓ per month. The jury must have found the facts as plaintiff alleged them to be, and the affirmance of the judgment in the Appellate Court is equivalent to finding the facts the same as the jury did. As the finding of facts by the Appellate Court is conclusive in all appeals to this court, it is not perceived how we can do otherwise than affirm the judgment. Conceding the truth to be as the Appellate Court seems to have found it was, the leasing was by the month after the expiration of the first year, then the landlord had the undoubted right to terminate the lease at the end of any month, which he did by giving the proper notice.

The instructions of which complaint is made are sanctioned by the decisions of this court in *Warner* v. *Hale*, 65 Ill. 395, and *Wheeler* v. *Frankenthal*, 78 id. 124. In the first of the cases cited it was distinctly ruled that where a party entered into possession of premises under a verbal letting which was voidable under the Statute of Frauds, agreeing to pay rent monthly, and paid rent as it accrued, he became a tenant from month to month. The instructions declare the same principle.

The judgment must be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* Oliver P. Powell *et al.*

v.

JOHN RUYLE *et al.*

1. ELECTION—*"returns" from which vote of precinct should be counted.* The tally list required to be sent to the county clerk is a constituent part of the "returns" from the board of election of a precinct, and where a doubt arises as to the number of votes cast upon the question of adopting township organization, from the informal character of the certificate of the election officers, the number being set down below instead of above their signatures, it is proper to consider the tally list, and from the two count the votes thus appearing to have been cast on the question.

2. The returns of an election consist of the certificate of the officers conducting the same, entered on the poll books, together with a list of voters, and one of the tally lists, all of which are to be carefully enveloped and sealed, and delivered to the county clerk. From these the abstract of the vote is to be made.

This was a proceeding by *mandamus*, commenced in this court by the relators against the county commissioners of Jersey county.

Messrs. PALMER, PALMER & ROSS, for the relators.

Messrs. ROBINSON, KNAPP & SHUTT, for the respondents.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

At the general election held in November, 1878, there was submitted to the voters of the county of Jersey, in this State, to be voted upon at said election, the question of the adoption of township organization in that county.

The result of the vote taken being claimed to have been in favor of township organization, this petition for a writ of *mandamus* was filed in this court to compel the respondents, who constitute the board of county commissioners of Jersey county, to proceed and appoint three commissioners to divide the county into towns, as required by the fifth section of the Township Organization act. The answer of the respondents

sets up, in defence, that there is no sufficient evidence on file in the office of the county clerk of the county that a majority of the votes cast at said election were given in favor of township organization.

The whole question rests upon the vote of Grafton precinct, —whether or not it shall be counted.

In Grafton precinct the certificate of the election officers was made upon the poll book, on printed blanks furnished, and was in the usual form; and after specifying, in detail, the names of the candidates for the various offices voted for, and the number of votes received by each, it concludes thus, (printed matter in roman, written matter in italics,):

Certified by us: *Jacob Godfrey,* *James R. Bell,* *George N. Slaten,* } Judges of the election.

Attest: *Thaddeus A. Slaten,* *B. F. Porter,* } Clerks of the election.

Beneath the signatures were written these words:

"For township organization, received one hundred and ninety-one votes.

"Against township organization, received seventy-two votes."

This certificate was accompanied, when sent to the office of the county clerk and received there, with a tally list, from which it appears, in the usual form:

For township organization, - - - - - - 191
Against township organization, - - - - - - 72

On the 6th day of November, 1878, as required by the statute, the county clerk, with the assistance of two justices of the peace of the county, opened the returns and made an abstract of the vote cast upon this question, which was as follows:

"Abstract of votes for and against township organization, given in the county of Jersey, and State of Illinois, on Tuesday, the 5th day of November, A. D. 1878:

"The total number of votes cast in said county was twenty-eight hundred and fifty-eight (2858).

"For township organization, fourteen hundred and fifty-nine votes (1459).

"Against township organization, thirteen hundred and ninety-nine votes (1399).

"The vote in Grafton precinct, in said county, was not certified to as required by statute, and the same, therefore, can not be lawfully counted by the board of canvassers. The uncertified vote of Grafton precinct is:

"For township organization, one hundred and ninety-one votes, - - - - - - - - - - - 191

"Against township organization, one hundred and four votes, - - - - - - - - - - 104

"Total vote cast in Grafton precinct, two hundred and ninety-five, - - - - - - - - - - 295

"The legal vote, therefore, cast on the question of township organization, is as follows:

"For township organization, twelve hundred and sixty-eight votes (1268).

"Against township organization, twelve hundred and ninety-five votes (1295).

"We, the undersigned, justices of the peace of the county above named, were this day taken to the assistance of the county clerk of said county, and the poll books for the aforesaid election were opened, and the foregoing abstract made in our presence, at the clerk's office in Jerseyville, in said county, this 6th day of November, A. D. 1878.

GEO. C. COCKRELL, J. P. [L. S.]
ROBERT BURGESS, J. P. [L. S.]"

—Which was duly filed and spread upon the records.

It is said that this abstract of votes constitutes the only evidence upon which the respondents can act, and that it shows that the total vote cast at the election was 2858, and for township organization only 1268.

In another part of the abstract, however, it is stated that there were 1459 votes cast for township organization, which would make the requisite majority.

But, it is said, this statement is wholly irrelevant, and made from some illegal and incompetent information the canvassers were in possession of. If the statement rested upon information contained in the returns, we do not think it is to be disregarded as made without warrant. The provision of the Township Organization act is: "If it shall appear, by the returns of said election, that a majority of the legal voters of said county are for township organization, then the county so voting in favor of its adoption shall be governed by, and be subject to, the provisions of this act," etc. Rev. Stat. 1874, page 1066, § 4.

The character of the "returns" of the election under the Township Organization law is defined in section 3 of that act, by reference to the law regulating the election of county officers. Rev. Stat. 1874, page 459, §§ 61, 62.

The "returns" consist of the certificate of the officers conducting the election, entered in the poll books, together with a list of voters and one of the tally lists, all which are to be carefully enveloped and sealed up, and delivered to the county clerk; and these are the "returns" which the county clerk, within seven days after the election, with the assistance of two justices of the peace, is required to open and make an abstract of the votes, as was done in this case. The tally list is a constituent part of the "returns," and it properly showed the number of votes for and against township organization. If a doubt arose as to the number voting for and against township organization in Grafton precinct, from the informal character of the certificate of the election officers,—the statement of such number being set down in the certificate below, instead of above, the signatures of their names,—it would be entirely removed by the inspection of the tally list. On comparing together the certificate and the tally list, there could be no doubt as to the number of votes given for and against township organization in Grafton precinct, and this as appearing by the "returns," and by the certificate itself, showing the statement of such number to be a part of such certificate, as intended to

be embraced therein. As said in *People* v. *Hilliard*, 29 Ill. 425: "The plain duty of the board was to make the abstract from the returns, and give the certificate to the person who appeared by the returns to have received the highest vote. The question in all such cases should be, whom did a majority of the qualified voters elect? Form should be made subservient to this inquiry, and should not rule in opposition to substance."

We regard, then, the first statement which appears in the abstract made by the canvassers, that 1459 votes were cast for township organization, as showing the number of votes so cast, as appearing from the returns, and as the statement which should be accepted as the true one, and the one which should prevail; and that the subsequent statement, of 1268 as the number of the votes so cast, should be rejected, as evidently being based merely upon the informality in the certificate of the election officers of Grafton precinct, and giving undue effect to such informality.

The writ of *mandamus* is awarded, as prayed for.

Mandamus awarded.

Scholfield, J., dissents.

The County of DeWitt

v.

John Wright.

1. Paupers—*liability of county for services rendered.* Under the present statute relating to paupers the overseer of the poor of a town has no power to render temporary relief to an indigent or poor person not required to be supported wholly by the county, contrary to the regulations and limitations prescribed by the county board, but he is bound by such regulations.

2. A rule and regulation of a county board that in case of need of medical aid by a poor person not required to be wholly supported by the county, the county physician should be resorted to, is a reasonable one, and if disregarded,

and another physician renders medical services in defiance of the rule, though by direction of an overseer of the poor, he can not recover for such services of the county.'

3. Former decisions. Since the cases of *The Board of Supervisors, etc.* v. *Plaut*, 42 Ill. 324, and *Supervisors of LaSalle County* v. *Reynolds*, 49 id. 186, the statute has been materially modified in respect of the questions above mentioned.

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

Messrs. Fuller, Graham & Monson, and Messrs. Moore & Warner, for the appellant.

Messrs. Donahue & Kelly, for the appellee.

Mr. Justice Scholfield delivered the opinion of the Court:

Appellee's claim against the county is based on this evidence: James Deland, who was the supervisor of the town of Clintonia, in DeWitt county, testified that, "Wright came to me and notified me, as overseer of the poor, that an old lady named Todd was sick, and had called on him for medical and surgical aid; that she had no property, and that I had better go and see her. I went, found her in bed, poor, and about 70 years old. She requested me to employ Wright to perform an operation upon her. Told her that the county had contracted with doctors to doctor the poor in this township, and named them. She objected, as they were young men and strangers, and that Wright had performed the same operation for her. She had confidence in him, and did not like to trust strangers; and although the county board had forbidden, my conscience would not allow me to refuse the old lady, so I called on Wright and told him that the old lady needed help, but that owing to the trouble the board had had with doctors' bills I could not and would not, as supervisor, employ him; but as overseer of the poor of the township I instructed him to go and render her assistance and I would

do all I could for him, and if the county board would not allow it, I would see that he got his pay from the township, or I would pay the bill myself. Wright replied, that if I would instruct him to perform the services, and the board would not allow the bill, he would trust to the courts, and not hold the town or me for it. I again told him that I would not bind the county, but as overseer of the poor instructed him to attend to the case, and suppose he did so. [Witness is here shown Wright's accounts.] This is my statement and signature. I ordered the services rendered, not as supervisor, but as overseer of the poor in town of Clintonia, where she resided. The poor are supported at the poor house. Mrs. Todd has never been an inmate of the poor house."

On cross-examination he testified: "I told Wright all the time, when I employed him, that I thought the county would not pay him; that I could not bind the county to pay. Mrs. Todd was not a county charge—not in the poor house. As overseer of the poor, I last winter helped her to a few groceries. She worked part of the time and supported herself."

Appellee, in his testimony, agrees with that given by the supervisor, and he further says: "Deland stated over the trouble the board had had about this class of doctors' bills, substantially as he has stated it here. He told me to go and render the services, and he would do all he could to have my bill allowed by the county board; that he could not bind the county, but as overseer of the poor he felt it his duty to employ me, and if the board failed to pay me, the township would pay me. I replied that I would not rely upon the township, but that if he would authorize me to perform the services I would rely on the county, and if the board would not pay, I would test the question of the county's liability in the courts."

Evidence was offered by the appellant, but rejected by the court, showing that at the time appellee treated Mrs. Todd, for which he now seeks compensation, the county had in its employ a competent physician and surgeon to furnish all

medicines and treat professionally all cases occurring in that township, for which the county was to become chargeable; and also that a certain rule or regulation of the board of supervisors was then in force, by which it gave notice that the county would not be liable for medical attendance, etc., by other than the regularly employed physicians, except in certain specified cases, which do not include that of Mrs. Todd.

Proper exception was taken to the several rulings of the court, so as to bring before us the question of the county's liability, under the facts proved, and proposed to be proved, as above.

If the overseer of the poor can employ in such cases whom he pleases, as physician, and bind the county by his employment, in defiance of any prior conflicting regulation of the board of supervisors, this judgment must be affirmed, otherwise it must be reversed. The question is purely one of power, nothing else, and the present, as the testimony of appellee shows, was designed as a test case.

Appellee's counsel rely with much confidence upon *The Board of Supervisors, etc.* v. *Plaut*, 42 Ill. 324, and *Supervisors of LaSalle County* v. *Reynolds*, 49 id. 186.

In the first of these cases it was held that where the overseer of the poor has entered into a contract for the support of a pauper, the liability of the county is thereby fixed, and its agents have no discretion, but must discharge the obligation. Still it was also said: "When the overseer of the poor has made an improvident and extravagant contract for the support of a pauper, that body," (*i. e.* the board of supervisors) "may, no doubt, when it is reported to them, reduce the amount; but until such action is had by the board, the contract, if fair and unaffected by fraud, will be binding on the county."

In the other case it was held that under section four of the pauper act, then in force, a liability was imposed upon counties to pay a reasonable compensation to a person who has been employed by the overseer of the poor, and who renders

medical aid to persons falling sick within the county, and having no money or property with which to pay for such services.

The law has been materially changed since those cases were decided.

It is provided by § 20, chap. 107, entitled "Paupers," (Rev. Stat. 1874, p. 756,) that, "The overseers of the poor shall have the care and oversight of all such persons in their town or precinct as are unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, and as are not supported by their relatives or at the county poor house, and shall see that they are suitably relieved, supported and employed, subject to such restrictions and regulations as may be prescribed by the county board, or in case the poor are supported by the town, subject to such restrictions and regulations as may be prescribed by such town."

When *The Board of Supervisors* v. *Plaut, supra,* was decided, the first part of this section was the law, and under it that case was decided; but the latter part, and especially that part which subjects the action of the overseers of the poor to "*such restrictions and regulations as may be prescribed by the county board,*" was not. See Rev. Stat. 1845, p. 403, § 6.

Then we have § 23, which was first enacted in the revision of 1874, as follows: "When any poor or indigent person does not require to be supported wholly by the county, the overseer of the poor may, *subject to such limitations as may be prescribed by the county board,* render him temporary relief without his being committed to the care of any such person," (*i. e.* person to whom the care of the poor of any town or precinct shall be committed,) "or being sent to the county poor house."

This seems to exactly meet Mrs. Todd's case. She is shown to have been poor or indigent, but not requiring to be supported wholly by the county.

Counsel for appellee insist that her case falls under § 24,

which is as follows: "Where any non-resident, or any person not coming within the definition of a pauper, of any county or town shall fall sick, not having money or property to pay his board, nursing and medical aid, the overseers of the poor of the town or precinct in which he may be shall give, or cause to be given to him, such assistance as they may deem necessary and proper, or cause him to be conveyed to his home, *subject to such rules and regulations as the county board may prescribe;* and if he shall die, cause him to be decently buried."

The original of this section, under which *The Board of Supervisors of La Salle County* v. *Reynolds, supra,* was decided, did not have the qualifying clause, "*subject to such rules and regulations as the county board may prescribe;*" but, instead, it was provided, "the overseers shall make such allowance for board, nursing, medical aid, or burial expense, as they shall deem just and equitable; which allowance shall be laid before the county commissioners' court, and the said court shall allow either the whole or such reasonable and just part thereof as ought to be allowed," etc.

We are of opinion that Mrs. Todd's case is not within the contemplation of this section. Her case is more accurately described by the § 23. But even if in this we are in error, we have seen that the overseer of the poor could only act subject to such rules and regulations as were prescribed by the county board. That board had made a rule and regulation that in case of need of medical aid by persons in the condition of Mrs. Todd, the physician designated and employed by the board should be resorted to. This regulation was known to and defied by appellee. The overseer of the poor had no power, and claimed none, to disregard it. The regulation was reasonable, and no circumstances are shown justifying a disregard of it.

The judgment is reversed.

Judgment reversed.

Syllabus.

ROBERT HALL
v.
THE CITY OF VIRGINIA.

1. SUBSCRIPTION — PARTIES — *who may sue upon a subscription, when no payee is named.* A subscription of money for the purpose of erecting a building to be donated to a county, with no payee or promisee named, may be enforced by and in the name of any person or corporation furnishing money and erecting the building on the faith of the same. Such person becomes the proper promisee or payee.

2. SAME—*whether conditional.* A subscription for the purpose of building a house in a public square of a city, to be donated to the county in the event of the removal of the county seat to such city, is not a conditional subscription, dependent upon the fact of the donation to the county.

3. SAME—*what would amount to a donation.* But if, in such case, the actual donation were essential to render the subscription binding, a lease to the county for ninety-nine years without the payment of rent, would be regarded as a donation.

4. SAME—*illegal issue of bonds by a city to carry out the purpose of the subscription.* Where a city, on the faith of subscriptions for the purpose of building a court house to be donated to the county, issues corporate bonds, upon which it raises money, which is devoted to the purpose of the subscription, a subscriber, when sued for his subscription by the city, can not be allowed to show in defence that the city exceeded its corporate powers in issuing its bonds to raise the money. That is a question alone between the city and the holders of the bonds.

5. INTEREST—*when allowable on subscriptions.* Interest on a subscription for the purpose of erecting a building is not recoverable without proof of the time the money was expended on the faith of it, and when the building was erected.

6. AGREED STATE OF FACTS—*presumption.* Where a case comes to this court upon an agreed statement of facts, such statement takes the place of a bill of exceptions, and this court will not presume other evidence not therein stated was heard which might affect the judgment.

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

Mr. CASSIUS G. WHITNEY, for the appellant.

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

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

This was an action of assumpsit, brought by the city of Virginia in the circuit court of Cass county, against Robert Hall.

The declaration contained the common counts for money paid, laid out and expended, money loaned, interest, money due and owing on account stated. The defendant pleaded the general issue, and on a trial of the cause before the court, a jury having been waived, the plaintiff recovered a judgment for $590, to reverse which defendant appealed, and the case is presented here upon an agreed statement of facts, as follows:

1st. It is agreed by the parties hereto that the defendant signed the contract or subscription declared on, which is in the words and figures following, to-wit:

"We, the undersigned, agree to pay the amount set opposite our respective names, for the purpose of building a house in the public square in the town of Virginia, Illinois, to be donated to Cass county for county purposes, in the event of the removal of the county seat from Beardstown, Illinois, to Virginia, Illinois. Virginia, Illinois, July 29, 1872."

—and that said subscription was also signed by others than the defendant. The amount of the subscription of the defendant was $500.

2d. It is agreed that a building was built in the public square of the city of Virginia after said subscription was signed, and that said building was leased by said city of Virginia to Cass county for the period of ninety-nine years, for court house purposes.

3d. Said building was built at the expense of said city of Virginia, including moneys collected on said subscription.

4th. The said defendant never paid any portion of his said subscription.

5th. That the said city of Virginia issued its bonds and borrowed money upon them with which to erect said building, and that said bonds are now outstanding against said city.

6th. That said building is now in use as the court house of said county of Cass, and that the county seat of said county was removed by law to Virginia, before the commencement of this suit.

7th. That said city of Virginia expended money in building said court house, in part, upon the faith of said subscription of said defendant, in common with the other subscribers thereto.

The first ground relied upon by the defendant to reverse the judgment is that the subscription paper in evidence contains no payee.

The money was subscribed by defendant for the purpose of building a house in the public square in the town of Virginia to be donated to Cass county for county purposes, as appears from the terms of the contract signed by defendant. It further appears, from the agreed statement of facts, that Virginia, after the subscription was made, and on the faith of the subscription, furnished money and erected the house. We understand the doctrine is well settled in this State, that the party who advances money, as did the city of Virginia in this case, on the faith of the subscription, becomes the proper promisee or payee in the subscription. This is fully settled in *McClure* v. *Wilson*, 43 Ill. 356, and cases there cited.

