REPORTS

OF

CASES DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

FROM

NOVEMBER TERM, 1850, TO JUNE TERM, 1851.

BOTH INCLUSIVE.

BY E. PECK,
COUNSELOR AT LAW.

VOLUME XII.

WITH REFERENCES BY

HON. W. H. UNDERWOOD.

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JUDGES OF THE SUPREME COURT.

SAMUEL H. TREAT, *Chief Justice.*

JOHN D. CATON, } *Associate Justices.*
LYMAN TRUMBULL, }

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TABLE OF CASES.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

NOVEMBER TERM, 1855, AT MOUNT VERNON.

THE COUNTY OF RICHLAND, Pltffs in Error, *v.* THE COUNTY OF LAWRENCE, Defts in Error.

ERROR TO LAWRENCE.

The money appropriated by the act to establish and maintain a general system of Internal Improvements, approved Feb'y 27, 1837, to the counties through which no railroad or canal was provided to be made, was subject to legislative control, and until definitely appropriated might have been resumed or diverted at the will of the legislature, prior to the passage of the law of 1845, which gave the money absolutely to certain counties.

The state may make a contract with, or a grant to a municipal corporation, which it cannot impair or resume.

A grant made to a public corporation for purposes of private advantage, although the public derives a common benefit therefrom, stands on the same footing that it would have done, had it been made to any body of persons.

Public or municipal corporations existing only for public purposes, possessing only such powers as are granted to them, are subject at all times to the control of the legislature.

This was a bill filed in the Lawrence Circuit Court, by Richland County, for the purpose of obtaining from the former for the benefit of the latter county, a portion of the fund appropriated by the legislature in 1837 for the benefit of such counties as had not any railroad or canal passing through them. By virtue of this law, Lawrence County received the sum of $11,125 00; subsequently to this appropriation, Richland County was created out of the County of Lawrence and the County of Clay. After the County of Richland was created, the legislature passed a law, directing that Lawrence County should pay out of the fund

received as aforesaid, to Richland County, such proportion of the fund, as the population of Richland County or that part of the territory taken from Lawrence County, as compared with the whole population, should show Richland County entitled to have.

Lawrence County refused to pay any portion of the fund for the benefit of Richland County. This bill was filed to compel Lawrence County to pay over the money. The bill was dismissed for want of equity, at the September Term, 1849, of the Lawrence Circuit Court.

Richland County sued out this writ of error, assigning for error the dismissal of the bill.

A. KITCHELL, for County of Richland.

It is insisted that the statute in question violates Sec. 10, Art. 1, of the Constitution of the U. S., because it impairs the obligation of a contract. And that it violates Sec. 1, Art. 1, of the State Constitution, because it is an assumption of judicial powers. A statute should never be decided to be unconstitutional, except in cases of clear necessity. Dorman *v.* Lane, 3 Scam. 240 ; The People *v.* Marshall, 1 Gil. 688.

The act does not impair the obligation of a contract. The County is a public corporation and subject to legislative control, she cannot enter into a contract with the state.

Sec. 4 Schedule of the Constitution ; 1 Greenleaf Ev. § 331; 2 Kent 274, 305 ; 3 Story's Com. on Const. 260 ; The People *v.* Wren, 4 Scam. 273—4 ; Coles *v.* The County of Madison, Breese 120 ; Commonwealth *v.* Bent, 1 Missouri, 170–1 ; Rush *v.* Shipman, 4 Scam. 191 ; The People *v.* Morris, 13 Wend. 337 ; Holiday *v.* The People, 5 Gill. 216 ; Dartmouth College case, Peters Condsd. Rep. 538, 556, 561.

The entire subserviency of a county to legislative control being established, the power to interfere with, take and dispose of the funds, follows necessarily. Shaw *v.* Dennis, 5 Gilman, 417 ; Thomas *v.* Leland, 24 Wend. 63.