It is also urged, that the court house has been leased to Cass county, and not donated, and hence the condition upon which defendant subscribed not having been complied with, the money is not due and can not be collected. The defendant's agreement was to pay money for the purpose of building a house to be donated to Cass county, not on condition the donation was made. Besides, a leasing for ninety-nine years, when no rent is required to be paid, may be regarded as a substantial compliance with the specification in the subscription, "to be donated." For all practical purposes the house is donated to the county. Doubtless, before the expiration of ninety-nine years the house will be worn out and of no use or benefit to any person, so that the county, by the lease,

derives the same benefit from the house as if it was donated.

It is next urged, the building of the court house was not a corporate purpose, and the city of Virginia had no right to issue bonds and erect the building, and could not become a party to this subscription contract.

It is doubtless true, a city or an incorporated town can not incur a debt or liability for other than corporate purposes, but the question, whether the city of Virginia is legally liable for the payment of the bonds it has issued for the purpose of raising money to erect the court house, can not be raised by the defendant in this action. So far as this record discloses, that question does not concern the defendant. The legality of the bonds is a question solely between the holders of such bonds and the city. It is not to be presumed in advance that the city of Virginia will undertake to repudiate her indebtedness, but whether she will or not, we are aware of no authority which would sanction the right of this defendant, when sued upon a debt of his own contracting, to interpose a defence of that character for the city of Virginia.

The sole question in this case is, whether the defendant is liable upon the subscription for the payment of the amount which he promised to pay, and not whether the bonds issued by the city are illegal or may be defeated by the city. On the faith of this subscription, and others of a like character, the city of Virginia erected the house for the purposes named in the subscription, and it has been devoted to the purpose contemplated by the subscription. Under such circumstances it would be manifestly unjust now to permit the defendant to escape payment of his subscription, on the ground the city may have exceeded its corporate powers.

It is next urged that the judgment is larger than warranted by the evidence. The subscription was $500, but the judgment was $590. The $90 was doubtless allowed for interest, but there is no evidence in this record upon which a recovery of interest can be based. It does not appear when the city expended the money in erecting the house, nor does it appear

when the house was built except that it was built before the suit was commenced. These facts should have been proven, to authorize a judgment for interest.

It is, however, suggested by appellee that it will be presumed the proof was made, in the absence of a bill of exceptions. The agreed statement of facts in the record takes the place of a bill of exceptions, and when parties have stipulated what the facts are, and the record comes up on the agreed statement of facts, we must presume the statement contains all the facts. We can not presume other evidence was heard which might sustain the judgment.

For the reason the judgment is larger than warranted by the evidence, it will be reversed and the cause remanded.

Judgment reversed.

LYMAN CHAPIN

v.

JULIA H. BILLINGS.

1. CONSTITUTIONAL LAW—*impairing obligation of contract.* A change in the law, giving a more speedy remedy to enforce a party's contract or covenant to surrender possession of land, does not impair the obligation of the contract.

2. Thus, where a party, in his deed of trust, covenanted with the trustees to give immediate possession to the purchaser in case of a default and sale, and after the execution of the trust deed the law relating to forcible entry and detainer was changed, extending that remedy to sales under deeds of trust, it was *held*, that forcible detainer would lie against him under such law, upon his refusal to give possession on a sale.

3. FORCIBLE DETAINER—*when it lies.* Where a party, in giving a trust deed, acknowledges himself the tenant of the trustee, and covenants that if he fails to surrender immediate possession to the purchaser in case of a sale under the power therein, an action of forcible detainer may be employed to dispossess him, the action will lie against him upon the happening of the contingency, independent of the statute extending the remedy to sales under powers in mortgages and deeds of trust.

4. SAME—*sale under trust deed before debt is all due.* In forcible detainer for land sold under a power in a deed of trust, where the sale has been made be-

fore the principal sum was due, for default in the payment of interest notes, under a provision that upon default in the payment of any such notes the payee might treat the entire debt as due, and require the trustee to sell, the plaintiff, who is the purchaser, is not bound to prove, independent of the recitals in the trustee's deed to him, that there had been a default in paying the interest, and that the holder of the notes had elected to treat the principal as due, and require the trustee to make the sale.

5. SAME—*usury in the debt secured by the trust deed—remedy.* The grantor in a deed of trust which authorizes a sale on the non-payment of interest, for the entire debt, can not show, in an action of forcible detainer against him by the purchaser, that there was no interest due, on account of usury in the transaction. The purchaser's title can not be questioned for such cause in this action, and the grantor's remedy, if any, is in a court of equity.

6. TRUST DEED—*remedy on sale when nothing is due.* If a sale is made under a power in a deed of trust when nothing is due, there being no power to sell, if the title passes the grantee will be held a trustee for the debtor; but that can not be inquired into in an action at law.

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

Mr. WILLIAM H. BARNES, Mr. ISAAC J. KETCHAM, and Mr. CHARLES A. BARNES, for the appellant.

Messrs. BROWN, KIRBY & RUSSELL, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

On the 1st day of July, 1871, Lyman Chapin procured a loan of $30,000 from Julia H. Billings, E. I. Chaffee, and Hinsdale Smith, executors of J. M. Billings, deceased, and, to secure the same, Chapin gave to the executors a note for the principal sum, due in ten years from that date. He also gave them twenty other notes, for $1500 each, for the interest falling due, semi-annually, on the sum loaned. One of these notes fell due every successive six months from the date of the principal note, the last maturing ten years from that date. The loan, by the terms of the contract, drew ten per cent interest per annum.

At the time of executing these notes, Chapin and wife executed a trust deed to Wm. D. Saunders, Edward P. Kirby,

and Jonathan B. Turner, on 827 acres of land in Morgan county, in this State, as a further security for the loan. This deed of trust contained a power authorizing the trustees to sell the lands to pay the principal and accrued interest, in case default in payment should be made of principal or interest; and in case of failure to pay any one of the interest notes at maturity, it authorized the payees to elect to declare the principal debt due, and on doing so the trustees were authorized and empowered to give the notice specified in the deed, and sell the property, pay the costs, the debt and accrued interest, and pay the surplus, if any, to Chapin.

It is claimed, and the deed from the trustees to Julia H. Billings recites, that Chapin made default in paying the interest note falling due July 1, 1876; that the executors thereupon elected to declare the debt due, and required the trustees to sell the property and pay the principal and accrued interest; that the trustees thereupon gave the required notice, and on the 11th day of November following, at the time, place, and upon the terms required by the deed of trust and notice, sold the property, and Julia H. Billings became the purchaser, she being the highest and best bidder therefor, having bid the sum of $30,000, and the trustees conveyed to her the lands described in the trust deed, for that sum.

The trust deed contained a clause that dispensed with personal notice to Chapin of the election of the payees to declare the principal sum due, and stipulated that all recitals that might be contained in any deed that might be made on a sale by the trustees, setting forth the fact of due notice of advertisement and sale of the property, should be considered and taken as *prima facie* evidence of all matters and facts set forth in such recitals, and that such deed or deeds should be effectual to pass the title.

Chapin and wife released all claim to a homestead in the premises. Chapin, also, by the deed, attorned to the trustees as their tenant. He also covenanted that he would, on the sale of the property, surrender immediate and peaceable pos-

session to the purchaser, or, on default thereof, the purchaser might immediately proceed against him, etc., for a wrongful detainer, according to the statute in such case made and provided, without further notice to quit.

On the 5th day of February, 1877, Julia H. Billings, by her attorney in fact, filed a complaint in forcible detainer against Chapin, to recover the land thus purchased by her at the trustees' sale. A summons was issued and served, and a trial had before the justice of the peace before whom the action was brought, resulting in a judgment, from which an appeal was prosecuted to the circuit court of Morgan county. A trial was had therein, by the court and a jury, when a verdict was found against the defendant, and the court, after overruling a motion for a new trial, rendered judgment on the verdict, and defendant appeals to this court, and urges a reversal.

It is claimed that the provision of the second section of the Forcible Entry and Detainer act, (Rev. Stat. 1874, p. 535,) which gives this action to the purchaser under a power of sale in a mortgage or trust deed, is unconstitutional. The provision is this: "Where a sale is made by virtue of any sale made under any power of sale in any mortgage or deed of trust contained, * * * and the party to such * * * deed of trust refuses or neglects to surrender possession thereof, after demand in writing by the person entitled thereto, or his agent," an action of forcible detainer may be maintained.

It is said that because this provision was adopted after the deed of trust was executed, it so far changes the remedy as to impair the obligation of the contract. Appellant, by the stipulation in his deed, bound himself to give immediate possession to the purchaser. He, therefore, contracted that the purchaser should, on the sale, be let into possession at once, and without delay; and even if the statute gives a more speedy remedy than existed when the deed was executed, still it was not as speedy as his contract and covenant provided for, and the action could not dispossess him as soon as his covenant bound him to surrender possession. We are, therefore, wholly

unable to conceive how it impairs any contract. It only operated to give the purchaser a more speedy means of enforcing the contract. On the sale being made, by his contract appellant's right to possession ceased. He thereby lost all right to use and enjoy the property, and good faith and fair dealing required him to surrender the possession, in fullfilment of his covenant. It is not perceived in what respect he has any reason to complain, as the law only compels him to do what he should have done without its coercive power. There is no force in this position.

Again, appellant acknowledged himself the tenant of the trustees, and covenanted that if he failed to surrender immediate possession to the purchaser, an action of forcible detainer might be employed to dispossess him. Under this acknowledgment and covenant that he was a tenant of the trustees, the action lies when there was a breach of the covenant, so that in any view that can be taken of the case the action lies.

It is next urged, that under this deed of trust appellee could not recover without proving by evidence independent of the deed from the trustees, that there had been a default in paying the interest, and the holders of the notes had elected to treat the principal as due, and had required the trustees to make the sale,—in other words, to prove that all things necessary to confer power to sell, before the debt became due, had been performed, before the deed could be read in evidence, to show appellee had become entitled to possession of the land.

In the case of *Reese* v. *Allen*, 5 Gilm. 236, it was held, that the sale by a trustee passed the legal title to the purchaser, and that a court of law would not inquire whether the trustee had complied with the conditions in the trust deed. If there were irregularities or fraud which should avoid the conveyance, the remedy was in equity and not at law.

Again, in *Graham* v. *Anderson*, 42 Ill. 517, it was held, that where a conveyance by a trust deed recited an indebtedness, the presumption of indebtedness continued until rebutted by proof of payment. And in that case the doctrine of *Reese*

v. *Allen, supra,* was again announced, that the sale by a trustee passed the legal title, and, in ejectment, a wrongful sale by the trustee could not be urged to defeat a recovery,—that in such a case the remedy was in equity.

The same doctrine was announced in the case of *Dawson* v. *Hayden,* 67 Ill. 52; and in the case of *Rice* v. *Brown,* 77 id. 549, the same rule was reiterated. And we had, in view of these several cases, running through our reports for thirty years, unshaken by any decision of this court, supposed that it would have been accepted as settled doctrine, and appellant has suggested nothing in argument that presents the slightest doubt of the correctness of the rule. In the last case above referred to it was held, that the action of forcible detainer would lie in a case similar to this, under the second section of the act, nor has appellant urged any thing that raises any doubt that the General Assembly has full power to adopt such a provision. The grantor in a trust deed has no vested or other right to hold the land after the trustee sells and conveys. If he holds after that time, it is as a wrongdoer, and is like any other tenant holding over wrongfully after his term has expired, and the statute only compels him to surrender possession illegally held by him.

It is also urged that the court erred in not permitting appellant to prove that the contract was tainted with usury, and that the payees had forfeited all of the interest, and that the principal was not due by the terms of the note, and, the interest being forfeited, there was nothing due, and, consequently, no power to sell and cut off appellant's rights, and the sale being unauthorized, conferred no title. If all that is claimed was conceded, still, in forcible entry and detainer the title can not be questioned, and under the cases referred to that question could not be raised on a trial at law, and the remedy, if any, is in equity. If nothing was due there was no power to sell, and if the title passed, the grantee would be held a trustee for the debtor; but we can not look into that question in this

case. The court below, therefore, decided correctly in rejecting the evidence.

Perceiving no error in this record, the judgment of the circuit court is affirmed.

Judgment affirmed.

SMITH TOWNSEND

v.

THE CHICAGO AND ALTON RAILROAD COMPANY.

1. RIGHT OF WAY—*constitutionality of law giving right to use land before payment of compensation.* A section in a railroad charter passed under the constitution of 1848, which allowed the taking of lands of persons for right of way by condemnation proceedings before either ascertainment or payment of compensation, was not in violation of such constitution.

2. SAME—*sufficiency of petition.* A statute authorizing the appointment of commissioners to ascertain the damages which the owners of lands taken for right of way *have* sustained, means also those that the owner will thereafter sustain. Therefore a petition for the appointment of such commissioners to assess the damages the owners *will* sustain is not invalid in not using the words "have sustained."

3. SAME—*condemnation can not be attacked collaterally for error.* Where commissioners have been duly appointed according to law to condemn land for right of way and assess damages, and have jurisdiction of the matters acted on by them, their action will be conclusive in all collateral proceedings.

APPEAL from the Circuit Court of Tazewell county; the Hon. JOHN BURNS, Judge, presiding.

The appellant commenced his suit against the appellee, in ejectment, to the circuit court of Mason county, to recover the possession of a certain parcel of land described in the declaration. The summons was returned to the November term of that court, 1873, and the declaration filed of that term.

The defendant pleaded not guilty, in the usual form, and, on leave, filed certain special pleas, each of which was held bad on demurrer. There was a change of venue, the cause

was transferred to Tazewell county, and on September 21, 1875, the cause was tried by the court without a jury. The court found the defendant not guilty, and, after motion for a new trial overruled, rendered judgment on the finding against the plaintiff for costs, and plaintiff appealed.

At the trial the title of the plaintiff was admitted unless defendant had right of possession under certain condemnation proceedings taken by the St. Louis, Jacksonville and Chicago railroad by virtue of an act of the General Assembly of the State of Illinois, entitled "An act to construct a railroad from Jacksonville, in Morgan county, to Alton, in Madison county," approved February 15, 1851, and certain other acts amendatory thereof, and others. The defendant offered the several acts in evidence.

The defendant then offered in evidence the petition of the last mentioned corporation to the judge of the first judicial circuit, setting forth the necessity to enter upon and take and use for railroad purposes certain lands, among which are the lands in controversy,—setting forth, also, the non-residence of some of the owners and the minority of others, and that in order to ascertain the amount to be paid as damages for entering, etc., it was necessary to have the appointment of commissioners to determine the damages which the owners will sustain by the occupation, etc., and asking such appointment. The introduction of the petition was objected to, the objection overruled, and the petition was read, and exception taken.

The order for the appointment of commissioners was offered, and received under objection. The report of the commissioners was next offered, and received under like objection, together with the certificate of the recorder that the report was filed in Tazewell county, November 18, 1867, and accompanying the report was a plat of the way the road cut across the tract.

The defendant then introduced the lease of the St. Louis, Jacksonville and Chicago Railroad Company to the defendant, of its road.

Evidence was also offered of an offer by defendant to pay to plaintiff's agent the amount of the award, which was objected to but admitted. There was other evidence not necessary to be stated.

Mr. E. A. WALLACE, for the appellant.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

The objections made to the introduction of the several pieces of evidence in the chain of the defendant's title, are not pressed here in the argument of the counsel for the appellant. But on an examination of these objections, we think they were properly overruled.

It is mainly insisted by appellant, that the 11th section of the act entitled "An act to construct a railroad from Jacksonville, in Morgan county, to Alton, in Madison county," approved February 15, 1851, (as the same appears in Private Laws of 1851, pp. 193 to 198,) is unconstitutional, because the said section allows the taking of the lands of persons by certain condemnation proceedings before either ascertainment or payment of the compensation, and, for this reason, it is insisted that the whole of said proceedings are null and void.

This is not a new question in this State, nor is it an open question. The law is well settled and we are not disposed to disturb it.

In the case of *Johnson* v. *Joliet and Chicago Railroad Company*, the validity of a statute almost identical with the one under consideration was upheld, and, ever since, the constitutionality of such statute has been maintained. Judge BREESE, in delivering the opinion, says: "Some of the State constitutions require that the compensation allowed shall precede the enjoyment of the property,—ours does not." 23 Ill. 202, 206, 208.

Subsequently, in the case of *Rich et al.* v. *City of Chicago*, 59 Ill. 286, the court affirmed this case and reiterated the same principle.

As these proceedings were taken before the constitution of 1870 was adopted, they do not fall within its provisions.

There is no force in the objection that the petition asks that the commissioners determine the damages which the owner *will* sustain, while the statute requires them to ascertain damages which the owners *have* sustained. It is evident that the statute intended the damages to be as well for the occupation already begun as that to continue, and such is the meaning of the petition. Both contemplated reimbursement to the owner for the injury he might sustain by the use of his land for that purpose.

Without following the various objections made to the proceedings for condemnation, it is sufficient to say that all these questions have been settled in the cases referred to, and we find no cause of objection to the regularity or sufficiency of these proceedings. The commissioners having been duly appointed, and having had jurisdiction of the matters acted upon by them, their action is conclusive in all collateral proceedings. *Galena and Chicago Union Railroad Company* v. *Pound et al.* 22 Ill. 399, 414.

Under like proceedings had under the act discussed, and other like acts of incorporation, many condemnations have been had, and important rights of property acquired, and it will not do to disturb them unless the law imperatively demands it.

The judgment must be affirmed.

Judgment affirmed.

James McGee *et al.*

v.

Melissa A. McGee *et al.*

1. Dower—*may be barred by provision in nature of jointure.* Any reasonable provision, whether secured out of realty or personalty, which an adult person, previous to marriage, agrees to accept in lieu of dower, will be a good jointure, in equity, and operate as a bar to any subsequent claim to dower.

2. Same—*ante-nuptial contract, as barring dower.* Where parties in contemplation of marriage entered into an ante-nuptial agreement in 1857, in which it was recited that both were then the owners of real and personal property, and that the intended wife, as an heir, would be entitled to other property, real, personal and mixed, and which then provided that each should retain and possess all his or her property, real, personal and mixed, in possession and expectancy, forever, absolutely free from the claim, right and control of the other, as fully as if such marriage had never taken place, and renouncing forever all claims in law and in equity of curtesy, dower, survivorship or otherwise, in and to all lands, etc., that then or might thereafter belong to or be acquired by the other, which was kept and observed by the parties after their marriage, it was *held*, that the contract was a reasonable one, and not prohibited by public policy, and was such as a court of equity would enforce, and compel the survivor to abide by and perform, and that on the death of the husband it might be set up as a bar to the widow's claim of dower.

3. Homestead—*extends to widow and children.* The policy of the law in relation to homesteads is to preserve the same for the benefit of the family as well as to the householder himself, and not to allow the same to be defeated by any ante-nuptial contract by the father and mother, so as to deprive their minor children of its benefits in case of the death of either.

4. Same—*on partition, in favor of minor children.* On a proceeding for partition by the heirs of a deceased owner of lands, his widow is entitled to have a homestead set off to her, to the extent in value of $1000, for the benefit of herself and the minor children, notwithstanding she may have relinquished forever all claims upon the estate of her husband by an ante-nuptial agreement. The provisions of the statute can not be defeated by mere private contract between persons not alone within its protection.

5. Husband and wife—*which bound to support children.* The wife is not bound, in the first instance, to apply her separate estate to the support of the children of the marriage. That obligation, primarily, is cast upon the husband's estate.

Appeal from the Circuit Court of Macoupin county; the Hon. Charles S. Zane, Judge, presiding.

Messrs. John M. & John Mayo Palmer, for the appellants.

Mr. John I. Rinaker, for the appellees.

Mr. Justice Scott delivered the opinion of the Court:

This was a bill in chancery, brought by the heirs of David McGee, deceased, for partition of the lands of which he died

seized. An ante-nuptial agreement between the decedent and his surviving widow is set forth in bar of all interest of the widow in the lands of her husband. Answering the bill, the widow claims homestead as well as dower in the lands of which her husband died seized, and all the questions made have relation to the claim put forth.

The ante-nuptial agreement recites, that the parties executing it are about to enter into a contract of marriage, and that both of them are owners of certain real and personal property, and then provides each shall retain and possess all of his or her property, real, personal and mixed, in possession and in expectancy, absolutely forever free from the claim, right and control of the other, notwithstanding such marriage, as fully and completely as if such marriage had never taken place; and in consideration of the premises, the parties respectively covenanted and agreed to and with each other, and for their heirs and assigns, that they did then and forever absolutely and fully renounce all claims, whether in law or equity, of curtesy, dower, survivorship, or otherwise, in and to all lands, tenements, goods, chattels, moneys, choses in action, or other property, that then or might thereafter belong to or be in any manner acquired by the other. The agreement bears date the 20th day of August, 1857, and in the same month the parties were married, and thereafter lived together as husband and wife, until the death of the husband, which occurred in 1875. Two children were born unto the parties, both of whom are now minors, and reside with their mother in the dwelling house where their father had resided. Each of the parents "owned and managed their separate property" during the entire period of their married life.

The facts out of which the questions made arise, are fully stated, and admit of no disagreement. Two propositions are discussed: First, whether the surviving widow is entitled to dower in the lands of her late husband; and, second, whether she is entitled to homestead.

It is conceded the provision made in the ante-nuptial agree-

ment does not create a jointure in favor of the wife, within the meaning of our statute on that subject. That provides, that when an estate in land shall be conveyed to an intended husband or wife, for the purpose of creating a jointure in favor of either of them, with his or her assent, to be taken in lieu of dower, such jointure shall bar any right or claim of dower by the party jointured, in the lands of the other. None of the elements of a statutory jointure are to be found in the provision made for the intended wife by the ante-nuptial agreement; but may not that provision be in the nature of jointure, and may it not, for that reason, bar the dower of the demandant? Although the cases on this subject are not entirely harmonious, the weight of authority seems to be that any reasonable provision which an adult person agrees to accept in lieu of dower will amount to an equitable jointure, and although it may be wanting in the requisites of a legal jointure, in equity it will bar dower.

This is not an entirely new question in this court. In *Jordan* v. *Clark*, 81 Ill. 465, it was agreed between the parties, by an ante-nuptial contract, that in the event the marriage should be consummated, and in case the wife should survive the husband, she should receive out of his estate the sum of $2000, in lieu of dower therein, and it was held, that while the provision made for the wife was not a statutory jointure, nevertheless it was in the nature of jointure, and would bar dower in her husband's estate. The case was decided on another question made; but the same rulings have been made by other courts in cases bearing a strong resemblance to the one at bar, and the precise principle announced as in *Jordan* v. *Clark*, that any reasonable provision, whether secured out of realty or personalty, which an adult person, previous to his or her marriage, accepts in lieu of dower, will be a good jointure in equity. Analogous cases, both as to facts and principles discussed, are *Andrews* v. *Andrews*, 8 Conn. 79; *Heald's Petition*, 2 Foster (N. H.) 265; *Gezer* v. *Gezer*, 1 Bailey Eq. (S. C.) 387; *Logan* v. *Phillips*, 18 Mo. 22. Illustrative of

the same view of the law are *Fendley* v. *Fendley*, 1 Gratt. 434; *Ellenmaker* v. *Ellenmaker*, 4 Watts, 89; *Stilley* v. *Folger*, 14 Ohio, 610; *Murphy* v. *Murphy*, 12 Ohio St. 407; *Cauley* v. *Lawson*, 5 Jones' Eq. 132.

Another point made is, the husband parted with nothing that had belonged to him which the intended wife could accept in lieu of dower, and for that reason it is said she ought not to be barred from claiming dower in the lands of her husband, as given by statute, either in law or equity. The objection rests upon a misapprehension of the legal effect of the contract. It will be remembered the agreement was made in 1857, in contemplation of a marriage soon to take place between the contracting parties, and ancillary to that event. In the agreement it was recited that both parties were then the owners of "real and personal property," and that the intended wife, as heir of Horace Lender, would be entitled to other "property, real, personal and mixed." As the law then was, the husband, on the consummation of the marriage, would succeed to the absolute ownership of the personal property of the wife, and would also be entitled to curtesy in his wife's real estate, as well as the usufruct thereof. Thus, it is seen the husband relinquished all the right which, by the marriage, he might have acquired over the estates of his wife, and in consideration of his agreements she also released all rights in the estate of her intended husband which the law would cast upon her in consequence of the marriage. It is conceded the husband, during his lifetime, abided by his part of the agreement, and that each of them "owned and managed their separate property."

The contract, in our judgment, is a reasonable one. It is one that persons advanced in life could, with great propriety, make, and especially where the parties have previously been married, and where there may be children by both marriages, among whom controversies as to property may arise after the death of the parents. Such agreements are forbidden by no considerations of public policy, and there can be no reason

why equity will not lend its aid to compel the surviving party to abide the contract. Our opinion is, the fair construction of the ante-nuptial agreement is, that it intercepts dower of the widow, and may be set up as an effectual bar to her demand for dower in the lands of which her husband died seized.

The question made as to homestead for the widow and her family residing with her where the husband resided, is one not depending on authority for its solution. It rests more on the construction of our statutes, and on the principles underlying the policy of our laws on that subject. Homestead is a right secured by statute to every householder having a family, and by a recent statute it is an estate in the lot or land owned or occupied by such party. It is continued, after the death of such householder, for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead, and of the children until the youngest child becomes twenty-one years of age. The exemption is absolute, except it is alienated in the mode prescribed in the statute, and no release of homestead is valid unless by the parties intended to be benefited, in conformity with the law that confers power to alienate it at all. The policy of the law is, as this court has had frequent occasion to declare, to preserve the homestead for the benefit of the family, as well as the householder himself. The statute was no doubt enacted from motives of public concern, and it is apprehended it is not in the power of the father and mother, by an ante-nuptial agreement, to so provide as to deprive their minor children of its benefits in case of their death.

It would seem to follow, therefore, that the children of the parties, no matter what construction shall be given to the ante-nuptial contract, during their minority, are entitled to the benefit of their father's homestead; and how can it be preserved to them unless it is set apart to their mother, as their natural guardian? Should the construction contended for be adopted, it would deprive the children of the decedent of the

benefits which this humane statute was intended to throw around them in their tender years, and it seems to us a proposition wanting in the support of both law and reason that they can be deprived of such right by an ante-nuptial agreement between their parents, however comprehensive in its terms. It does not militate against this view of the law that the widow may have sufficient means, derived from her separate estate, with which to support her minor children. She is not bound, in the first instance, to apply her separate estate to the support of her husband's children. The law has cast that obligation primarily upon the husband's estate. The policy of the law is, to provide a home for the family, that they may be kept together, and the mother is not obligated by her ante-nuptial agreement to abandon her children, but may share with them the homestead which their father in his lifetime had provided, so long as the youngest child is under twenty-one years of age. As in *Phelps* v. *Phelps*, 72 Ill. 545, the ante-nuptial contract may debar the widow of dower in her husband's lands, but it does not prevent her from sharing in the provisions the law has made for the benefit of the family. It is a matter of public concern, and the beneficent provisions of the statute for the protection of the family can not be abrogated by mere private contract between parties not alone within its provisions.

The decree will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

IRA JAMES

v.

THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY.

1. LIMITATION—*twenty years—title, how claimed.* Where a railroad company has been in the actual, visible and exclusive possession of land for a right of way for twenty years, it is not essential to the bar of the Statute of

Limitations, in ejectment against the company, that its officers should have made oral declarations of claim of title, but it will be sufficient if the proof shows that the company has so acted with reference to the property as to clearly indicate that it claimed title.

2. SAME—*and herein, as to extent of possession.* The continued occupation of land by a railway company for a right of way for its road for over twenty years, with acts of ownership during that period, will constitute a bar to a recovery by the former owner. But where such possession is not taken and held under color of title, it will extend only to the portion actually occupied, and not apply to any portion of such right of way as may have been occupied within twenty years by the original owner.

3. SAME—*promise to pay for land does not stop the running of the statute.* The promise of officers of a railway company to pay for land occupied and used by the company for a right of way, within the period of limitation, is not an admission of title in the promisee, so as to prevent the running of the limitation of twenty years.

4. AGENCY—*when authority must appear.* The promises of officers of a railway company to pay for land occupied by the company can not be received in evidence to bind or affect the company, without proof of their authority to make them.

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

Ira James brought an action of ejectment against the Indianapolis and St. Louis Railroad Company for the possession of "all the land occupied by the defendant for a right of way across the north half of the west half of the north-west quarter of section 22, township 12, range 7 east of the third principal meridian, being fifty feet on either side of the center of said railroad track, across said described land," claiming title thereto in fee.

The railroad company pleaded, first, not guilty; and secondly, that the supposed cause of action did not accrue to the plaintiff at any time within twenty years next before the commencement of the suit.

By agreement of parties a jury was waived, and the cause was tried by the court, who rendered judgment in favor of the defendant. The record is brought here by the appeal of the plaintiff.

It was agreed, upon the trial, that "The Illinois Central Railroad Company acquired the title to the land described in the plaintiff's declaration from the government of the United States, in the year 1852, and that the defendant was, at the time of the bringing of this suit, and is now, in the possession of the land described in the plaintiff's declaration."

The plaintiff then, having first made preliminary proof of the loss of the original, introduced the record of a deed from the Illinois Central Railroad Company to himself, for the west half of the north-west quarter, and the north half of the south-east quarter of section 22, in township 12 north, of range 7 east of the third principal meridian—reserving, however, the right of way for the Illinois Central railroad—and stipulating therein that "the grantee shall settle the question of the right of way for the Terre Haute and Alton Railroad Company over said land, with the last named company, and hold the Illinois Central Railroad Company harmless against any and all damages the said grantee may claim by reason thereof." This deed bears date May 28, 1869.

The defendant then proved by the evidence of several witnesses that the railroad track of the Indianapolis and St. Louis railroad was laid over the above described tract of land in 1853, and that the railroad has been operated there ever since.

The plaintiff, in rebuttal, then testified that he obtained possession of the land described in the deed, about eighteen years before, under a contract of purchase from the Illinois Central Railroad Company, pursuant to which the deed, a copy whereof was given in evidence, was made; that he erected on the land in controversy an ice-house and house, about eighteen years before, and occupied said buildings until they were burned down about fifteen years before; that he had had frequent talk with the officers of said railroad company, and they had promised to pay for the land, and that said talks extended over a period from the time the plaintiff purchased up to the time of the commencement of the suit. He further testified

that said railroad company never claimed title to said land, in any of the talks he had with its officers, and that he had paid the taxes on the land in controversy from the time he contracted for the same until the time of trial. And this was all the evidence.

Messrs. CRAIG & CRAIG, for the appellant.

Messrs. WILEY & NEAL, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The evidence sufficiently shows that the possession of the railroad company is actual, visible and exclusive. It is not essential there should be proof that officers of the defendant made oral declaration of claim of title, but it is sufficient that the proof shows that the defendant has acted so as to clearly indicate that it did claim title. No mere words could more satisfactorily assert that the defendant claimed title, than its continued exercise of acts of ownership over the property for a period of more than twenty years does. Using and controlling property as owner is the ordinary mode of asserting claim of title—and, indeed, is the only proof of which a claim of title to a very large proportion of property is susceptible.

The possession by the plaintiff of the portion of the property occupied by the ice house and other building, within twenty years, it may be conceded, removes the bar of the Statute of Limitations as to that portion of the property. But this did not dispossess the defendant of its track, or of any other portion of the property which it was actually using. It relies not upon claim or color of title, drawing a constructive possession, but adverse possession alone, and this applies only to the portion actually occupied. *Turney* v. *Chamberlaine*, 15 Ill. 273.

The promises of the officers of the defendant to pay for the land can not be regarded as an admission of title in the plaintiff, for two reasons: 1st. It does not appear that they were offi-

cers having authority to bind the defendant by their promises. 2d. A promise to pay for land, although evidence of a debt, is not inconsistent with a title in the promisor to the land,—as, for instance, where title has been conveyed before payment is made of the purchase money.

We see no cause to disturb the judgment. It is, therefore, affirmed.

Judgment affirmed.

WILLIAM MURRAY *et al. v.* THE CITY OF VIRGINIA, and THE CITY OF VIRGINIA *v.* DANIEL MITCHELL *et al.*

1. BOUNDARIES *of cities and villages—extending the same to embrace contiguous lands—construction of a special charter.* Where an incorporated town, embracing about forty acres nearly in the center of a section of land, had its boundaries extended by a special charter so as to include one mile square, which charter provided that "whenever a tract of land adjoining said town" should "be at any time laid off or sub-divided into town lots and recorded as an addition to said town, such tract" should become a part of said town and within the corporate limits thereof, and subject to all the provisions of the act, it was *held* that the words "land adjoining" meant land adjoining the town as incorporated by the charter, and were not confined to an addition to the original town plat within the square mile.

2. Where the charter of a town fixing its boundaries one mile square and providing that any addition thereto, when the plat should be recorded, should become a part of the town and within its corporate limits, and subject to all the provisions of the act, further provided that the territory of the town, as fixed by the act, should be an election precinct and school district for the purposes of the act, and for no other purpose, it was *held*, that when an addition was made, the new territory was within the corporate limits for voting and school purposes.

3. SAME—*mode of annexing territory under general law.* Under the general law relating to cities and villages, contiguous territory may be annexed thereto by ordinance and filing a copy of the ordinance, with a map of the territory annexed, in the office of the recorder of deeds and having the same recorded. Without such ordinance no territory can be annexed. The approval of a plat of an addition by the council and granting a permit to record the same, will not be sufficient to bring the addition within the corporate limits.

APPEAL from the County Court of Cass county; the Hon. J. W. REARICK, Judge, presiding.

This was an application by the collector for judgment against certain lots in Petefish's and in Beers' additions to the city of Virginia, for the taxes due thereon for the year 1877. All the taxes were tendered except the city taxes, the payment of which was resisted on the ground that said lots were not within the corporate limits of the city, and, consequently, not subject to taxation by the city. The court found the lands in Petefish's addition subject to the tax, and rendered judgment for the same, but sustained the objection as to the lots in Beers' addition. The city appealed as to the lots in the latter addition, and Murray and others as to the lots in the first named addition.

Messrs. KETCHAM & GRIDLEY, for the objectors.

Mr. GEORGE L. WARLOW, for the City of Virginia.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The question here presented is, whether Petefish's addition and Beers' addition to the city of Virginia are a part of the city of Virginia and within the corporate limits thereof, so that the lots in said additions are the subject of taxation by the city.

The following provisions appear in the charter of 1857 of the town of Virginia. Private Laws 1857, p. 1443:

"Sec. 2. The boundaries of said town of Virginia shall include one square mile of territory, the center of which shall be a point in the center of Morgan street equi-distant between Beardstown and Springfield streets, as said streets are laid down on the recorded plat of the original town of Virginia and of the first addition thereto, and the boundary lines of said town of Virginia as hereby incorporated shall run and be parallel with the boundary lines of said original town; and whenever a tract of land adjoining said town shall be at any

time laid off or sub-divided into town lots and recorded as an addition to said town, such tract shall become, and be from the time of recording the same by the recorder of Cass county, a part of said town and within the corporate limits thereof, and subject to all the provisions of this act."

"Sec. 33. The territory within the limits of the corporation of the town of Virginia, as fixed by this act, is hereby declared to be an election precinct and a school district for the purposes of this act, and for no other purpose."

The addition of Petefish was laid out as an addition to the town and duly recorded March 29, 1872, while Virginia was acting under the charter of 1857, a part of which addition lay within and a part without the corporation line of the town as designated in the charter of 1857. The question respects only that part of the addition without said corporation line.

The original town of Virginia embraced about 40 acres lying nearly in the center of the 640 acres designated in the charter of 1857 as the corporation of Virginia. It is contended that the language of the charter stating that when a tract of land adjoining said town shall be laid off into an addition, it shall become a part of the town, means whenever a tract is thus laid off which lies adjoining the original town, but within the square mile described in the charter of Virginia; that otherwise the owners of lots without the square mile would be taxed for city purposes and at the same time be deprived of the right to vote or have the benefit of school privileges, as, by section 33, the territory fixed by the act—the square mile—is declared to be an election and school district.

There is no warrant for such a construction. As one square mile of territory was included in the charter of Virginia and defined by boundaries, when the words "land adjoining" were used, they meant land adjoining said town incorporated by the charter as designated by its boundaries.

The supposed consequence of such an interpretation in respect of school and voting privileges does not, as we conceive, result. Whenever an addition to the town was made in ac-

cordance with section 2, it became "a part of said town and within the corporate limits thereof, and subject to all the provisions of this act." It would then be territory within the limits of the corporation of the town as fixed by the act, and come within the purview of section 33.

Beers' addition was made since the city became incorporated under the general law, and is governed by the provision of that law respecting the annexing of territory to cities, towns and villages. Rev. Stat. 1874, p. 244, § 195. It is thereby, among other things, provided that the city council or board of trustees of any city or incorporated village or town may, by ordinance, annex contiguous territory thereto upon filing a copy of the ordinance, with a map of the territory annexed, in the office of the recorder of deeds of the proper county and having the same recorded therein. A plat of Beers' addition was presented to the city council of Virginia by the owners, asking that the city council permit the plat to be recorded, which request was granted by the city council and the plat approved, but no ordinance of annexation was ever passed. Such ordinance is essential, and without it Beers' addition is not legally a part of the city of Virginia, and is not subject to taxation by it.

The judgment of the county court was comformable with what is here expressed, and it is affirmed.

Judgment affirmed.

The McLean County Coal Company

v.

John Lennon.

Measure of damages—*trover for taking coal in mine.* In trover for coal taken from the land of another and converted, the true measure of damages is the value of the coal at the mouth of the pit or shaft, less the cost of conveying it there from the place where dug or mined, allowing nothing for the digging, or the labor in separating the stone, sulphur, slate and earth from the coal first

broken loose, or in breaking up the large masses, and in brushing the road. The tort-feasor will be allowed nothing for the mining or any other act necessary to the production of the coal as an article of commerce.

Appeal from the Circuit Court of McLean county; the Hon. John Burns, Judge, presiding.

Messrs. Stevenson & Ewing, for the appellant.

Messrs. Tipton & Pollock, for the appellee.

Mr. Justice Baker delivered the opinion of the Court:

This was trover, by John Lennon, the appellee, against appellant, to recover damages for coals taken by it from the land of appellee and converted to its own use, without his consent. The case was tried before a jury, and a verdict was returned in favor of appellee for $259. Judgment was rendered on the verdict, and this appeal was taken.