Admitting the county could not be deprived of moneys or funds, which belong to the county for ordinary purposes of expenditure ; yet the fund in question was a special public fund, deposited with the county for special purposes. The county

was but the trustee for the public use. The legislature continued to exercise control over this appropriation, until 1845, when it was given up wholly to the Counties. Acts of 1845. p. 50 ; Acts of 1839, p. 44, 81, 258, 261 ; The People *v.* Moon, 3 Scam. 126; The County of Pike *v.* The State, 11th Ills. R. 203.

The act is not an assumption of judicial powers. Shaw *v.* Dennis, 5 Gil. 407 ; People *v.* Moon, 3 Scam. 126 ; Thomas *v.* Leland, 24 Wend. 65.

The power of the legislature is only limited by the constitution of the state, and of the U. States. While her acts are kept within those limits, her power is omnipotent for all purposes of legislation. Sawyer *v.* The City of Alton, 3 Scam. 127 ; Mason *v.* Wait et al., 4 Scam. 134.

W. B. Scates & U. F. Linder, for the County of Lawrence.

This money has long since been paid to Lawrence County by the State, and disposed of by her, as shown by the bill.

Counties are created bodies " corporate and politic," and authorised to sue and be sued, in the name of each county respectively. R. L. 1833, p. 139, sec. 1 ; 1 Scam. 97; 5 Gill. 513.

They are made capable of taking, holding, and disposing of lands, chattels, &c., by deed, &c. R. L. 1833, Secs. 2, 3, 4 ; 1 Scam. 97 ; 5 Gil. 513.

Also to appoint agents, &c., whose contracts are binding upon the county. R. L. 1833, Sec 5.

County Commissioners are agents of the " county," in the management of their suits, &c. R. L. 1833, Sec. 1, 3 ; 1 Scam. 97 ; 5 Gil. 513.

Fines and penalties are given to the Commissioners' Court for the use of the county treasury. R. L. 1833, p. 141, sec. 1.

The legislature has also organized a separate, distinct jurisdiction for municipal and political purposes, viz: " the County Commissioners' Court," and invested it with certain limited judicial and ministerial powers, to be exercised for the benefit of the inhabitants of the county, for public, politic, municipal, and police purposes. R. L. 1833, p. 142, Secs. 1 to 12 inclusive.

" Public and municipal corporations may stand, as to grants made to them by the state, on the same footing as would any individual or private corporation, upon whom like special fran-

chise may have been conferred." Angel & Ames on Corp. 30, 31 ; Bailey *v.* Mayor, &c., N. Y., 3 Hill, 531.

A public municipal corporation, besides the powers granted for public purposes, may also have other powers and rights in relation to property, and these powers and rights ought not to be confounded. 3 Hill, 531 ; Modalay *v.* East India Co., 1 Brown Ch. R., 469 ; 1 Scam., 97 ; 5 Gill., 513.

The legislature may alter, modify, or destroy the corporation and its powers, but it has no more constitutional power over its rights of property, its contracts, &c., than it has over those of individuals and private corporations. Angel & Ames on Corp., 31, note 1 ; Bowdoinham *v.* Richmond, 6 Greenleaf, 113 ; 2 Kent Com., 305 and 306, note b.

But the legislature has no power to impair the obligation of a contract, and this applies equally to property in possession, under contracts executed, or to " grants," and whether by the state or individuals. 3 Story Com. Const., 241, 242, 243, sec. 1370 to 1374 inclusive ; State of Maryland *v.* Balt. & Ohio R. R. Co., 3 How., 548.

So grants of land by the State are irrevocable, whether made to " parishes, towns, or private" persons. 3 Story Com. Const., 257–8 ; Terret *v.* Taylor, 3 Cond., 259 ; Town of Pawlet *v.* Clark et al., 2 Cond., 418 ; Fletcher *v.* Peck, 2 Cond., 208.

And so, by a party of reason, would be a grant or gift of money or property.