The principal question involved in the suit is as to the correct rule for the measure of appellee's damages for the coals taken by appellant.

Robertson v. *Jones et al.* 71 Ill. 405, was trespass for taking coal from a mine. We there said, the plaintiff "has the right to recover the value of the coal after it is dug in the bank; or, he could recover the value of the coal at the mouth of the pit, less the cost of conveying it, after dug, from the mine to the mouth of the pit. This rule is founded in justice, and seems to be sustained by the authorities."

We afterwards, in the case of *McLean County Coal Company* v. *Long*, 81 Ill. 359, applied the same rule for the assessment of damages in an action of trover; holding that in either form of action the plaintiff was entitled to compensation only for the damage he had actually sustained, unless it was a case of trespass calling for vindictive damages. We said, "for the expense and trouble of separating the coal from its kindred layers and making it a chattel, the defendant can not claim to be reimbursed; but the coal had no value as a salable article

without being taken from the pit, and any person purchasing the coal in the pit would have deducted from the price the cost of bringing it to the pit's mouth."

During the trial the circuit court had used this language: "I understand the measure of damages is, the value of the coal at the time of the conversion. I think the measure of damages is, the value of the coal at the mouth of the shaft, less the expense of drawing it up." We quoted this language, and suggested that if the court had adhered in the instructions to the rule thus announced, it would have conformed to our views of the law and to former decisions of this and other courts. We said, "the court should have told the jury the plaintiff could recover as damages the value of the coal at the mouth of the shaft, less the cost of conveying it from the place where it is dug to the mouth of the shaft. This is, in effect, saying he can recover the value of the coal when it first became a chattel by being severed from the mass and under their control." We referred to the case of *Sturges et al.* v. *Keith*, 57 Ill. 451, and announced the doctrine to be that the damages are to be estimated at the value when the chattel is converted.

In *Illinois and St. Louis Railroad & Coal Company* v. *Ogle*, 82 Ill. 627, which was an action of trespass, the court had instructed the jury to allow the plaintiff the value of the coal taken, estimated at the pit mouth, less the cost of carrying it from where it was dug to the pit mouth, allowing the defendant nothing for the digging; and the instruction was held to be correct, and the judgment was affirmed. We there quoted with approval this language of Lord Denman, in *Morgan* v. *Powell*, 43 Eng. Com. L. 734: "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." We again stated the rule for the assessment of damages to be, 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.

The instructions of the court given in the case now under consideration are in conformity with the rule announced by us in the cases to which we have referred. The several instructions given inform the jury, in substance, that they should allow the plaintiff the value of the coal at the mouth of the shaft, less the cost of conveying it from where it was dug in the pit to the mouth of the shaft.

It seems the coal in controversy was mined by digging out the clay from under it, when the weight of the top would break it off. This left the coal in large masses, mixed with sulphur, slate, stone and clay. These masses had to be broken up and the sulphur, slate, stone and clay removed before the coal was in a condition to be put on the cars and run out to the shaft.

As we understand the claim of appellant, it is that the expense of breaking up these masses and removing the extraneous substances, and the time and labor of the miner in brushing his road, should all be deducted from the value of the coal at the mouth of the shaft.

The evidence shows the brushing of the road was necessary in order to reach the coal and break it loose, and, on principle, the wrong-doer should not be allowed compensation for the labor expended in converting the property taken into a chattel.

There was no conversion to the use of the appellant of the aggregate mass broken off by undermining, but a conversion of the coal after it was broken up and separated from the rock, slate, sulphur and clay, after it existed as coal, as a chattel distinct and separate from the various other substances with which it was primarily imbedded. This separation was a necessary part of the operation of mining it, and of its production as an article fit for commerce and use. Until such separation it did not become the chattel called coals. It was the coals, and not a conglomerate mass of coal, slate, sulphur, clay and other substances, that were taken and converted by appellant and lost

to appellee. As shown by the evidence, this slate, sulphur, stone and clay were left there. The appellant is not entitled to be reimbursed for the expense and trouble of detaching the coals from the surrounding substances. It is the value of the article when it first exists as coals that forms the basis of the measure of damages. This severance of the several substances was part and parcel of the unlawful act of procuring the coal, and was part of the labor expended in producing the chattel, and for such unlawful act and labor no charge can be made.

The rule as stated in *Robertson* v. *Jones et al.* that the plaintiff can recover "the value of the coal at the mouth of the pit, less the cost of conveying it, after dug, from the mine to the mouth of the pit;" the rule as stated in *McLean County Coal Company* v. *Long*, that the plaintiff can recover as damages "the value of the coal at the mouth of the shaft, less the cost of conveying it from the place where it is dug to the mouth of the shaft;" and the instruction that was sustained in *Illinois and St. Louis Railroad and Coal Company* v. *Ogle*, to the effect that the value of the coal taken, estimated at the pit mouth, less the cost of carrying it from where it was dug to the pit mouth, allowing nothing for the digging, was the measure of damages, would all have to be disregarded in order to hold, as is here contended for, that the labor expended in separating the stone, slate, sulphur and earth from the coal, after the mass containing the coal first broke loose upon the removal of the underlying clay, should be deducted from the value of the coal at the mouth of the pit. We are unable to see how such severance of other substances from the coal forms any part of the conveyance, carriage or transportation of the coal from the place where dug to the mouth of the pit; and by the rule as heretofore announced, the cost of such conveyance, and that only, can be deducted from the value at the mouth of the shaft.

The severance spoken of in the *Long case* and in other cases must be understood as including all the acts done and labor used in order to sever and separate the coal from the mass of

other material and render it that chattel and article of commerce known as coal, for not otherwise will the language used be consonant with the rule enunciated in that and the other cases. When detached from the clay, stone, slate and sulphur, and after all the labor has been bestowed upon it that is required to make it the coal of commerce, then, and not till then, is it to be considered as fully severed from the mass and under the control of the miner; and then, and not till then, is the conversion complete. Then the value attaches which becomes the basis of the measure of damages, and to ascertain that value, we deduct from the value at the mouth of the pit the cost of transportation from the place where dug to the mouth of the pit. This affords a simple and certain rule for the ascertainment of the damages, and is consistent with former decisions of the court, and avoids giving compensation to the trespasser and tort-feasor for his labor unlawfully expended in producing the coal.

The same rule is held in the English cases which have been heretofore cited and approved by us. *Martin* v. *Porter*, 5 Mees. & Wels. 302; *Morgan* v. *Powell*, 43 Eng. Com. L. 739; *Wild et al.* v. *Holt*, 9 Mees. & Wels. 672. In these cases, as in former decisions of this court, expressions such as "the value of the coal as soon as it exists as a chattel," and the like, are used; but such expressions are uniformly found in immediate connection with some such statement as that in the leading case of *Martin* v. *Porter*, where it is said "which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got, to the pit's mouth." Thus showing that the time fixed for the valuation of the coal is after all labor on it has been performed, and it is severed from the other layers and substances, and first exists as the chattel to which the labor bestowed was intended to reduce it. None of these cases indicate an intention to allow compensation for the labor expended in procuring the coal.

With the law thus understood, the evidence in the record

is amply sufficient to sustain the finding of the jury and the amount of damages assessed.

There was no error in refusing the instruction asked by appellant; the latter portion of it was, in view of the evidence introduced by appellant as to the general expenses of running the mine and conducting the business of the company, calculated to mislead the jury.

The judgment of the circuit court is affirmed.

Judgment affirmed.

C. S. CRANE *et al.*

v.

J. J. KILDORF, EXR.

1. ASSIGNMENT *of contract of purchase of corn—subsequent modification of contract by assignee—rights and liabilities of the various parties.* Where A had contracted with B for the delivery to the former of shelled corn at 40 cents per bushel, and A afterwards assigned the contract to C, who received and paid for a part of the corn, and B being unable to get the balance shelled, C agreed to take the corn in the ear at two cents a bushel less, under which modification other of the corn was delivered, and A, on the refusal of C to pay for the corn in the ear, paid the same to B and brought suit against C to recover the money so paid by him, it was *held*, that the waiver of the right by C to have the corn shelled did not avoid the original contract between A and B, but left it in force, except that the price was less per bushel, and that the subsequent payment by A was a ratification of the change made in the contract, and that A was entitled to recover of C the amount so paid for him under the modified contract.

2. The purchaser of corn to be delivered at a certain place has the right to direct to whom it shall be delivered at such place, and its delivery to his assignee, without any agreement on the part of the vendor to release him and look to the assignee for payment, does not release the original purchaser from his obligation to pay under the contract, and when he makes such payment on default of the assignee to pay, he may recover the sum so paid of the assignee who had agreed with him to pay for the grain.

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

Messrs. DUMMER, BROWN & RUSSELL, and Mr. R. W. MILLS, for the appellants.

Messrs. WHITNEY & TINNEY, for the appellee.

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

This was an action of assumpsit, brought by George Spurck, against C. S. Crane and John Hurd, partners, doing business under the firm name of C. S. Crane & Co., to recover a certain amount of money which the plaintiff had paid one Josiah Evans for corn delivered to the defendants under a written contract made between Evans and the plaintiff, which had been assigned by Spurck to the defendants.

The written contract was as follows:

"*Virginia, Ill., Dec.* 18, 1873.

"This agreement witnesseth, that Josiah Evans has this day sold to George Spurck, of Peoria, between 5000 and 6000 bushels of corn, being the crop now on the Beggs & Elmore farm, raised by said Evans; to be delivered by said Evans at Philadelphia, shelled, as soon as the condition of the roads will permit, the price to be 40 cents per bushel, the cost of weighing to be divided between the two parties; and the receipt of $100 is hereby acknowledged on this contract.

GEORGE SPURCK,
per Ditton.

JOSIAH EVANS.

"It is further agreed, that if a part of said corn should be delivered, and said Evans should be prevented by the condition of the roads from delivering the remainder for any considerable time, then he is to be paid for what he has delivered."

On the back of the contract was the following assignment:

"For value received I hereby assign the within contract to the firm of C. S. Crane & Co. Virginia, Illinois, January 3, 1874.

GEORGE SPURCK,
per H. Ditton."

It appears, from the evidence, that Evans delivered to Crane & Co., under the contract, 2019 bushels of shelled corn, for which he was paid. About this time Evans had some trouble to get a sheller, and under an arrangement with Crane & Co. he delivered 652 bushels and 40 pounds of corn in the ear at a reduction of two cents per bushel, the price of shelling. After the delivery of this corn the roads were in such a bad condition that corn could not be hauled, and Evans stopped the delivery of corn and called on the agent of Crane & Co. for payment for the 652 bushels. Payment being refused, he at once went to the agent of plaintiff and demanded payment under the written contract, and received of Spurck's agent $255, the amount due. Spurck then called on Crane & Co. for payment of the money which he had advanced. They refused payment, and this action was instituted to recover the same.

It is neither questioned nor denied that Crane & Co. received the 652 bushels of corn, nor is there any dispute in regard to the fact they have paid nothing for it, but it is contended the ear corn was delivered under a new contract made between Evans and Crane & Co., to which Spurck was a stranger, under which he was not liable to Evans. This position is not sustained by the facts of the case.

Under the written contract, Evans agreed to deliver the corn, shelled, at 40 cents per bushel. The sheller left Evans' farm and went to some other place, and he could not, at that time, obtain a machine to shell his corn, when he was told by Crane & Co. that he could deliver corn in the ear at two cents less on the bushel, the cost of shelling.

Now, while this was a waiver of the right Crane & Co. had to receive the corn shelled, it by no means set aside or vacated the original contract, but left it in force as originally made, except that the money to be paid for the ear corn was two cents less per bushel.

But while the arrangement to receive, under the contract, ear corn instead of shelled may be regarded as a modification of the contract, and conceding that Spurck had no knowledge

of this modification at the time it was made, yet the payment for the corn delivered by him subsequently must be held to be a ratification by him of the change made in the original contract. The fact, therefore, that the contract was modified, in the view we take of the case, did not change the rights or obligations of the contracting parties.

It is, however, contended that the delivery of the corn by Evans to Crane & Co. was a recognition of the assignment of the contract, and in effect released Spurck from any liability to Evans on the original contract, and that Spurck's payment was that of a mere volunteer.

Under the contract, the corn was to be delivered to Spurck at Philadelphia. He had the undoubted right to direct that the corn should be delivered to any other person at the place of delivery he might name. While Spurck had this right, he could not, without the consent of Evans, release himself from that provision of the contract which obligated him to pay for the corn.

There is nothing in this record that shows that Evans agreed to release Spurck and accept Crane & Co. as paymasters. Indeed, when he commenced the delivery of the corn, he did not even know of the assignment of the contract. There is nothing in the assignment which would indicate that Crane & Co. assumed to pay Evans for the corn, and it is unreasonable to believe that he would release a man whom he doubtless knew to be responsible, and rely upon a firm who resided out of the State and with whom he had no acquaintance. The mere fact that Evans delivered the corn to Crane & Co. is of little importance. When Spurck had by the assignment ordered the corn to be delivered to that firm, Evans could not do otherwise.

The delivery of the corn to Crane & Co. can not, therefore, in our opinion, be held to be a release of Spurck from the obligations of the contract. As Spurck was, under the contract, bound to pay for the corn, and as he had directed the corn to be delivered to Crane & Co., no reason is perceived

why he may not compel Crane & Co. to pay for the balance due on the corn they received.

The giving of certain instructions for plaintiff and refusing others for defendant is assigned as error. The decision of the court on the instructions was substantially in harmony with the views which we have expressed in considering the merits of the case, and it will not be necessary to review the instructions.

We regard the judgment as right, and it will be affirmed.

Judgment affirmed.

JESSE LING *et al.*

v.

HENRY W. KING & CO.

1. CONFESSION OF JUDGMENT *in vacation—must be an entry of judgment.* The clerk of the circuit court is authorized to enter judgment by confession in vacation for a *bona fide* debt. The filing of the necessary papers authorizing such entry is not of itself sufficient, but the judgment must, in fact, be entered by the clerk before an execution can be legally issued, and an execution issued without such entry is void, and may be attacked collaterally.

2. Where the clerk states, in a judgment by confession in vacation, that it is considered that the plaintiff have and recover, etc., it is not his consideration, but it is the conclusion of the law. In term time it is announced through the judge, and in vacation through the defendant or his attorney in fact, and it is no more the finding of the clerk in the one case than the other. In both he but records the conclusion of the law.

3. COSTS—*discretionary, in chancery.* The statute provides for the recovery of costs by the defendant where the complainant dismisses his bill, and that in all other cases not otherwise directed by law, it shall be in the discretion of the court to award costs or not. This statute invests the circuit court with a discretion that this court has no power to review.

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

Mr. S. B. RADEBAUGH, and Messrs. A. M. & H. W. AYERS, for the appellants.

Messrs. SOMERS & WRIGHT, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

On the 8th day of September, 1876, appellant Ling filed in the office of the clerk of the circuit court a declaration, a promissory note, and a warrant of attorney to confess a judgment against Stewart & Benford; also, proof of the execution of the warrant of attorney and a *cognovit*, all of which were spread at large on the records by the clerk. This was all done in vacation, and out of term time. The clerk entered no judgment or order of any description, but thereupon issued an execution against Stewart & Benford for the sum named in the *cognovit*, directed to the sheriff, and it was delivered to the sheriff to execute, who thereupon levied it on a stock of goods, as the property of Stewart & Benford, and took them into possession, and advertised them for sale, to satisfy the execution. There were executions issued by justices of the peace, on judgments against Stewart & Benford, amounting to about $500, in the hands of constables, which were also levied on the same stock of goods. Appellees, at the September term, 1876, of the circuit court, recovered a judgment against Stewart & Benford for the sum of $1557.60, and costs. They caused an execution to issue thereon, and placed the same in the hands of the sheriff for collection.

Upon bill in chancery exhibited by the appellees, setting up the foregoing facts, it is further alleged, that the sheriff threatens to sell on the execution in favor of appellant, and apply the proceeds of such sale to its satisfaction, and to the exclusion of appellees' execution; that the property levied on is insufficient to satisfy all of these executions, and if the proceeds of such sale shall be applied as the sheriff threatens to do, appellees will not receive any portion of the funds thus

realized, and that, owing to the insolvency of Stewart & Benford, appellees will lose their debt.

These facts were admitted by filing a demurrer to the bill, and on a hearing the court below overruled the demurrer, and, defendants failing to answer, the court decreed the relief prayed by the bill, and defendants appeal, and ask a reversal.

It is claimed that merely spreading the declaration, note, warrant of attorney and plea of confession on the records of the court, constitutes a judgment, and the execution was regularly issued on the record thus made; that the clerk's duties are only ministerial, and that he can perform no judicial function, and any judgment formally entered is the consideration of the law, and that can only be exercised by a person authorized to act judicially. If this position be true, then the General Assembly was powerless to authorize the confession of a judgment at all in vacation. If the entry of a judgment order is a judicial function, none but a judge could exercise it, and only in term time. A judge has no power, as an individual, to make orders, decrees and judgments, but that can be done only when he is acting as a court. The clerk, in all cases and in all of his official acts, whether in term time or in vacation, performs them as a ministerial officer. He so acts in entering up a judgment in term time, under the direction of the judge, who considers and decides. In entering a judgment in vacation, the clerk acts under the direction of the defendant and the statute. The law requires him, in term time, to enter judgments and orders under the direction of the judge; and the statute imposes it as a duty to enter a judgment by confession in vacation, when the requisite papers are filed, and the defendant, by plea of confession, by himself in person or by an attorney in fact, directs him to enter the judgment for the amount specified in the plea. In the one case he is required to perform the ministerial act under the law through the judge, and in the other through the direction of the defendant. Where the clerk states in the judgment order that it is considered that the plaintiff have and recover, etc., it is not his

consideration or conclusion, but it is the conclusion of the law. In term time it is announced through the judge, and in vacation through the defendant, or his attorney in fact. It is no more the finding of the clerk in the one case than the other, and in either he but records the conclusion of the law.

The 66th section of the Practice act, (Rev. Stat. 1874, p. 782,) authorizes any person, by himself or attorney duly authorized, to confess a judgment for a *bona fide* debt due, in vacation, and it gives to it, when so entered, from the date thereof, like force and effect, and to become a lien in like manner and extent as judgments entered in term time. It will be observed that the statute speaks of the entry of a judgment both in term time and in vacation. No distinction is made. All know that the filing of such papers in term time without the entry of a judgment order would not constitute a judgment, or authorize the issuing of an execution, and we must presume that when the General Assembly authorized an entry of judgment in vacation, it was to be done in the same form as when entered in the court in term time. We can give the statute no other construction, and, so far as our knowledge extends, this is the first time since the adoption of this statute that a different construction has ever been claimed.

Here, there were all the facts appearing to require the clerk, under the statute, to enter the legal conclusion, but that was not done, and until done there was no judgment, but simply authority to enter a judgment. If appellants were to sue on the note, can it be contended that the mere spreading it and other papers on the record of the court could be set up and pleaded as a bar to a recovery thereon? We presume not, because there was no finding by the law and a recovery pronounced.

We are, therefore, of opinion that there was no judgment on which the execution could issue, and that it was unauthorized and void, and appellants acquired no rights under it, as against appellees, and, being void, it could be attacked collat-

erally as effectually as by a direct proceeding. The execution is not merely irregular, but it was issued without authority.

The 18th section of the Costs act, (Rev. Stat. 1874, p. 299,) provides, that where a complainant shall dismiss his bill, or it shall be dismissed for want of prosecution, the defendant shall recover costs; but in all other cases not otherwise directed by law, it shall be in the discretion of the court to award costs or not, and the payment of costs, when awarded, may be enforced by execution. As we have repeatedly held, this statute invests the circuit judge with a discretion that we have no power to review. Hence, the objection that the court below decreed costs against defendant is not well taken.

The decree of the court below is affirmed.

Decree affirmed.

JOHN W. FUNK

v.

HIRAM BUCK.

1. LIQUIDATED DAMAGES—*waiver by delay to sue.* Where the payee in a promissory note bearing ten per cent interest from date till due, and fifteen per cent thereafter if not paid at maturity, on being pressed not to sue shortly after the note became due, promised that he would not sue as long as he could help it, but gave no definite time, this was held no waiver of his right to exact the fifteen per cent interest as damages for non-payment at maturity.

2. USURY—*greater rate after maturity than is allowed.* Where a promissory note provides for the payment of fifteen per cent per annum interest after maturity if the note is not promptly paid when due, a simple delay in bringing suit, at the request of the principal maker, as a personal favor, there being no valid extension of the time of payment, will not indicate that the delay was a mere device to secure an unlawful rate of interest.

APPEAL from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

Statement of the case.

The declaration in this case is on a promissory note made by A. C. Funk and John W. Funk, bearing date April 21, 1874, for the sum of $3000, payable to Hiram Buck or order, twelve months after date, with interest from date at the rate of ten per cent per annum; and if not paid promptly at maturity, fifteen per cent per annum thereafter, as liquidated damages for non-payment. At the time of executing the note the makers also executed a power of attorney authorizing any attorney of any court of record to appear for them in any court of record and confess a judgment on such note, against them, and in favor of the payee or the legal holder of the same, for the principal and interest to become due on the note. On the 1st day of June, 1875, the sum of $300 was paid and indorsed as a credit on the back of the note.

At the March term of the McLean county circuit court an attorney of record appeared in open court, and in the names of defendants confessed a judgment, in favor of plaintiff, for the sum then due on the note, including interest after the maturing of the note at the rate of fifteen per cent per annum. At the same term of court defendants appeared and moved to vacate the judgment, and for leave to plead to the merits of the action. On the hearing of that motion defendants proved by plaintiff that when A. C. Funk, who was the principal in the note, paid plaintiff the $300 credited on the note, he pressed plaintiff not to sue on the note, and plaintiff told him he would not as long as he could help it, "but did not give him any definite time." Before bringing the suit, however, plaintiff told defendant he could wait no longer.

This was all the evidence offered on this point in the case, and thereupon the court overruled the motion to vacate the judgment.

Defendant John W. Funk brings the case to this court on appeal.

Messrs. ALDRICH & KERRICK, for the appellant.

Messrs. TIPTON & POLLOCK, and Mr. E. M. PRINCE, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

It is very clear, from the evidence preserved in the record, there was not the slightest intention on the part of plaintiff to waive any right to exact damages for the non-payment of the note at maturity. He was not asked to do so. Nor was there any valid extension for the payment of the note for any definite period that indicated it was a mere device to secure a greater rate of interest than the statute allows. What was done was done simply to oblige defendants for the time being, as a personal favor, and must have been so understood by them. Plaintiff consented to no extension of payment for any definite period, nor did he waive his right to sue defendants at any time. It was the privilege of defendants to pay the note at their pleasure, and thus avoid the payment of the damages agreed upon on account of the failure so to do. The case, in all its essential features, is within the rule declared in *Downey* v. *Beach,* 78 Ill. 53, and the judgment must be affirmed.

Judgment affirmed.

WILLIAM J. WYATT *et al.*

v.

MILTON MAYFIELD *et al.*

1. SPECIFIC PERFORMANCE—*of promise without consideration, when no estoppel arises.* Where the principal in a joint note agreed with his surety to apply certain indebtedness due him in payment of the note, without any new consideration therefor, and with this intention took a note from his debtor, payable to the payee in the first note, but never delivered the same to the payee, and afterwards transferred the same to his brother, in violation of the agreement with his surety and his promise to the payee, and where the surety did no act on the faith of such agreement whereby his condition was changed to his prejudice, it was *held,* that the surety could not specifically enforce the agreement to apply the latter note upon the first, in equity, for the want of any consideration to support the promise.

Statement of the case.

2. TRUST—*agreement to apply note in payment of prior debt.* Where the principal in a joint note takes a note for a debt due himself, payable to the holder of his note, and promises his surety to apply the latter note on the former, but has not been constituted an agent by the holder of the joint note to take the second one in his name, and it does not appear that the latter note was so taken in pursuance of any prior agreement or understanding between the principal in the joint note and the holder thereof, so that the latter could be compelled to take the same as a payment, there is no trust created, and the holder of the joint note can not compel the delivery of such latter note to him. Until the delivery of the latter note to him and its acceptance, the party so taking the same will be the equitable owner, and may transfer his equitable title.

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

Appellants filed their bill in chancery, in the court below, against appellees, alleging therein that on the 7th of May, 1867, the appellant William J. Wyatt, and the appellee Milton Mayfield, executed and delivered to the appellant Robert Seymour their promissory note for $1000, due —— after date, with interest at ten per cent per annum, on which Mayfield was principal and Wyatt was surety; that, afterwards, Mayfield, Wyatt, and appellant John B. Burch, became partners in a cattle transaction, from which resulted an indebtedness from Burch to Mayfield of $519.59, and a promissory note was executed therefor in the following language:

"*Franklin, August* 5, 1871.

"One day after date, for value received, I promise to pay to Robert Seymour, (senior,) the sum of five hundred and nineteen dollars and fifty-nine cents ($519.59), with ten per cent interest from date, until paid.

JOHN B. BURCH."

—that, when this note was executed, it was agreed by and between Wyatt, Mayfield, Seymour and Burch, that it should be made payable to, and delivered to, Seymour, and be by him accepted as a credit, for the amount thereof, upon the $1000 note held by him against Mayfield and Wyatt, before mentioned.

It is further alleged, that Mayfield has been, since the execution of the note by Burch, and still is, insolvent; that, in violation of the agreement and intention of the parties, Mayfield refused to deliver the note to Seymour, but, after the same became due and payable, delivered the said note to one Francis Mayfield, his brother, without the knowledge or consent of either of the complainants; that afterwards, on the 1st of May, 1873, and without the knowledge or consent of the complainants, said Francis Mayfield instituted suit on the law side of the circuit court of Morgan county, in the name of Seymour, for his (Mayfield's) use, against Burch, to collect the amount due on said note, which suit is now pending; that Seymour has always been, and now is, willing and anxious to accept the delivery of said note, and apply the proceeds of the same on the $1000 note; and Wyatt, as surety on said $1000 note, has been, and is yet, anxious that said note be so applied, and if the same is not so applied, said Wyatt will suffer loss to the extent of said note, as surety.

It is further alleged, that Burch, under the agreement in pursuance of which the note was executed, has always, and does now consider himself bound to pay said note to Seymour, the payee thereof, and to no one else; that he was then, and is now, solvent and able to pay the same, and thus, to the extent of its face and interest, cancel the said $1000 note; and that with this object in view, and no other, said note was made payable to Robert Seymour, and to no one else.

It is further alleged, that Wyatt, as surety of said Milton Mayfield, has paid all of the said $1000 note, except the amount or balance which the said Burch note would cancel and pay, and that unless said note can be so applied, he, the said Wyatt, will be compelled to pay out and lose the amount yet due upon the said $1000 note; that by reason of the insolvency of said Milton Mayfield, and by reason of the delivery of the said note by him to the said Francis Mayfield, the complainants are without remedy in the premises in a court of law, etc.

Statement of the case.

The bill prays for temporary injunction, and that on final hearing it be decreed that Francis Mayfield deliver the said note to the said Robert Seymour, Sr., to him to be paid by said Burch, and the proceeds thereof to be applied on the $1000 note, and for general relief.

Francis Mayfield, only, answered. He says, in his answer, that whatever may have been the agreement between the parties, the Burch note was not applied as a payment on the $1000 note due from Milton Mayfield and Wyatt to Robert Seymour, Sr., and that Burch owes the amount mentioned in said note according to its terms; that he, respondent, bought said note of Milton Mayfield, who had the same in his possession, and gave a good, sufficient and full consideration therefor, in cash, and that said Burch now owes said note, and that said money is due him. He denies that he ever made any contract or agreement, or had any understanding, with Wyatt, Robert Seymour, Sr., Milton Mayfield or John B. Burch, since he received said note, except that the same should be paid to him, respondent, and he denies that he had any agreement with these parties, except that with Milton Mayfield, before he purchased.

Replication was filed to the answer, and the respondents thereupon filed their motion to dissolve the injunction, and affidavits were filed in support of this motion, and in opposition thereto.

By agreement of parties the affidavits were treated by the court, on hearing, as depositions, and, on hearing said motion, the court ordered the injunction to be dissolved and the bill dismissed. From this order an appeal was prayed, and prosecuted to this court.

The errors assigned question the ruling of the court in dissolving the injunction and dismissing the bill.

Mr. I. J. KETCHAM, for the appellants.

Mr. WM. H. BARNES, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Without considering other evidence than that furnished by the affidavit of appellant Wyatt, we think it is clear no case is made for equitable relief. It is there alleged, that in the settlement between Milton Mayfield and that appellant, the former told the latter that what was coming from Burch should be paid on the note of $1000 to Robert Seymour, and what that appellant was found, in that settlement, to be indebted to Mayfield, should also be paid on that note; that after Milton Mayfield had settled with Burch, and taken the note for $519.59, and while appellant Wyatt and he were trying to settle their part of the business and other matters between them, Milton Mayfield took from his pocket the Burch note, handed it to appellant Wyatt, and stated that he had the note drawn payable to Robert Seymour for the express purpose of liquidating a part of the $1000 note, and told appellant Wyatt that the first time he should see Robert Seymour he would apply the Burch note on the note given by himself and that appellant; and that appellant Wyatt was surety, only, on the $1000 note, Milton Mayfield being the principal.

It is to be borne in mind it is the equitable, not the legal, aspect of these facts that is to be considered.

Milton Mayfield undoubtedly intended, when the Burch note was executed, that it should be delivered to Seymour as a payment on the $1000 note. But this was a mere unexecuted intention. There was no new consideration passing from appellant Wyatt to him, sufficient to support the promise and make it a valid contract, so as to be susceptible of enforcement in the courts. Appellant Wyatt did no act on the faith of this promise whereby his condition was changed to his prejudice, so as to create an *estoppel in pais.*

There was no trust created, as argued by counsel for appellants, in behalf of Seymour, because Seymour never constituted Milton Mayfield his agent or trustee for that purpose, and it

does not appear that the note was executed pursuant to any prior agreement or understanding between Milton Mayfield and Seymour. Seymour could not be compelled to accept the Burch note, and credit the amount on the $1000 note, against his will, and he would be concluded by no promise to that effect until after an actual delivery to and acceptance by him of the Burch note.

Until a delivery of the Burch note to Seymour, and its acceptance by him, it was equitably the property of Milton Mayfield. This equity he has transferred to appellee Francis Mayfield. Seymour has no equity which he can enforce as against the note, and the bill, indeed, is not framed on that hypothesis. The equity alleged in the bill is in favor of appellant Wyatt, and, unfortunately, it has no other foundation than the naked promise of his principal, unsupported by any legal consideration, and not accompanied by circumstances creating an *estoppel in pais.* It is as worthless as any other delusive promise of a failing creditor in regard to his future intentions of securing his debts.

The decree is affirmed.

Decree affirmed.

WILLIAM D. WHITLOCK

v.

SARAH MCCLUSKY *et al.*

1. FORGERY—*sufficiency of evidence to show.* Where the name of an intestate upon a note of $1000 which had been allowed against his estate, was shown not to be in his handwriting, and it was not shown that any one had general authority to sign notes for him, or special authority to execute this particular one, and the intestate's name was signed just after that of one M. and if written by M was not in his usual, but in a simulated handwriting, and that M, when charged with the forgery, absconded from the State, and the payee offered no explanation whatever, and it appeared the note was not presented until nearly two years after the testator's death, and about the same length of time after maturity, it was held that these facts and other circum-

stances were sufficient to show that the pretended signature of the intestate was a forgery.

2. ADMINISTRATION—*when letters fraudulently obtained.* The procuring of letters of administration by the attorney of claimants in pursuance of a prearranged plan to procure the allowance of their claims, without notice to the heirs, and without defence, is a fraud not only upon the heirs but also upon the court.

3. SAME—*payment of fraudulent claim prevented in equity.* Where the holders of two forged notes procured the appointment of their attorney as administrator after consultation with him, and by collusion, and the administrator, without notifying the heirs, or filing any inventory or making any inquiry as to the personalty, gave notice for the presentation of claims and consented to the allowance of such forged notes, without requiring any proof, or even a sufficient affidavit from the claimants, and afterwards procured an order for the sale of real estate to pay such claims, the heirs being lulled into repose by the forger acting with the claimants, upon conference with the administrator, it was *held*, that a court of equity, in view of the fraud and collusion and imposition upon the heirs, would prevent the payment of the unpaid purchase money of the land to such claimants, and order it paid to the heirs whose property had been wrongfully sold.

4. ESTOPPEL—*when not allowed in equity.* Persons pretending to hold claims against an estate will not be allowed to take advantage of the estoppel of an order for the sale of the lands of heirs, as against such heirs, where such estoppel grows out of a mere neglect to defend, and that neglect was induced by the conduct of such claimants and their attorney acting as administrator, and no merit is shown in their claims.

APPEAL from the Appellate Court of the Third District; the Hon. CHAUNCEY L. HIGBEE, presiding Justice, and the Hon. OLIVER L. DAVIS and Hon. LYMAN LACEY, Justices.

Mr. JOHN B. JONES, and Messrs. PALMER, PALMER & ROSS, for the appellant.

Messrs. HAY, GREENE & LITTLER, for the appellees.

Mr. JUSTICE BAKER delivered the opinion of the Court:

A bill was exhibited in the circuit court of Christian county by the appellees, heirs at law of one William Johnson, deceased, against James C. McQuigg, the administrator of said Johnson, and William D. Whitlock and J. B. Fagan, in

whose favor claims had been allowed in the county court, and William T. Vandeveer, the purchaser of certain lands that had belonged to Johnson in his lifetime, to compel the administrator to account for the proceeds of the sale of the lands, to the complainants as heirs, instead of applying them to the payment of the claims of Whitlock and Fagan. The theory of the bill was, that the notes which had been allowed against the estate were forgeries; that they were improperly allowed by the administrator, who was the attorney of the holders of the notes; and that the holders of the notes colluded with the administrator and one McClusky in defrauding the heirs.

The venue of the cause was changed to Sangamon county, and in the circuit court of that county, upon a hearing, a decree was entered ordering the unpaid purchase money to be paid to the heirs whose lands had been sold.

The defendant Whitlock perfected an appeal to the Appellate Court of the Third District. In that court the decree of the circuit court was affirmed; and thereupon said Whitlock appealed to this court.

The name of William Johnson to the note of Whitlock was not in his handwriting, and did not resemble his handwriting; it is not shown any one had general authority to sign such instruments for him, or special authority to execute this particular note; it is not shown McClusky ever at any time had authority to sign Johnson's name to any paper; the signature here was in immediate connection with the name of McClusky, following his on a joint note, and if written by McClusky was not in his usual but in a simulated handwriting; and McClusky, when charged with the forgery, abandoned his home and family and absconded from the State. We think these facts, combined as they are with many other circumstances tending to the same conclusion, sufficiently show the signature of Johnson to said note was a forgery.

William Johnson died in January, 1873. Nothing was heard of this forged note until the fall of 1874, nearly two

years after the death of Johnson, and nearly two years after the note fell due, when it appeared in the hands of Whitlock, the payee named therein. There is no evidence in the record to show the note was genuine, or the circumstances under which it was given; nothing to show either Johnson or McClusky was ever indebted to Whitlock, or any consideration paid for the note. Appellant, although he had full opportunity to do so, has given no explanation of his possession of this forged instrument. The transaction out of which it originated must have been directly with him, the payee thereof. It may be possible no one was present when the note was taken, yet it is hardly probable there was a business dealing or transaction with either McClusky or Johnson, in which a note for so large a sum as $1000 was executed, and wherein a consideration passed from him to either or both of them, and still there be no legal evidence to indicate such transaction. If it grew, incidentally, out of a transaction with some third party, then the testimony of that third party could readily be produced. The note is attacked as a forgery, and yet there is no effort made to show a meritorious possession on the part of the holder.

In the fall of 1874, Fagan, the holder of the other forged note, and who also represented Whitlock, consulted McQuigg as an attorney, in regard to the collection of the two notes. Shortly afterwards Whitlock personally consulted with McQuigg on the same subject. As the result of these consultations, and in furtherance of the advice given as an attorney and of the plan agreed upon, McQuigg, who does not know whether he had these claims in his hands or not at the time he applied for letters, took out letters of administration upon the estate of Johnson. He thereupon, forthwith, and without any notification to the children and heirs of Johnson either that he had the notes, or that any such were in existence, or that he had been appointed administrator of the estate of their father, and without making or filing any inventory or appraisement bill, or paying any attention to or

making any inquiry after personal estate, fixed an adjustment day and advertised for the presentation of claims against the deceased. Fagan was there on that day, and McQuigg is not sure whether Whitlock was or not. McQuigg had been consulted as an attorney as to what steps to take in order to enforce the collection of these notes, and all subsequently done in that regard was done as the result of the advice given and plan determined on. If Fagan or Whitlock, the supposed creditors, had either of them procured letters of administration, then the statute would have required the appointment by the county court of some discreet person to appear and defend the estate against the demand of the administrator; but here the statute was evaded by securing the appointment of the attorney of the claimants. It was a fraud not only upon the heirs, but upon the court.

Both claims were allowed. It does not appear any evidence of the signatures or of the genuineness of the notes was required by the administrator; but it does appear the affidavits of the claimants, instead of conforming to the statutory requirement and stating the claims were "just and unpaid," stated merely the respective amounts that were "due and unpaid on the notes." It is suggested the notes were allowed by the county court, and not by the administrator. This is in one sense true; but the court was probably misled by the imposition upon it of an administrator who was secretly interested against the estate; and, at all events, the facts and circumstances stated throw light on the conduct and intentions of the administrator and claimants.

After this, for the first time, the administrator went out in the country to the farm of appellees, to make an inventory. They, up to this time, were in total ignorance of any administration proceedings. These heirs, the appellees herein, consisted of a feeble-minded man, who appears here by his conservator, and two women, one of them the wife of McClusky. McQuigg testifies he never had any collusion with McClusky, and did not confer with him about the matter in any way; and yet it

appears from his own testimony that McClusky had told his wife that he, McQuigg, was coming out. This would seem to indicate at least some degree of conference between them in regard to the matter.