The defendant claims, therefore, that by the grant of this money by the state, and after its receipt, it became the property of Lawrence County, for the use of the inhabitants of the county for the objects intended by the gift, and consequently beyond legislative assumption, without a violation of the Constitution of the United States and of this state. Clause 1, Sec. 10, Art. 1, const. U. S. ; Sec. 1, 2, Art. 1, Const. Ills. ; Sec. 16, Art. 8, Const. Ill.

The act of Feb. 21, 1843, which gives Richland county a portion of this money, is unconstitutional and void, being in violation of both constitutions. Ibid.

It adjudges Lawrence county to b e indebted to Richlande county, and imposes a penalty for non-payment, and therefor is unconstitutional and void. Sec· 1, 2, Art. 1, const. Ills. ; Sec. 16, Art. 8, const. Ills.

The legislature cannot take the property of one individual,

county, or corporation, and give it to another, or apply it to public uses without just compensation, or by consent; which is here attempted. Sed. 8, 11, Art. 8, Const. Ills.; County of Hampshire v. County of Franklin, 16 Mass., 75; Bowdoinham v. Richmond, 6 Greenleaf, 112; 2 Wend., 135; 16 Conn., 171, 172; 4 Mass., 329, 390.

Neither can the legislature adjudge an individual, county, town, or corporation, to be indebted to another. Dorman v. Lane, 3 Scam., 240; Sec. 1, 2, Art. 1, Const. Ills.; 16 Mass., 75; 6 Greenleaf, 112.

Nor can they constitutionally act, where the consequences of the act lead to the creation of a debt, or the fixing of a liability or debt upon another—as by legalizing the marriage of a female pauper, they cannot change her residence to that of her husband, and so charge another town, with her maintenance. Inhabitants of Brunswick v. Inhabitants of Litchfield, 2 Greenleaf, 28.

So in this case, by the organization of a new county, partly out of the County of Lawrence and partly out of Clay, the legislature cannot create an indebtedness from Lawrence to the new County.

The state has no power, without the consent of parties, to compel them to submit to a special, certain mode of adjustment and settlement by arbitration of disputes about property, though the state be a party. Little v. Frost, 3 Mass., 116.

Nor suspend a particular provision of law for the benefit of one individual, by which a liability of another is revived. Holden v. James, admr., 11 Mass., 396.

Having established these positions and principles by the foregoing authorities, the defendant would present the following cases, in which it was holden that property was vested in the inhabitants of towns by dedications of the proprietors to public uses.

Lebanon v. Warren County, 9 Ohio, 80; Le Clerc et al. v. The Trustees of Gallipolis, 7 Ohio; 217; The State of Maryland v. The Baltimore & Ohio R. R. Co., 3 Howard, 548; New Orleans v. The United States, 10 Peters, 720.

Trumbull, J. The County of Richmond filed a bill in chancery against the County of Lawrence, alleging that the latter was one of those counties through which no railroad or canal was provided to be made, by the act to establish and maintain a gen-