McQuigg and Mrs. McClusky do not agree as to what took place at this interview. There is no question he told appellees he had been appointed administrator and had in his possession notes to which the name of William Johnson was signed. He says he then and there informed the heirs the notes had been allowed, and the amount of them would have to be made out of the land. She testifies she did not know of the allowance of the claims until after the land was sold. Neither of them states that the amount called for by either of the notes was mentioned. He did not show them the notes; and he does not pretend to say he informed them he was the attorney of the claimants. The heirs, then, had good right to rely on the good faith of the administrator and trustee. The holders of these claims, colluding with their own attorney, had, without the knowledge or consent of the heirs, thrust that attorney into a position of fiduciary relationship to them. McQuigg having voluntarily assumed that position of trust, should have ascertained the signatures to the notes were not in the handwriting of Johnson and were forgeries. The heirs had a right to presume he neither had permitted nor would permit the allowance of fraudulent and forged claims, by neglect of duty on his part, and that he was not inimical to their rights, so far as the probating of debts against the deceased was involved.

The only serious question in the case is this. The administrator afterwards filed a petition for the sale of lands to pay the debts of the estate, and in said proceeding a summons was duly issued and served upon the heirs. They had the undoubted right to then appear and contest the justice of the claims of Whitlock and Fagan. The existence of the debts allowed was necessarily put in issue by the proceedings for a sale. Appellees admit the proceedings for the sale of the lands are so far conclusive upon them that the decree of sale is not open to attack,

and that the title of the purchaser in good faith of the lands at the administrator's sale can not be disputed. But, under the circumstances of this case, should the unpaid purchase money be arrested in equity and be ordered paid to the heirs whose lands were wrongfully sold for the payment of these forged demands against the estate?

We do not perceive McQuigg, even were he appealing, has any rights or equities which have been affected by the decree entered in the circuit court. He was not required by the decree to refund or make good the cash payment on the lands, which he had collected and paid over to Fagan and Whitlock.

It is the position of Whitlock, the appealing claimant, which is principally to be considered. It is his interests and those of Fagan that are affected by the decree. As we have seen, he has wholly failed to show he has any meritorious claim growing out of the note he held. He obtained this forged paper from McClusky and makes no pretence of any value paid by him therefor, and he refuses to discover the circumstances of his possession. Nearly two years after Johnson's death he appears with this forged paper, then nearly two years overdue. Then, instead of presenting the claim to the heirs, or taking out letters as a creditor and proceeding in accordance with the provisions of the statute for its collection, by having some discreet person appointed to defend against it, he secretly places his own attorney in the inconsistent fiduciary position of administrator, and procures the allowance of his claim, without even filing an affidavit of its justice.

This decree affects only the holders of this forged paper, and they do not urge the justice of their demands or equities that grow out of their positions with reference thereto, but claim solely the benefit of an estoppel as against these heirs. The heirs failed to interpose their defence when they should have done so. Were the claimants guilty of any fraud or misconduct that induced or assisted in inducing the heirs to

sleep upon their rights? They wrongfully intermeddled with the estate by imposing their own attorney upon the heirs as administrator, and then kept them in ignorance of the anomalous position that administrator occupied. They deprived them of safeguards provided by law against unjust and fraudulent claims. They not only took from them the services of a discreet person appointed by the court for the special purpose of defending against these claims, by substituting their attorney for themselves in the administration of the estate, but, by that substitution, imposed upon the confidence naturally placed by the heirs in the administrator, so far as regards the allowance of debts against the intestate.

The evidence in the record justifies the conclusion the heirs had no actual knowledge of the allowance of these claims or of the sale of the lands until the day before McClusky absconded. Even then he denied such was the fact. He was the husband of one of the heirs, and, after the death of Johnson, assumed to act as agent for them all. The evidence points him out as the perpetrator or instigator of the forgeries, and he lulled the apprehensions of the heirs in regard to these claims until the very eve of his departure from the State. They seem to have left the matter to him. He was advised by McQuigg, the attorney for the claimants, as to when he was coming out to the farm to make an inventory; and he kept the heirs in ignorance of the status of affairs, although, as is shown by the evidence of McQuigg, he had employed Vandeveer as an attorney to represent himself and the heirs, in some way not disclosed by the record, in the matter. There can be no doubt McClusky knew what was transpiring, and was intentionally misleading appellees. He, and the administrator, and the two claimants, were each engaged in the common object of foisting these fraudulent claims upon the heirs and enforcing their payment out of these lands. All the acts of McQuigg and of the holders of these notes were clearly in concert, and well calculated to mislead appellees and induce the very *laches* it is now sought to take advantage of. McClusky worked to

the same end; but to what extent he acted in concert with Whitlock and Fagan is not discovered by the evidence. From the very necessity of the case the transactions out of which these notes originated must have been matters especially within the knowledge of the claimants, and yet they have failed to make even an attempt to disclose them. They declined the opportunity afforded them on the hearing to show the nature, extent and duration of their connection in these matters with McClusky. They wholly failed to show just and meritorious claims, and made no attempt so to do.

We think the holders of this forged paper should not be allowed, in the court of equity, the benefit of an estoppel growing out of a mere neglect, when, to say the very least, their own acts and conduct and that of their attorney contributed in inducing appellees to neglect making their defence to the notes when they had opportunity so to do in the proceedings to sell land. If the rights of parties with clean hands were here involved, the result might be otherwise. But the decree concerns only the holders of forged notes who refuse to show meritorious possession or to explain their connection with the forger. They and their agent, by wrongful and fraudulent and oppressive practices, contributed to the default. To permit them now the benefit of the estoppel claimed, would give them an advantage from their own wrong, and lead to a result inequitable and unjust. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

JOHN GALLAGHER *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. RECOGNIZANCE—*validity.* It is not necessary to the validity of a recognizance that it shall contain *every condition* provided in the statute. It is good for the conditions found in the statute that are also embodied in the recognizance.

Statement of the case.

2. SAME—*effect of condition to appear, etc.* A condition in a recognizance that the principal shall be and appear before the circuit court of, etc., on the first day of the March term, etc., and then and there answer and abide the order and judgment of said court, etc., is sufficiently broad to require his appearance from time to time and from term to term until the case is disposed of.

3. DEFAULT—*setting aside, discretionary.* The setting aside of a default is a matter within the discretion of the court, and unless it appears affirmatively that that discretion has been abused, this court will not disturb the ruling below. It is properly refused where due diligence in presenting the defence is not shown.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

On the 26th of September, 1876, the following writ of *scire facias* was issued by the clerk of the circuit court of Champaign county.

"STATE OF ILLINOIS, } ss.
Champaign County. }

The People of the State of Illlinois to the Sheriff of said county—Greeting:

"Whereas, at the September term, 1874, of the circuit court, in said county of Champaign and State aforesaid, John Gallagher was indicted by the grand jury, having lawful authority, for the crime of selling liquor to minors; which said indictment was duly presented by said grand jury at said term in open court, which then and there became matter of record; at which said term of said court it was ordered by said court that the said John Gallagher be held to bail in the sum of $300, and recognizance for that amount required; and, whereas, the said John Gallagher, as principal, and Patrick McCann, as security, then and there, to-wit, on the 2d day of October, A. D. 1874, in open court, came and acknowledged themselves jointly indebted to the people of the State of Illinois in the penal sum of $300, to be levied and collected out of the goods and chattels, lands and tenements, of the said John Gallagher and Patrick McCann, conditioned that the above John Gallagher shall personally be and appear before the circuit court of said county on the first Monday of March, 1875, being the March

term, A. D. 1875, and then and there answer and abide the order and judgment of said court touching the matter of indictment, then, in that case, said recognizance shall become void, otherwise to be and remain in full force and virtue; and which said recognizance then and there became a matter of record.

"And afterwards, to-wit, at the September term, A. D. 1876, of the circuit court, begun and held in the court house, in said county of Champaign, the matter of said indictment against the said John Gallagher, for selling liquor to minors, coming on to be heard, the said people appearing by the State's attorney, and the said John Gallagher being three times solemnly called, came not, as by recognizance bound to do, but herein made default; and the aforesaid surety being three times solemnly called to deliver the body of the aforesaid John Gallagher, failed herein and made default; therefore, it was ordered by the said court, at the said term thereof, that judgment of forfeiture be taken of the said recognizance, and that *scire facias* issue against the said John Gallagher and Patrick McCann, said recognizance being still in full force and unsatisfied.

"We, therefore, command you to summon John Gallagher and Patrick McCann, if to be found in your county, to be and appear on the first day of the next term of the circuit court, at the court house in the said county of Champaign, commencing on the first Monday of March, 1877, and show cause, if any they can, why the aforesaid judgment of forfeiture shall not be made absolute and execution shall not issue in favor of the people according to the force, form and effect of said recognizance; and of this make due service and lawful return."

This writ was duly signed by the clerk and sealed with the seal of the court, and at the March term, 1877, of the court, was returned by the sheriff of that county as duly served upon Gallagher and McCann, by reading to them, on Feb. 1, 1877.

At that term, and on the 6th day of April, 1877, the defendants, being called, failed to appear, and judgment was rendered by default against them for the sum of $300 and costs.

Statement of the case.

On the 9th day of April, at the same term, motion was made to set aside the forfeiture and judgment by default. This motion, on the 10th of April, was overruled by the court, and defendants excepted. On the motion to set aside the default, the affidavit of Gallagher was read, stating that at the September term, 1876, when the forfeiture of the recognizance was taken, he was confined to his bed with sickness and unable to be out of his house or attend court, and that he was absent at that time for no other reason, and had been sick for a long time before that with typhoid pneumonia; and that on the first day of the March term, 1877, he requested Mr. Wright, a lawyer practicing in that court, to attend for him to the suit against him upon this recognizance, and prepare the necessary papers, and that Wright said he would, and that he (affiant) supposed that Wright was attending to the matter for him, until after the judgment was rendered by default. This affidavit stated the belief of affiant that he was not guilty of the offence with which he was charged in the indictment mentioned in the recognizance, and that he had attended and was ready for trial every term of court since the recognizance was taken, except the September term of 1876.

Mr. Wright's affidavit was also filed, in which it is stated that when Gallagher (as it seems from Gallagher's affidavit) spoke to him about attending to this proceeding on the recognizance, he (Wright) understood him to refer to proceedings that were pending in the court upon a recognizance by one Boggy, for whom Gallagher was surety, and that he was not aware that a default had been entered upon this recognizance or that a *scire facias* had been sued out upon it; that he had, for a long time, been the attorney for Gallagher, attending to his business, and that he had looked over the docket of the people's causes at this term for the purpose of calling his attention to such matters as his clients were interested in, and that there was no cause upon that docket against Gallagher, upon a *scire facias* in this case, and that he is informed that this case, at the April term, 1877, was not docketed, but that

the writ of *scire facias* upon its return was placed among the papers relating to the indictment against Gallagher, and was not docketed as a separate suit; that if it had been docketed in the regular way his attention would have been called to it, and the defence of Gallagher would have been interposed.

Defendants bring the case to this court upon a writ of error.

Plaintiffs assign for error, 1st, that the recognizance is not conditioned as required by law.

2d. The court erred in giving judgment of forfeiture at the September term, 1876.

3d. The *scire facias* is insufficient, and so is the service.

4th. That the court erred in overruling the motion to set aside the judgment by default on the *scire facias*.

It is insisted by the plaintiffs in error that the recognizance is void because it is not conditioned as required by law. The statute on the subject of recognizances in criminal cases says: "The recognizance, except where otherwise provided, shall be so conditioned as to bind the accused to appear at the court having jurisdiction of the offence on the first day of the next term thereof to be holden in the county (specifying the time and place of holding the same), * * * and from term to term, and from day to day of each term, until the final sentence or order of the court, to answer for the offence charged, * * and to abide such final sentence or order, and not depart without leave." * * (Rev. Stat. 1874, 396.)

The condition of the recognizance as set out in the *scire facias* is, that the accused "shall personally be and appear before the circuit court of said county on the 1st Monday of March, 1875, being the March term, A. D. 1875, and then and there answer and abide the order and judgment of said court touching the matter of indictment, then in that case said recognizance shall become void."

Messrs. SOMERS & WRIGHT, for the plaintiffs in error.

Mr. JAMES K. EDSALL, Attorney General, and Mr. M. W. MATHEWS, State's Attorney, for the People.

Per CURIAM: The majority of the court are of opinion that this judgment should be affirmed.

It is first insisted that this recognizance is not conditioned as required by the statute. We are of opinion that it is unnecessary to the validity of a recognizance, that it should contain *every condition* which is provided in the statute. It is good for the conditions found in the statute, that are also embodied in the recognizance.

Under the former statute on the subject of recognizances it was held by this court, that bail, entering into a recognizance for an offender conditioned that he should appear at a given term of the court to answer a given charge, and not depart the court without leave, took upon himself an obligation that the accused would attend from time to time, and from term to term, until the final order of the court, as long as the case was continued from term to term. The present statute requires no more. The statute simply states, more in detail, the legal effect which was declared by this court to attach to recognizances in the form in use before the passage of the act of 1874. (*Gallagher* v. *The People*, 88 Ill. 335.)

The recognizance in this case contains a condition that the accused shall personally be and appear before the court on the 1st day of the March term, 1875, and then and there answer, etc., and abide the order of said court, etc.

Adopting the line of construction in this case which was adopted by this court in *Norfolk* v. *The People*, 43 Ill. 9, and in *Stokes* v. *The People*, 63 Ill. 489, we are of opinion that the language of this recognizance is sufficiently broad to require the appearance of the accused from time to time, and from term to term, so long as the proceeding in which he was charged was continued.

We have held that a recognizance of this character imposes that obligation under the statute of 1874. We must, therefore, hold the *scire facias* in this case to be sufficient.

We also think that the appellant failed to show due diligence in presenting his defence in the court below, and there-

fore was not entitled to have the judgment by default upon the *scire facias* set aside upon his motion. The setting aside of a default is a matter within the discretion of the circuit court, and unless it appears affirmatively that that discretion has been abused, this court will not disturb its determination.

Judgment affirmed.

JAMES LAKE *et al.*

v.

THE CITY OF DECATUR.

1. SPECIAL ASSESSMENTS—*appointment of commissioners by county court not unconstitutional.* The act of 1872, conferring power upon the corporate authorities of cities, etc., to make local improvements by special assessments, etc., is not in violation of sec. 9, art. 9, of the constitution because it authorizes the appointment of commissioners by the county court to assess benefits. The legislature clearly has the power to so authorize the appointment of commissioners, where the corporate authorities have determined that the improvement shall be made, and what its character and cost shall be.

2. SAME—*validity of ordinance appointing engineer to fix grade.* An ordinance for the improvement of a street of a city is not rendered invalid by the fact it requires the city engineer to fix the grade of the street, where the cost has been estimated by a committee appointed by the council, and their report is approved. This is not a delegation to the engineer of power to fix and determine the cost, or the extent and character of the improvement.

3. SAME—*ordinance may confine special assessments to contiguous property.* While the provision of the constitution relating to special assessments is broad enough to authorize the assessment of property benefited by a proposed improvement, though not contiguous to the street to be improved, yet it does not require that such assessments shall be made on all the property benefited. Therefore, an ordinance is not invalid because it requires only contiguous property to be assessed.

APPEAL from the County Court of Macon county; the Hon. SAMUEL F. GRIER, Judge, presiding.

Mr. A. J. GALLAGHER, Messrs. CREA & EWING, and Messrs. ROBY, OUTTEN & VAIL, for the appellants.

Messrs. HAY, GREENE & LITTLER, for the appellee.

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

This is an appeal from a judgment of the county court of Macon county, affirming an assessment, made by commissioners, for the purpose of improving a certain street in the city of Decatur.

It is first contended, that all that portion of the act of the legislature known as "An act to provide for the incorporation of cities and villages," approved April 10, 1872, under which the proceedings were had, was in conflict with sec. 9, art. 9, of the constitution of 1870, which declares: "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise." The argument is, that while the constitution confers the power on the legislature to authorize cities, towns, etc., to make local improvements by special assessments, it confers no power on the legislature to vest in the county court such power.

It is, doubtless, true, under the section of the constitution cited the legislature can not confer the power on the county court to make local improvements by special assessment. That power, if conferred, must be vested in the corporate authorities of the city or town. We do not, however, understand that the act in question has conferred, or even attempted to confer, the power on the county court, or that the county court has exercised such power in the proceedings in the case before us.

The first section of article 9 of the act, (Laws of 1872, page 247,) in express terms declares: "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."

Under this section of the statute the city council of Decatur

passed an ordinance that the improvement should be made, —that it should be paid for, in part, by special assessments. The cost of the improvement was estimated, and the character and quality of the work was settled, by the corporate authorities of the city. Upon these matters the county court was not consulted, nor did it have any connection whatever with them. But when, during the progress of the proceedings, it became necessary to have commissioners appointed to assess benefits on the property which would be specially benefited by the improvement, a petition was presented to the county court for the appointment of commissioners, as is provided for in the act. The county court, as will appear by reference to the several provisions of the act, has no voice in determining whether the improvement shall be made, what its character and cost shall be, when it shall be commenced, and when stopped. Indeed, in so far as the making of the improvement by special assessment is concerned, the county court is an utter stranger to the proceeding, and has no voice in it. These various matters are conferred upon the corporate authorities of the city or town. How can the language of the constitution, "may vest the corporate authorities of cities, towns or villages with power to make local improvements by special assessment," be held to prohibit the appointment by a court of commissioners, during the progress of the proceedings to assess benefits to the property owner who is to be specially benefited by the improvement, when the legislature has conferred such a power upon the court? The legislature has provided that the city, during the progress of the proceedings, may apply to the county court for the appointment of commissioners, and that they may be appointed; and as the constitution does not prohibit the General Assembly from so providing, it clearly has that power.

It does not follow, as has been suggested, that when application is made to the court for the appointment of commissioners, the making of the improvement is transferred from the corporate authorities of the city to the county court. The

court takes no charge or control over the improvement. It has nothing to say or do in regard to the prosecution of the work. The application by the city to the court to have commissioners appointed, and the subsequent proceedings in the court, may be regarded as a mere resort by the corporate authorities to the judicial tribunal to settle questions of dispute that arise between the corporate authorities of the city and the property owners in reference to the prosecution of the work, and the collection of money to aid in its prosecution.

Appellants have referred to *Updike* v. *Wright*, 81 Ill. 50, as an authority sustaining their position. That case will, however, upon an examination, be found to have no bearing on the question here presented. In that case, the constitutionality of the act in regard to drains, ditches and levees was involved, and it was held that the legislature had no power to invest any person with power to make local improvements by special assessments, except corporate authorities named in the constitution. That doctrine is not disputed, but there is nothing in that case which can be tortured into an argument to sustain the position of the appellants here.

The next objection to the proceedings is, that the second section of the ordinance is inconsistent with the act of the legislature, because it delegates to the city engineer powers that could only be exercised by the corporate authorities of the city. The engineer was required to fix the grade of the street, and it is contended this, to a great extent, involved the amount of the cost of the improvement, which the council could not delegate.

The nineteenth section of the act required the ordinance to specify the nature, character, locality and description of the improvement. Section 20 of the act provides, that the city shall appoint three competent persons to make an estimate of the cost of the improvement, including labor, materials, and all other expenses attending the same. The first section of the ordinance provided, that East Eldorado street, in said city, be improved by grading, tiling, curbing, graveling and

guttering, from the east line of North Water street to the west line of the Illinois Central railroad. Other sections of the ordinance contained more specific descriptions of the nature and character of the work.

The report of the committee appointed to determine the cost of the improvement contained a full and accurate report of the cost. It was filed eighteen days after the ordinance was passed, and approved by the council. While it is true, by the second section of the ordinance the city engineer was required to fix the grade of the street, yet, the cost of the improvement was determined by a committee, in the mode pointed out in the act, and by the other sections of the ordinance the nature, character, locality and description of the improvement were so fully specified, that we perceive no satisfactory ground for the conclusion that the city had delegated any authority upon the city engineer to establish the amount of the cost of the improvement.

There is no similarity between this case and *Foss* v. *The City of Chicago*, 56 Ill. 354, cited and relied upon by appellants. In that case it was held, that the responsibility of prescribing what improvements shall be made, and the manner and extent of the same, rested upon the common council of Chicago,—that there was no authority for leaving it to the discretion of the board of public works. The decision then made upon the facts of the case there presented is entirely accurate, but here the facts are so different, that the decision is not applicable. The extent or character of the improvement, or the cost, was not delegated by the city council, but, with accurate precision, the character and extent of the work was fixed by the ordinance, and the cost by a committee, in the mode required by law.

It is next objected that the ordinance is in conflict with sec. 9, article 9, of the constitution, for the reason that sec. 5 of the ordinance limits and confines the special assessment to contiguous property fronting and abutting on East Eldorado street, and in support of this objection we are referred to

Guild v. *The City of Chicago*, 82 Ill. 472, where the section of the constitution was considered. The question in the *Guild case* was, whether an ordinance was void for the reason that it failed to limit the assessment of benefits on contiguous property of the improved street, and it was held that the ordinance was not void. It was there said: "We can have no doubt that, taking the whole of the article together (article 9), 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."

But, the question whether an ordinance would be void which did limit the assessment to contiguous property, did not arise in the *Guild case*, and was not decided, nor do we understand that the conclusion can be drawn, from what was said in that case, that such an ordinance would be invalid. Conceding that the constitution does not confine a special assessment to contiguous property, as held by a majority of the court in the *Guild case*, the question here presented is, whether the constitution compels a special assessment, when made by a city, to be imposed on all property within the city benefited, or may the city limit the assessment to contiguous property.

That the language of the statute under which the ordinance in question was passed is broad enough to authorize it, will, we apprehend, be conceded. It declares: "That 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." Under this statute a city may make a local improvement on contiguous property either by special assessment or by special taxation, or both, as may be provided by ordinance. Does this section violate the constitution?

The first part of sec. 9, art. 9, of the constitution, says: The General Assembly may vest the corporate authorities of

cities, etc., with power to make local improvements by special assessment. Whether the assessment shall be confined to contiguous property, or whether all property benefited shall bear a part of the burden, the instrument is silent; and as the legislature has the right to confer the power without restriction in this regard, we are aware of no reason why that power may not be exercised. The last part of section 9 requires uniformity in the assessment and collection of taxes for all municipal purposes, other than as specified in the first part of the section. This would seem to indicate that a special assessment should be local.

The objection to the ordinance we do not regard as well taken.

Some other objections to the validity of the proceedings have been urged, but they are of a technical character, and we find none of them of sufficient magnitude to reverse the judgment of the county court. We do not regard it necessary to enter upon a discussion of these minor questions.

As we perceive no substantial error in the record, the judgment will be affirmed.

Judgment affirmed.

HENRY LAWLER

v.

JOHN GORDON.

APPEAL *from county court to circuit court — dismissal for want of prosecution.* On an appeal from the county court to the circuit court by the defendant in the suit, it is his duty to be present in court and ready for trial on the call of the case when regularly reached on the docket, and if he neglect this duty his appeal may properly be dismissed for want of prosecution, and this, notwithstanding the cause may be at issue.

WRIT OF ERROR to the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. DUMMER, BROWN & RUSSELL, for the plaintiff in error.

Messrs. MORRISON, WHITLOCK & LIPPINCOTT, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In this case an action was brought in the county court, and on a trial plaintiff recovered a judgment for $480. Defendant thereupon appealed to the circuit court. The case stood on the docket of that court until the 20th day of November, 1876, when the appeal was dismissed for want of prosecution. On the 28th of the same month defendant entered a motion to set aside the order dismissing the appeal, which was overruled by the court, and defendant prosecutes this writ of error.

The affidavit on which this motion was based fails to show any kind of diligence. Appellant stated in his affidavit that he was in the court a few days before the 20th of November, to inquire when his cause would be reached, so as to prepare for trial, and was informed by his attorney that the call of the criminal docket would continue on the 20th, and that affiant need not be present on that day. But the civil docket was unexpectedly called on that day, and his suit was called whilst he was absent from town; that he believed he had a meritorious defence to a part of the demand against him, etc.

A party having a suit in court must be prepared for trial when it is regularly reached. He has no right to expect the court to delay its business to suit his convenience. In this case there does not appear to have been the slightest effort to prepare for trial. He, when he took the opinion of his attorney as to when the cause would be reached, did so at his peril. He does not show he had witnesses or had subpœnaed them, or in fact had made the slightest preparation for trial. There was none, the slightest abuse of discretion in the court refusing to set aside the default and dismissal of the appeal.

It is, however, urged, that as the case was pending and at issue, the court had no power to dismiss the appeal; that the correct practice required the court to have called a jury, and that the plaintiff prove his cause of action; that until the plaintiff should prove a case against him he was required to do nothing in the case, and he could be in no default before plaintiff established his cause of action.

In support of the action of the court below, we are referred, by counsel for defendant in error, to the cases of *Boyd* v. *Kocher*, 31 Ill. 295, and *Allen* v. *The City of Monmouth*, 37 id. 372. These cases were appeals from justices of the peace to the circuit court, and by the defendants in the cases, against whom the justices had rendered judgment. The law relating to such appeals provided that there should be a trial *de novo*. So the cases are similar, as to the parties appealing and as to the law requiring a trial *de novo*.

It is urged that this case was at issue, but it may be replied that in the cases above referred to the law regards them, being before justices of the peace, in which defence was made, as being at issue. In this there was no material distinction between this and those cases. There, as here, appellant bound himself to prosecute his appeal with effect. The mere execution and filing of an appeal bond does not discharge that obligation. It imposes the duty of being present, ready for trial when the cause is called regularly for trial, and not only so, but to change the result of the trial in the court below. Here, the case was regularly called for trial; plaintiff in error was not present, and failed to be present to prosecute his appeal by defending his suit. Had he been present when the appeal was dismissed it might have been otherwise. *Langenham* v. *Stickney*, 90 Ill. 361.

We regard the cases referred to above as being decisive of this case, and the judgment of the court below is affirmed.

Judgment affirmed.

Syllabus.

WILLIAM T. HEWITT

v.

YOUNG B. CLARK.

1. NOTICE—*of unrecorded deed.* Where a subsequent purchaser was informed by his grantor that he had made a prior deed to the same land, but the trade was broken off and the deed had not been delivered, and the purchaser and grantor then went to the recorder's office and inquired if such prior deed had been left for record, and finding it had not, then went to a notary's office and inquired to see the papers between the grantor and the prior grantee, and was shown what he took to be a deed, this was held conclusive notice to him of the prior unrecorded deed.

2. FRAUD—*in procuring deed does not render it void.* A deed for land, though procured by fraud, is not void, but voidable only. Until set aside by the action of the parties, or a decree in chancery, it will pass the legal title to the grantee.

3. DEED—*delivery.* Where a party acknowledges before a proper officer the execution and delivery of a deed made by him, and allows the officer to hand the same to the grantee without objection, this will amount to a delivery.

4. EVIDENCE—*question assuming a fact.* In an action of ejectment, where the question was whether a deed relied upon by one of the parties had ever been delivered, it was held to be error to allow a witness to be asked the question as to what agreement was made about the delivery of the deed, without first showing there was some agreement made on the subject.

5. SAME—*mode of proving agreement by parol.* The safe and proper way of proving an agreement by parol is, to require the witness to state what was said, if anything, by either of the parties in the presence of the other on the subject. If the witness can not give the words of the parties, he may state the substance of what was said, but he ought not to be allowed to substitute his inferences from what was said, or his understanding.

APPEAL from the Circuit Court of Christian county; the Hon. H. M. VANDEVEER, Judge, presiding.

Mr. W. M. PROVINE, and Messrs. JOHN M. & JOHN MAYO PALMER, for the appellant.

Messrs. MCCASKILL & BRO. and Mr. JOHN B. JONES, for the appellee.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This is an action of ejectment, by Hewitt against Clark. The land in controversy was the property of Rice. Hewitt derives title from Rice through a deed dated August 25, 1874, filed for record August 31, 1874; Clark claims title from Rice by a deed dated August 28, 1874, and filed for record on the same day.

It is claimed by appellee, that appellant's deed was never delivered; that it was procured from Rice by fraud and circumvention; and that appellee, at the time of his purchase, had no notice of appellant's title.

Appellee himself testifies, that, on the day he received his deed, and before it was made, he and Rice went to the recorder's office, and appellee inquired if Hewitt had filed for record a deed to him from Rice; that finding no such record, they went to the office of Mr. Taylor, a notary public, and appellee asked Taylor to show him the papers between Hewitt and Rice, and that he there saw what he took to be the deed from Rice to Hewitt. He further says, that Rice told him, before they went to the recorder's office, that deeds had been made between him and Hewitt; that he had made a deed for this land to Hewitt, and that the deeds were left in Taylor's office and that the trade had been broken off. This is conclusive as to notice to Clark of whatever Hewitt's rights under this deed may be. Having bought with information that the deed to Hewitt had been made, even if he supposed that the trade was broken off he took the risk when he acted on the faith of Rice's statement.

As to the charge of fraud, it is of such character as at most to render Rice's deed to Hewitt voidable. The deed could not be held void upon that ground. Until set aside by the action of the parties or a decree in chancery, this deed was adequate to pass the title to Hewitt.

But it is insisted, Hewitt's deed was not delivered by Rice. Goodrich testifies that he drew the deed in question, and a

deed from Hewitt to Rice for another tract of land. This was done at the request of Rice and Hewitt. The parties then took these deeds away for the avowed purpose of having them acknowledged before Taylor, the notary; and that in about half an hour Hewitt returned with the deed in question in his possession, duly certified as acknowledged, and the same was then left with the witness by Hewitt.

Taylor, the notary, testifies, that when the deed in question was acknowledged by Rice, and after the certificate of acknowledgment was made, the deed was at once given to Hewitt in the presence of Rice, and Hewitt put it in his pocket and took it away.

To countervail this as to the fact of delivery, we have the testimony of Rice, who says: "It was *my* understanding that both deeds were to be left in Taylor's office until Mrs. Hewitt should come in and sign and acknowledge his (Hewitt's) deed to me; then we were to meet there and I was to deliver my deed to Hewitt, and he was to deliver his deed to me." Rice also says, "I never delivered it, (the deed,) and never authorized Taylor to deliver it." He states no fact warranting the understanding he had on this subject, and when he says he never delivered the deed, he evidently means to deny that with his own hands he gave the deed to Hewitt, and to deny that he gave any express authority to Taylor to do so. He does not deny that he supposed Hewitt had, in fact, taken the deed away at the time of the acknowledgment, and from his own testimony he seems to show that he did so suppose, for Clark, evidently acting upon information from Rice, had an idea the deed might have been filed for record, and hence the first place they looked for this deed was in the recorder's office.

Bowman, who was present when the deeds were acknowledged, testifies to *his understanding* that both deeds were to be left, for the time being, at Taylor's office, but he states no fact as a ground for such understanding, except that Hewitt and Rice

as they were leaving Taylor's office, talked about "the time when they would come in to exchange deeds."

This is all the proof offered to countervail the fact that Rice acknowledged to Taylor that he had executed and *delivered* this deed to Hewitt, and the fact that Hewitt immediately took possession of it in the presence of Rice and with the knowledge of the officer, and carried it away, and half an hour later left it with Goodrich.

The weight of the evidence is so plainly in favor of the allegation of delivery, that the verdict ought to have been at once set aside.

It was error to allow a witness, against the objection of plaintiff, to be asked the question as to what agreement was made about the delivery of the deeds, until it was first shown that there was some agreement made by Hewitt on that subject. The safe mode of proving an agreement by parol is, to require the witness to state what was said, if anything, by either of the parties in the presence of the other on the subject. If a witness can not give the words of the parties, he may, undoubtedly, be permitted to state the substance of what was said. He ought not, however, to be allowed to substitute his inference from what was said or his understanding. To permit a witness, in answer to such a question, to say "it was my understanding," etc., is erroneous.

The proof of the relative value of the two tracts of land was not pertinent to the issue, and tended to mislead the jury.

The judgment must be reversed, and the cause remanded for a new trial.

Judgment reversed.

Statement of the case.

OWEN T. REEVES, Admr.

v.

GEORGE W. STIPP.

1. INTEREST FROM DATE—*to insure prompt payment.* Where a promissory note provides for the payment of ten per cent interest from date if not paid when due, it may be regarded as an agreement to pay a specific sum of money with interest from date, with the privilege to the maker to pay the principal without interest at maturity. If this is not done, the absolute agreement remains in force as made, and may be enforced.

2. SAME—*not released by party's death.* Where parties understandingly and fairly enter into a contract for the payment of money by the one to the other, agreeing to pay a certain lawful rate of interest from date, if not paid when due, the death of the debtor before maturity will not discharge his estate from the payment of the interest.

3. CONTRACT—*when provision is penalty, and when liquidated damages.* Whether the sum named in an agreement to secure performance is to be treated as liquidated damages, or as a penalty, must depend upon the intention of the parties where that can be ascertained, and this is the case where the parties call such sum neither penalty nor liquidated damages, but simply interest.

WRIT OF ERROR to the Appellate Court of the Third District; the Hon. CHAUNCEY L. HIGBEE, presiding Justice, and the Hon. O. L. DAVIS and Hon. LYMAN LACEY, Justices.

The claim in this case is based on a promissory note made by John Starling, since deceased, bearing date February 1, 1876, for the sum of $1624, payable ten months after date to A. R. Jones or order, with interest at the rate of ten per cent per annum from date, for value received, if not paid when due, and by the payee assigned to claimant. It is admitted the maker of the note died May 15, 1876, and appellant was appointed administrator of his estate June 5, 1876, and that the note was presented for allowance as a claim against the estate on the 21st day of December, 1877. It appears the county court allowed the principal of the note with interest at the rate of ten per cent per annum *after* the maturity of the note; but on appeal the circuit court allowed claimant the

face of the note with interest at the rate of ten per cent per annum from the *date* of the note to the *date* of the allowance of the claim. On the hearing of the appeal taken to the Appellate Court, the judgment of the circuit court was affirmed, and the administrator brings the case to this court on appeal.

Mr. O. T. REEVES, *pro se.*

Messrs. TIPTON & POLLOCK, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The judgment in this case might be affirmed on the ground the note is an agreement to pay a specific sum of money with interest at the rate of ten per cent per annum from date, but with the privilege to the maker to pay the principal without interest at maturity. As that was not done the absolute agreement remains in force as it was made, and may be enforced against the estate of the maker as it might have been against him if living.

The defence insisted upon is, that the interest reserved in the note from the date thereof, unless paid at maturity, is a penalty, and as the maker died before the note matured, it is contended the estate, equitably, ought not to be held for it. The fallacy of the position taken lies in the assumption, that the rate of interest reserved from the date of the note, which was evidently intended to secure prompt payment, is penalty and not liquidated damages. Whether the sum named in an agreement to secure performance will be treated as liquidated damages or as penalty, is often a question of much difficulty, but the authorities are to the effect it must be determined in accordance with the intention of the contracting parties, when that can be ascertained. *Gobble* v. *Linder*, 76 Ill. 157. It is very clear the parties in this case intended the interest reserved should be the measure of damages in case the note was not paid when due. The parties call it neither penalty nor liquidated damages, but that is a matter of no conse-

quence. It is simply a rate of interest which is lawful by contract under our statute from the date of the note, inserted with a view to secure prompt payment. It is a contract the maker could lawfully make, and if living it could be enforced against him as valid and binding in law. It is not understood how the death of the maker of the note can render void his contract understandingly and fairly entered into. The intestate chose to make his contract in this form, and no reason exists why it should not be enforced as he made it. It may well be understood, from the contract itself, that the damages for non-payment of the principal of the note at maturity have been the subject of calculation and adjustment, and the amount definitely agreed upon by the rate of interest fixed from the date of the note.

It is said, that because of the death of the maker he could not pay the note so as to avoid the interest from date. Were that a valid objection, it might be urged with equal propriety against paying interest on any interest bearing obligations after maturity in case of the death of the makers—a proposition that finds no sanction either in reason or authority.

The judgment must be affirmed.

Judgment affirmed.

ISAAC J. KETCHAM

v.

SERVETUS M. THORP.

INTEREST—*on money collected by an attorney.* Where an attorney collects money for his client and tenders him an insufficient amount after deducting his fees, interest may be allowed against the attorney on the sum due from him, to the time of the verdict.

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

Mr. I. L. MORRISON, for the appellant.

Mr. E. H. PALMER, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit, brought by Thorp, against Ketcham, for the recovery of money collected, wherein the plaintiff recovered a verdict and judgment for $873.30, and the defendant appealed.

On the 15th day of March, 1871, Thorp placed in the hands of Mr. Ketcham for collection a note in favor of Thorp against Daniel Waldo, of the date of February 4, 1861, for the sum of $450, payable with interest at the rate of ten per cent from date. Nothing had been paid on the note and Waldo was reputed insolvent.

Judgment was obtained upon the note December 23, 1873, for $1023.75. Mr. Ketcham having succeeded in the collection of the amount of the judgment on execution, on June 24, 1876, made a tender to Thorp of the sum of $630 as the amount coming to him from the collection, which Thorp refused to receive, and afterward brought this suit to recover the money collected. The only controversy is as to the amount of attorney's fees.

The defendant claimed, on the trial, that there was a contract made at the time the note was left with him that his fees as attorney were to be made out of the note, and that he was to have the interest upon the note for his services. Proof was likewise made that in a case of this character, half the amount collected would be no more than a reasonable fee.

There was a conflict in the testimony as to the terms upon which the note was left for collection, and the finding of the jury either way, as to whether or not defendant was to have the interest for the collection, there would not be sufficient reason to disturb.

Upon a careful examination of the testimony we are of opinion that the verdict does not leave in the hands of the

defendant an amount equal to the interest on the note or to one-half of the sum collected.

We are satisfied, from the evidence, that the amount of the tender made was not sufficient, so that there might rightly have been an allowance of interest to plaintiff to the time of the verdict.

Although the evidence, in our judgment, would have justified a larger allowance than has been made to the defendant, yet we think he has been given a quite liberal compensation, and that there is not cause sufficient for an interference with the verdict of the jury.

We find no substantial cause of complaint in respect of instructions.

The judgment will be affirmed.

Judgment affirmed.

The Chicago and Alton Railroad Co.

v.

Charles H. Erickson, use, etc.

1. Common carrier—*liable for delay in taking cattle for transportation.* A railroad company as a common carrier is bound to receive and transport cattle when they are first offered for shipment, unless it has a reasonable excuse for its refusal, and when its refusal to take and ship cattle when first offered is without such excuse, it will be liable in damages to the owner for the deterioration in the value of the cattle between the time when they were first offered for shipment and the time when they were received and shipped.