eral system of Internal Improvements, approved Feb'y 27, 1837 ; that the 15th division of sec. 18 of said act declared, "There shall be appropriated the sum of two hundred thousand dollars of the first moneys that shall be obtained under the provisions of this act, to be drawn by the several counties in a ratable proportion to the census last made, through which no railroad or canal is provided to be made at the expense or cost of the State of Illnois ; which said money shall be expended in the improvement of roads, constructing bridges, and other public works ;" that the County of Lawrence, in November, 1838, received her ratable proportion of said fund, amounting to eleven thousand one hundred and twenty-five dollars ; that in 1841, the County of Richland was created, being formed in part from the County of Lawrence ; that at the time of the formation of the County of Richland but a small portion of the fund received by Lawrence County had been expended ; and that the legislature by an act entitled, "An act for the relief and benefit of Richland County," approved Feb'y 21, 1843, provided as follows: "That the County of Richland shall be and is hereby authorized to demand and receive, from the County of Lawrence her proportion of said appropriation, according to the following terms and conditions : first, the census for the State of Illinois, for one thousand eight hundred and forty, shall be taken as the ratio of population in said counties ; second, that part of the County of Richland which was taken off the County of Lawrence, shall be entitled to receive of the fund which the County of Lawrence received of said appropriation, a proportionate share, according to the relative number of inhabitants in said part of Richland County, compared with the inhabitants of the present County of Lawrence, as exhibited in the State census, for one thousand eight hundred and forty." The act further goes on to provide that if any portion of said fund had been expended in that part of Lawrence County which was stricken off to Richland, that it should be deducted from the sum due Richland, that Lawrence should be entitled to pay the balance in notes ; that Richland should bear her proportion of the losses which Lawrence might have sustained in loaning the fund ; that the county commissioners of the respective counties should meet and make a settlement, and that in case the County of Lawrence refused to comply with the requisitions of the act, the County of Richland should be entitled to bring suit, &c.

The bill alleges a refusal by Lawrence County to comply with the foregoing act, and prays for a settlement and payment to Richland County of the sum due her under the provisions of said laws.

The circuit court dismissed the bill for want of equity. A single question has been submitted for the consideration of this Court, which is, the constitutionality of the "Act for the relief and benefit of Richland County."

It is insisted on the part of the County of Lawrence, that the legislature having omitted in the act creating the County of Richland to provide for a distribution of said fund, could not do so by a subsequent act; that by the receipt of the money it became the property of Lawrence County for the use of the inhabitants thereof, and was beyond legislative control.

The provisions of the Constitution supposed to be violated are Sec. 10, Art. 1, of the Constitution of the U. S., and Sec. 16, Art. 8, of the old Constitution of Illinois, which inhibit the passage of any *ex post facto* law, or law impairing the obligation of contracts; also the 1st and 2d sections of the 1st Art. of the Constitution of this State, which provide for a distribution of the powers of government into three distinct departments, and that one department shall not exercise the powers belonging to either of the others. Without determining whether it is competent for the legislature to control all the funds and property belonging to a public municipal corporation, like a county, it is clear that they had the right to control this fund. The case showed that the greater portion of it, and more than sufficient to pay Richland County what might be coming to her, was still unexpended.

The law did not grant the money to Lawrence County or the inhabitants thereof, but simply appropriated it to be drawn by the county and expended in the improvement of roads, constructing bridges, and other public works. To hold that the money belonged absolutely to Lawrence County would be a misinterpretation of the act making the appropriation. As well might it be insisted, that the millions of dollars appropriated by the same act and directed to be expended in the construction of railroads throughout the State, belonged to the board of commissioners of public works, who were to make the expenditure.

The money in this instance was appropriated out of the funds received by the State for purposes of Internal Improvements, and

was directed to be drawn and expended by the county officers in a particular manner. Before its expenditure, we cannot doubt that the legislature had entire control over the fund, either to resume it altogether, or to change the purposes for which it was originally designed to be expended.

There was no contract here between the State and Lawrence County, either at the time the appropriation was made, or when the county received the money. The county was the mere agent of the state for the disbursement of a certain amount of the money of the state as she directed.

That the state may make a contract with, or a grant to a public municipal corporation, which it could not subsequently impair or resume, is not denied; but in such case, the corporation is to be regarded as a private company. A grant may be made to a public corporation for purposes of private advantage, and although the public may also derive a common benefit therefrom, yet the corporation stands on the same footing as respects such grant, as would any body of persons upon whom like privileges were conferred.

Public or municipal corporations, however, which exist only for public purposes, and possess no powers except such as are bestowed upon them for public, political purposes, are subject at all times to the control of the legislature, which may alter, modify, or abolish them at pleasure. 2 Kent's Com., 305; Bailey *v.* City of New York, 3 Hill, 531. (*a*)

The case of Hampshire *v.* Franklin, 16 Mass., 76, so much relied upon in argument, was wholly unlike the present.