2. Same—*excuse for not taking and shipping cattle.* An unconstitutional law, prohibiting railway companies from carrying Texas or Cherokee cattle into or through the State, being void, will afford no excuse for a refusal or delay in receiving and shipping such cattle when offered. Such a statute can neither be regarded as imposing obligations nor as affording protection.

3. Texas and Cherokee cattle—*act relating to, unconstitutional.* The act of the legislature in relation to Texas and Cherokee cattle, (Rev. Stat. 1874, p. 141,) is void, as being repugnant to that clause of section 8, article 1 of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Appeal from the Circuit Court of Sangamon county; the Hon. Charles S. Zane, Judge, presiding.

Messrs. Hay, Greene & Littler, for the appellant.

Messrs. Scholes & Mather, for the appellee.

Mr. Justice Scholfield delivered the opinion of the Court:

This was an action on the case, by appellee, against appellant, in the circuit court of Sangamon county, for damages sustained by appellee in consequence of appellant's failure, as a common carrier, to promptly receive and transport 42 head of cattle from Venice station, near St. Louis, to Springfield, Illinois.

The following statement, taken from the brief of the counsel for appellant, sufficiently presents the material facts:

"On the afternoon of Thursday, the 27th day of May, 1875, the cattle in question were brought across the Mississippi river at the upper or Madison county ferry, above St. Louis, in the cars of the Kansas City and Northern Railroad Company, and on the transfer boats of the ferry. They were landed at Venice, a station of the Chicago and Alton railroad, situated at the terminus of the ferry. While the cattle were yet in the cars of the Kansas City and Northern Railroad Company, the young man in charge (Erickson, plaintiff,) offered the cattle to the station agent of defendant below, for shipment to Springfield, Illinois. The agent of defendant declined to receive and ship the cattle, assigning as reasons that they were Cherokee cattle, and that, under the instructions of his superior officers, he could not receive them. This agent, however, referred the matter to his immediate superior, Mr. Lake, whose headquarters were at East St. Louis. Lake was telegraphed to come to Venice the same afternoon, but did not receive the dispatch till the next day. In the meantime the cattle were unloaded in the yards of the National Stock Yards Com-

pany, on the Illinois side of the river. The next morning Mr. Lake went to Venice, and after looking at the cattle and talking with Erickson about them, declined to receive them, for the same reasons given by the local agent, Nesbitt. Whereupon the cattle were taken back across the river and put into the Union Stock Yards, where they remained until the following Monday afternoon. On that afternoon the agents of the railroad company, under special instructions telegraphed from their superior officers in Chicago, forwarded the cattle to Springfield."

The damages claimed are such as resulted from the deterioration of the cattle between the time when they were offered for shipment and the time when they were received and shipped.

That appellant was bound to receive and carry the cattle, when they were first offered for shipment, unless it had a reasonable excuse for its refusal, is conceded by appellant's counsel; but they contend that it had such reasonable excuse for its refusal. They insist that the evidence shows that these cattle were "Texas or Cherokee cattle," and that, under the circumstances in proof, appellant was justified, by the provisions of the act in relation to "Texas or Cherokee cattle," (Rev. Stat. 1874, pp. 141–2–3–4,) in refusing to receive and ship them—at least, for the length of time it did so refuse.

If we were authorized to regard the provisions of the act referred to as valid law, it may be conceded the position of the counsel would be tenable and conclusive against the right of recovery by appellee, and, were we permitted to adhere to our own views of the validity of this act, such would necessarily be our ruling. *Yeazel* v. *Alexander et al.* 58 Ill. 254; *Chicago and Alton Railroad Co.* v. *Gasaway*, 71 id. 570.

But the Supreme Court of the United States, in *Railroad Company* v. *Husen*, (95 U. S.) 5 Otto, 465, have held that an analogous act of the legislature of Missouri is unconstitutional and void, because in conflict with that clause of § 8, art. 1 of the Constitution of the United States which provides that

"Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The suit there was brought in the circuit court of the State, against the carrier, for bringing "Texas, Mexican or Indian cattle" into the State, in violation of the statute which prohibited their importation except at certain seasons and under certain restrictions, and a recovery was had for the resulting damage to the plaintiff's property. An appeal was prosecuted from the judgment of the circuit court to the Supreme Court of the State. In that court the validity of the statute was sustained, but a writ of error was sued out of the Supreme Court of the United States to the Supreme Court of the State, on the judgment, and the judgment was by that court reversed.

An examination of the acts of Missouri and of this State will disclose that, so far as the principles controlling or affecting the decision of the Supreme Court of the United States are concerned, there is no substantial difference between the acts. This is expressly recognized by the judge pronouncing the opinion of the court in the *Husen case*, who, after referring to *Yeazel* v. *Alexander*, *supra*, says the court can not concur with the ruling in that case.

This question is one upon which the decision of the Supreme Court of the United States is paramount, and we are in duty bound to follow its rulings, however much we may in opinion disagree with them.

We have at the present term followed the decision in *Husen's case*,—*Salzenstein* v. *Mavis*, *ante*, 391.

The act, being void for repugnancy to the constitution of the United States, can neither be regarded as imposing obligations nor affording protection.

There being no reasonable excuse, in legal contemplation, shown for the refusal to carry, the judgment below must be affirmed.

Judgment affirmed.

The McLean County Coal Company
v.
Honora Long.

1. Parties—*when executor must sue—not devisee.* The sole devisee of a deceased person can not maintain an action in his own name for a tort, or conversion of the property of the testator in his lifetime, but the suit must be brought in the name of his executor or administrator.

2. Where a party died pending an action by him to recover for a quantity of coal the defendant had mined, removed from the plaintiff's land, and converted, and after his death his sole devisee suggested the death, and by leave of court was substituted as plaintiff, no letters having been taken out, and recovered judgment, it was *held*, that no recovery could be had in the name of such devisee, and that the judgment should have been arrested.

3. The appointment of an executor to carry out the provisions of a will vests the legal title to the goods, chattels and choses in action of the testator in the executor, as a *quasi* trustee for the use of the creditors, distributees and legatees, and he alone, when qualified, can maintain the proper actions for the recovery of such property, or for injury thereto or its destruction.

4. Same—*holder of legal title must sue.* An equitable title never confers the right to sue at law, but the action must be in the name of the person invested with the legal title.

5. Practice—*when wrong person sues.* Where a person not having the legal title sues at law for an injury to property, the defendant need not plead in abatement to take advantage of the want of a proper party plaintiff, but the error is fatal under the general issue, and if apparent on the face of the declaration, on demurrer or motion in arrest of judgment.

6. Pleading—*errors cured by verdict.* Where a declaration, on its face, discloses no cause of action, the defect will not be cured by the verdict.

Appeal from the Circuit Court of McLean county; the Hon. Owen T. Reeves, Judge, presiding.

Mr. H. A. Ewing, and Messrs. Stevenson & Ewing, for the appellant.

Messrs. Tipton & Pollock, for the appellee.

Mr. Justice Walker delivered the opinion of the Court:

It appears that John Long, the husband of appellee, in his lifetime sued appellant to recover for a quantity of coal it had

mined, removed from land belonging to him, and converted to its own use. He recovered a judgment, and appellant brought the case to this court, and the judgment was reversed and the cause remanded. (See 81 Ill. 359.) After the judgment was reversed, and before the case was redocketed in the court below, Long died, having, by will, devised and bequeathed all of his property to appellee. The cause was docketed, the death of Long suggested, and leave given to amend the declaration, which was done by making appellee plaintiff, and the cause progressed in her name to a trial and judgment against the company, a motion for a new trial and in arrest having been overruled, and the company again appeals.

On the trial appellant objected to the admission of evidence of the mining and conversion of the coal.

It appears that appellee nor any other person ever became executor or administrator of Long's estate, no steps being taken in the probate court for the purpose. On the one side it is urged that appellee could not maintain the action, or any one else, until letters should be granted on Long's estate. But it is claimed, as all of Long's property was willed to appellee, she thereby became vested with the legal title to the claim, and may recover.

We shall not discuss the question of the measure of damages, as we understand the rule to be settled in this court by this case, when previously before us, in following the rule announced in the case of *Robertson* v. *Jones*, 71 Ill. 405, previously decided. We perceive nothing in appellant's argument to create the slightest doubt as to the correctness of those decisions.

At common law it was an inflexible rule, with few exceptions, that a chose in action could not be assigned or transferred so as to give the assignee a right of action in his own name. That could not be done verbally or in writing, neither by deed, will or simple contract. Even promissory notes could not be so assigned or transferred until authorized by the statute of Anne. Bills of exchange were not an exception, under

the common law, as they were governed by the mercantile law. Leases, and some covenants for title, ran with the land, and were assigned and transferred by a conveyance of the land to which they related. An effort to thus transfer causes of action and contracts no doubt passed to the assignee an equitable title, which the courts of law came to recognize and protect, as such, by requiring the assignor, on being indemnified, to permit suit to be prosecuted in his name, that his assignee might have the benefit of the equitable transfer of the claim.

Had Long in his lifetime sold this claim, would any one contend that the purchaser could have maintained an action in his own name? Or, suppose he had bequeathed this claim to some one else, and willed the remainder of his property to appellee, would any one suppose that the legatee could sue and recover in his own name? Had Long bequeathed to appellee notes or contracts, does any one suppose she would thereby derive authority to sue? The will does not vest the legal title to a cause of action in the legatee, any more than would his assignment of such a claim in his lifetime. The appointment of an executor to carry out the provisions of the will, vests the title to the goods, chattels and choses in action in the executor, as a *quasi* trustee, for the use of the creditors, distributees and legatees. He can maintain trover, replevin, or other appropriate action for the recovery of the personal property, or to recover damages for its wrongful injury or destruction. The legatee can not maintain such actions, and the same is true of choses in action. These are elementary rules that need no discussion.

But we are referred to the cases of *Riley* v. *Loughrey*, 22 Ill. 97, and *Cross* v. *Carey*, 25 id. 564, as controlling the case at bar. We fail to perceive any analogy in the cases. In the first of those cases notes had been given to a person who afterwards died, and his widow, without administering on his estate, took new notes, payable to herself, and surrendered the notes payable to her husband. She afterwards died, and her administrator sued upon the notes payable to his intestate, and

it was set up as a defence that there was no consideration for the note, as the payee was not the administrator of her deceased husband. The plea was held bad, as the surrender of the old notes constituted a sufficient consideration. There the note was payable to the widow, which gave the right to sue in her name whilst living, and by her administrator after her death. Had an administrator been appointed on the estate of the person to whom the three notes were given, and which were surrendered, and the contest had been between such administrator and the payee of the new notes, or her administrator, a very different question would have arisen; but as the case stood, the question was, whether the payee would be protected in paying the money as he promised by his new note, and it was held he would. That case did not involve the question whether the widow, as such, could sue in her own name on the three notes which she surrendered. Had appellant given its note to appellee in discharge of this claim, and she had sued on the note, then the cases would have been similar.

In the case of *Cross* v. *Carey, supra,* one Cross died intestate, leaving a widow, but no child or descendants of a child. There was no administration granted on his estate, but his widow sold the property of her deceased husband. Solomon Cross purchased a portion of the property, and when sued by the widow he set up as a defence that she had no title to the property he purchased of her. It was there held, that as heir of the husband she had such an equitable title as would enable her to sell the property and collect the price; but in that, as in the case of *Riley* v. *Loughrey, supra,* it was a question simply between the buyer and seller. Had an administrator been appointed after the sale, and he had sued the purchaser for the price of the property, altogether a different question would have been presented. There, the widow had possession of the property and the equitable ownership of it, and the legal title had vested in no one, and the purchaser who had the property could not be heard to say he would keep it and not pay the price agreed upon by the parties. A person may sell

his property and pass the legal title, but not so of a mere claim for damages. Here, appellee has only an equitable title, and that never confers the right to sue at law. It may, perhaps, be true, that an executor, of his own wrong, may, under some circumstances, sell property of the deceased and pass title, or may settle and discharge debts of the deceased; still, we are aware of no case, nor do we believe any can be found, which holds that such an executor may sue and recover either property or a chose in action of the deceased. It is contrary to all of the analogies of the law. It is unprecedented to hold that a mere stranger, without right, may intermeddle in such matters.

We are, therefore, of opinion that appellee had no right, without obtaining letters on the estate, to maintain the action.

It is urged that appellant should have pleaded in abatement. We fail to see that the law required such a plea to interpose the defence. To recover, she was bound to prove a legal right vested in her. She could not recover by proving a right in another person. A person can not recover by claiming a demand, and showing another person holds the demand claimed, —and such is the proof here. This defence may be made under the general issue, as that put her on the proof of her claim. We are at a loss to understand how the defence could have been interposed under a plea in abatement.

Had the conversion occurred after the death of Long and the probate of the will, it may be that appellee might have maintained the action. But the conversion occurred in his lifetime. Had appellant demurred to the amended declaration the demurrer would have been sustained, as the fact of the conversion in the lifetime of Long, and that no letters testamentary or of administration had been granted, appeared on the face of the declaration. It disclosed no cause of action, and hence was not cured by the verdict.

The court below, therefore, erred in not arresting the judgment, and for that error the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

INDEX.

CHANCERY. *Continued.*

SETTING ASIDE FRAUDULENT DEED.

8. *Of the character of relief to be granted.* Where a bill is filed by a prior purchaser of real estate to avoid a subsequent conveyance of his vendor made in fraud of his rights, the proper decree is to declare the title of the subsequent purchaser void. It is not proper in such case to require him to convey his title to the complainant, who must look to his vendor alone for a conveyance. *Coari* v. *Olsen*, 273.

FRAUDULENT CLAIMS AGAINST ESTATES.

9. *Their payment prevented in equity.* See ADMINISTRATION OF ESTATES, 2.

IMPEACHING A JUDGMENT.

10. *Of the manner thereof, and for what causes.* A record of a court imports a verity and can not be contradicted by parol evidence. It must be taken as showing the absolute truth, and must be tried by itself. What is or is not a record, is a matter of evidence, and any instrument offered as such may be shown to be forged or altered. *Blackburn et al.* v. *Bell*, 434.

11. Where a bill in chancery seeking to enjoin the collection of a judgment at law, on the ground it was rendered by one having no judicial power and not the judge of the court, shows that the judgment is upon the records of the court, and that the record thereof still remains, and that there is no error apparent on the face of the record, and, moreover, its affirmance by the Supreme Court, it shows a valid judgment as tested by the record set out in the bill. Ibid. 434.

12. To impeach a judgment shown to be valid by the record, the party complaining must make it manifest that the judgment was the result of either fraud, accident, or mistake, and that it is unjust, and was not the result of *laches* or misconduct on his part. Ibid. 434.

13. Where a bill to enjoin a judgment shows by its averments, and the implications flowing therefrom, that the plaintiff and defendant knowingly and willfully engaged in the perpetration of a fraud upon the law and the courts,—that, having a suit pending in the circuit court, they conspired together and had the issue submitted to a trial before one whom they knew to be a mere intruder upon the bench,—that they knowingly and willingly went through the trial before such person, and equally participated in the submission of a motion for a new trial, and in arrest of judgment, and in bringing the record to the Supreme Court showing the trial had been before the lawful judge, when, in fact, the judgment had been entered by such intruder upon the bench, and that they joined in palming off such record as the genuine record, it was *held*, that the complainant, being a party to such fraud, was not entitled to equitable relief. If such judgment was a fabrication, a party assisting in its fabrication and in giving it a standing as a judgment of a court, can have

*Also, see *Marshall* v. *Perry et al.* 90 Ill. 289, as to what constitutes a loan.

STATUTE OF FRAUDS.

HINDERING AND DELAYING CREDITORS.

Whether an agreement is fraudulent. See FRAUD, 1.

STOCKHOLDERS.

LIABILITY FOR DEBTS OF CORPORATION.

1. *Estoppel of stockholder from denying his liability under unconstitutional charter.* Although a provision in a charter of a corporation giving banking privileges may be unconstitutional, still, if a stockholder has acted under it, and thereby induced or contributed to the loss of a creditor of the corporation, such stockholder will be estopped from denying his individual liability under the charter. *Dows* v. *Naper*, 44.

2. *Amendment of charter as affecting liability of stockholder.* Where a stockholder in a corporation with banking powers is conversant with its affairs, and makes no objection to an amendment to the charter, and changes in the business consequent thereon, and participates in the benefits derived therefrom, he can not avoid personal liability to creditors on account of such amendment, but will be held to have acquiesced in the same. Ibid. 44.

3. *Evidence of amount and character of deposit.* Where the charter of a corporation with banking powers provided that its officers, when required by any person making a deposit in the savings department of the company, shall issue certificates of deposit for the same, and made the stockholders personally responsible to depositors in such department, it is not essential to the liability of the stockholders that a certificate of deposit be given, but the amount and character of a deposit may be shown by any other competent evidence. It may be shown by the pass book given the depositor. Ibid. 44.

4. *Books of corporation as evidence against stockholder.* In an action by a depositor in a bank against a stockholder, the ledger of the bank, though not a book of original entries, is competent testimony against the stockholder as an admission of the company, on its own books, of the amount due the depositor. Ibid. 44.

5. *Evidence to show acceptance of amendment to charter.* The record or journal of the acts and proceedings of a corporation is admissible in evidence against a stockholder in a suit to enforce his personal liability to a creditor of a corporation. It is competent evidence to show an acceptance of an amendment of the charter, without first showing that the persons accepting the same were directors, when they are named as such in the journal. Ibid. 44.

6. *Parol evidence to show one a stockholder.* In a suit by a creditor of a corporation seeking to enforce the personal liability of a stockholder, the plaintiff is not required to prove the ownership of stock by record evidence, but such fact may be shown by the defendant's admission and the testimony of the officers of the corporation. Ibid. 44.

WITNESSES. *Continued.*

CREDIBILITY.

3. *Who shall determine.* An instruction that if two witnesses for the prosecution swore to a particular fact, in which they were contradicted by the defendant and two other witnesses whose credibility was not affected by any evidence in the case, then the jury would not be justified in finding the fact in favor of the prosecution, is improper, as invading the province of the jury as judges of the credibility of the witnesses. *Hanrahan* v. *The People*, 142.

TABLE OF UNREPORTED CASES,

DIRECTED BY THE COURT TO BE OMITTED FROM THE REPORTS AS UNNECESSARY TO BE PUBLISHED.

SEBTEMBER TERM, 1878.

BARTON *et al.* v. KIMBALL *et al.* *Per Curiam.* Decree reversed.

CHICAGO CITY RY. CO. v. CITY OF CHICAGO. *Per Curiam.* Judgment affirmed.

COURSEN *et al.* v. HIXON *et al.* *Per Curiam.* Judgment reversed.

GATISS v. LILL *et al.* *Per Curiam.* Judgment affirmed.

MOORE v. SALTER. Opinion by *Baker, J.* Judgment affirmed.

NILES *et al.* v. ANDREWS *et al.* *Per Curiam.* Decree affirmed.

PARTRIDGE, TOWN OF, v. SNYDER. Opinion by *Sheldon, J.* Judgment affirmed.

ROBERTS v. TREADWAY. Opinion by *Walker, J.* Judgment affirmed

WRIGHT v. NYMAN. *Per Curiam.* Judgment affirmed.