In that case the money sought to be recovered by the new county had belonged to the old one before the division; was never the property of, or received from the state, yet in that very case, although the Court held that it was not competent for the legislature to create a debt from one corporation to another, it was at last decided that Franklin was entitled to recover, upon the ground of assent on the part of Hampshire, though the evidence of such assent as shown by the case is not, to say the least, very apparent.

Had the fund appropriated by the Internal Improvement Act of 1837, to be drawn by the counties through which no public works were to be constructed, been absolutely given to the counties, to be by them applied to any and all purposes, as it subse-

(*a*) Trustees &c. *vs.* Tatman, 13 Ill. R. 30, and notes.

quently was by an act of the legislature passed in 1845, there would be much more plausibility in contending that the legislature could not afterwards resume the fund.

The act of 1845 cannot, however, have any bearing upon the case under consideration, because the portion of the fund claimed by Richland County had been previously directed to be paid to her by a specific act, which is not repealed or affected by the general law of 1845. The County of Pike *v.* The State, 11 Illinois, 203.

The other objection to the act for the benefit of Richland County is, that the legislature in its enactment undertook to exercise judicial powers.

The act does not profess to fix the amount that Richland County shall receive, and if it did, we do not know that it would be objectionable in a constitutional point of view ; but it simply provides for the equitable distribution of a fund over which the legislature at the time had entire control, and authorizes the bringing of suit in case the County of Lawrence should refuse to settle as provided by the act. We can see nothing of a judicial nature, or which the legislature might not properly do in the act in question.

The decree of the Circuit Court dismissing the bill is reversed and the cause remanded for further proceedings.

Decree reversed.

ANDREW MATHER, Pltff in Error, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, Defts in Error.

ERROR TO MADISON.

The death of the principal in any recognizance, after forfeiture thereof but before judgment rendered upon the *Scire Facias* issued thereon, may be pleaded by the securities, in discharge of such recognizance.

Elisha W. Dunn, on the eleventh day of February, 1850, entered into a recognizance before Charles Cook, a justice of the peace for Madison county, with Andrew Mather, the plaintiff in error, as his surety, to appear at the next term of the Madison

Mather *v.* The People.

Circuit Court, to answer a charge of having in his possession counterfeit coin, and apparatus for making the same.

At the next term of the said court, being the March term, 1850, an indictment for counterfeiting was found against said Dunn, and he failing to appear, the recognizance was forfeited, and a *scire facias* ordered, returnable to the next term. At the next term of the Circuit Court, being the August term, 1850, the said Andrew Mather appeared, and waived service of process (no *scire facias* having been served on him) and plead in discharge of his recognizance, that the said Dunn, since the last term of the court, to wit, on the 18th day of April, A. D. 1850, departed this life. To this plea the prosecuting attorney interposed a demurrer, which was sustained by the court, and a judgment rendered against Mather for the amount of the recognizance. To reverse this judgment, rendered by Underwood, Judge, at August term, 1850, Mather brings the case to this court by writ of error, and assigns for error that the court below should have overruled the demurrer and given judgment for the people.

Davis & Edwards, and J. Gillespie, for Pltff in Error.

The term *bail* applies as well to a criminal as to *civil* proceedings. Jacobs' Law Dict. vol. 1, p. 208 ; Bouvier's Law Dict. vol. 1, p. 163—4 ; 8th Amendment to the constitution of the U. S.

The 10th section of the act concerning bail, R. S. of 1845, p. 83 applies to all cases, criminal as well as civil. The 8th, 12th, and 13th sections are expressly made applicable to *civil* cases. The 10th section extends by its terms to *all* cases.

If, however, the above is not correct, it is still insisted that the 196th section of the criminal code, R. S., p. 187, enters into and forms part of the recognizance, and gives to the surety the *right* to deliver up the principal, in discharge of his recognizance at any time before the judgment is entered up against him upon the *Sci. Fa.* People *v.* Manney, 8 Cowen, 297.

Where a man is prevented by the act of God, from the performance of an act or duty, he shall be discharged.

P. Fowke, Dist. Att'y, for the people.

To show that the statute relating to bail does not apply to

criminal cases, 1 Scam., 25 ; 3 Gilman, 355 ; 3 U. S. Dig., p. 324, §24,§49,§83 ; 2 Supp. U. S. Dig., p. 693,§39 ; 3 Harrington,333.

Trumbull, J. This case presents the question, whether the death of the principal, subsequent to a forfeiture of his rocognizance, discharges the bail.

The statute declares, R. S., ch. 30, §196 : " in all cases of bail for the appearance of any person or persons charged, with any criminal offence, the security or securities of such person may, at any time before judgment is rendered upon *scire facias* to show cause why execution should not issue against such security or securities, seize and surrender such person or persons, charged as aforesaid, to the sheriff of the county wherein the recognizance shall be taken ; and it shall be the duty of such sheriff on such surrender, and the delivery to him of a certified copy of the recognizance by which such security or securities are bound, to take such person or persons, so charged as aforesaid, into custody, and by writing acknowledge such surrender, and thereupon the security or securities shall be discharged from any such recognizance, upon payment of all costs occasioned thereby."

This law must be deemed to be within the purview of the recognizance, as much as if it were incorporated therein.

What, then, is the obligation which the security takes upon himself ? It is, that in case the recognizance is forfeited, he will either pay the amount thereof, or surrender up the principal before judgment is entered upon the *scire facias* to show cause. The surrender of the principal within the time thus prescribed, is a matter of right, and the surety could clearly plead it in bar of proceedings upon the *scire facias*. Beers *v.* Houghton, 9 Pet. 330 ; Champion *v.* Noyes, 2 Mass., 480.

Such being the right of the security, it only remains to inquire, whether when by the act of God the principal is taken out of the custody of his bail, so as to prevent his being surrendered, it is equivalent to a surrender.

It is said in Co. Lit., 206, *a* , "If a man be bound by recognizance or bond with condition that he shall appear the next term in such a court, and before the day the conusee or obligor dieth, the recognizance or obligation is saved." The reason given is that "the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken till there be a default

in the obligor ; and therefore in all cases where a condition of a bond, recognizance, &c., is possible at the time of the making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved. "

Under our law the obligation of the security may be regarded as executory, until the rendition of judgmeut against him upon the *scire facias*. He has till then to surrender the principal, but if the principal dies before that time and before surrender, that which it was possible for him to have performed in discharge of his obligation, is made impossible by the act of God. The forfeiture of the bond does not absolutely fix the liability of the security. He still has the right to a discharge upon the surrender of the principal, aud ought not to be prejudiced by his death before his liability is absolutely fixed. At the common law, the bail in civil suits were said to be fixed, if the principal died after the return of *non est inventus* upon the writ of *capias ad satisfaciendum* issued against him, although before the time indulged by the rules of Court for his surrender had elapsed. If, however, the principal obtained a certificate in bankruptcy between the return of the writ and the time allowed for his surrender, the surety was entitled to his discharge.

In several of the States, under statutes authorizing a surrender of the principal in discharge of the bail at any time before judgment on *scire facias* against them, a similar distinction has been drawn as to the effect of the death of the principal and his discharge by operation of law. Champion *v.* Noyes, 2 Mass., 480 ; Olcott *v.* Lilly, 4 John., 407 ; Hamilton *v.* Dunklee, 1 N. H., 172.

In other States the Courts have recognized no such distinction, but have held that the death of the principal at any time before the expiration of the period allowed by law for his surrender, could be pleaded by the securities in their discharge. In the case of The Bank of Mount Pleasant *v.* Pollock, 1 Ohio, 27, it was held that the death of the principal could not prejudice the right of his bail, who had till the return of the *scire facias* to make the surrender. The Court say in that case : " the bail do not undertake for the life of the principal, but for his surrender if alive. They are discharged by his death. The limitation of the English rule is not adopted by the legislature, and the Court have no authority to insert it by interpolation. " So in Georgia,

bail may surrender their principal in discharge of their liability, at any time before final judgment against them, but not afterwards; and it is held, that the death of the principal before such judgment, discharges bail. Griffin *v.* Moore, 2 Kelly, 321. In this state it is expressly declared by statute, that "in all actions against bail, it shall be lawful for the bail to plead in bar of such actions, the death of the principal before the return day of the process against the bail." R. S. ch. 14, §10.

This statute, however, has no application to proceedings against bail upon a recognizance in a criminal case. The only question therefore is, whether in the absence of any statute expressly authorizing it, the bail can plead in discharge of their obligation the death of the principal, when it occurs before the time for his surrender has expired.

The authorities all agree, that the discharge of the defendant by operation of law, would be a good defence for the bail in such a case, but some of them hold that his death would not. The reason for this distinction is not very obvious. Particularly when the person only of the debtor is discharged under an insolvent law, as was the case in 9 Peters, 330, before referred to, where it was expressly held that the bail could plead such discharge in bar of proceedings against them. It can make but little difference to the bail whether the principal is taken from his custody by operation of law or by the act of God. In either event he is beyond his control. Whatever might be the rule in proceedings upon bail bonds given in civil suits in the absence of any express statute upon the subject, we think it clear, that no such distinction should exist as to the liability of bail in a criminal case.

The case of The People *v.* Manning, 8 Cowen, 297, was analogous in principle to the present. There the action was against the bail upon a recognizance of the sheriff to appear and answer for a contempt, and it was contended in that case, as in this, that the recognizance was analogous to that of bail in a civil suit, where the death of the principal after the bail are fixed, cannot be pleaded. The Court, however, held that the cases were not analogous. That the bail were not fixed by the failure of the sheriff to appear, and that his bail could plead his subsequent death in bar of a suit against them.

The bail in a civil suit undertake, that the defendant shall pay

or surrender his body in execution, or that they will pay for him, while in a criminal case, the undertaking is simply that the accused will appear and answer. The accused may never be convicted of the offence, or if convicted he is discharged from human punishment quite as effectually by death, as he could possibly be of his debts by a certificate of bankruptcy. The liability of the principal undoubtedly became fixed by the forfeiture of his recognizance, but the statute gives his security further time within which to discharge themselves, and of the benefit of this provision they ought not to be deprived by the death of the principal. (*a*)

The demurrer to the plea of the security was therefore improperly sustained, and for that reason the judgment is reversed and the cause remanded.

Judgment reversed.

THE GOVERNOR OF THE STATE OF ILLINOIS, for the use, &c., Pltff in Error, *v.* EDWARD H. RIDGWAY, et al., Defts in Error.

ERROR TO JEFFERSON.

If a declaration contains one good count, a demurrer to the whole declaration will be overruled, although some of the counts are defective.

A general assignment of a breach of covenant which is sufficient to apprise the defendant on what account he is sued, is admitted.

A breach which seeks to make a party liable for the failure of his principal, acting as clerk, to account for and pay over fines without alleging that the fines were ever paid to or received by the clerk, is insufficient.

A party is not responsible upon his official bond, for failing to do what the law did not require.

The sureties of any officer upon his official bond, conditioned for the faithful performance of the duties of an office, are liable for the performance of all duties imposed upon him, which come within the scope of his office, whether those were required by laws enacted prior or subsequent to the execution of the bond.

The sureties of a clerk of the Circuit Court are liable for the failure of their principal to collect and pay into the county treasury all jury and docket fees, which by the use of ordinary diligence could have been collected.

The presumption is, that when a docket fee has been taxed, that it was legally done.

This was an action of debt, upon the official bond of a clerk

(*a*) Mix *vs.* People, 26 Ill. R. 480; Brown *vs.* People, 26 Ill. R. 32; Shook *vs.* People, 39 Ill. R. 444.

of the Circuit Court brought against himself and his sureties, in the Jefferson Circuit Court, which was dismissed upon a general demurrer, heard before Denning, Judge, at the August term, 1849, of the Jefferson Circuit Court. The facts of the case necessary to a full understanding of the opinion are stated in it.

S. Breese and L. Casey, for Pltffs in Error.

W. B. Scates and R. Wingate, for Defts in Error.

Trumbull, J. This was an action of debt against Ridgway and his sureties, as clerk of the Circuit Court of Jefferson County, on his official bond.

The condition of the bond is, that the clerk shall "well and truly do and perform all the duties required to be performed by him in all things faithfully as clerk, &c."

The declaration contains two counts, and under the second, a number of distinct breaches are assigned. The Circuit Court sustained a demurrer to the whole declaration, and that decision is assigned for error.

If a declaration contains one good count, a demurrer to the same will be overruled, although there may be other counts which are defective. That the first count was good we entertain no doubt. It is objected on account of the generality of the breach, which is, that the said Ridgway, while clerk, received the sum of seven hundred dollars as docket fees, jury fees and fines in the several cases determined in the Circuit Court of Jefferson County, while he was clerk thereof, and did not pay over and account for the same.

These allegations were amply sufficient to apprise the defendants on what account they were sued, and it was wholly unnecessary to set forth the names of the parties and the particular cases in which the money was received. This general assignment is sufficient, and is admitted to avoid a cumbersome prolixity upon the record. Hughes *v*. Smith, 5 John., 168.

As this disposes of the case, it would be unnecessary to notice the question involved in the assignment of breaches under the second count, but for the fact, that the case will have to be remanded and upon the trial those questions will necessarily arise and have to be determined. It becomes necessary, there-

fore, to settle them now. These breaches set forth the cases in which docket and jury fees were taxed, and fines imposed, during the time that Ridgway was clerk, and allege that he failed and neglected to collect and pay over the docket and jury fees into the county treasury, or to account for and pay over the fines to the county commissioners' court or the county treasury. None of these breaches allege that the fees or fines were ever paid to the clerk or came into his hands. As it respects the fines imposed by the circuit court, there is no statute making it the duty of the clerk of that court to account for and pay them over, at all events, it is not his duty unless they are paid to him; of which there is no allegation in the breaches under the consideration. Section 192, chap. 30, R. S., requires the clerk at the end of each term to issue execution for every fine which may have been imposed by the court during the term, and which remains unpaid; and section 171 of the same chapter declares that the fines, when collected, shall be paid into the county treasury, but by whom is not specified. In the absence of any statutory provision directing who shall pay over the money, it becomes the duty of the officer who collects or receives the fine to pay it into the county treasury, or account for and pay it over to the County Commissioners' Court, as required by section 30, chap. 27, R.S. It follows that the breaches which seek to make the defendants liable for the failure of the clerk to account for and pay over fines, without alleging that they were ever paid to or received by him, are insufficient.

In determining as to the liability of the defendants for the failure of the clerk to collect and pay over the docket and jury fees, it will be necessary to look at the laws upon those subjects, in force at the time the bond was executed, and during the time that the declaration charges such failure. The bond bears date November 29th, 1841, and the statute at that time required the docket and jury fees to be paid to the clerk, and that he should pay them over to the treasurer of the county: acts '35–'38. By virtue of other statutes then in force, the clerk was authorized to issue process for the collection of these and other fees, and on request of any officer interested he was required to issue such process: Revised Laws of 1833, p. 298, sec. 8. It was also made the clerk's duty by section 14 of the same act to issue fee bills in all cases of judgments upon which execution

should issue, whether requested or not. This continued to be the law till September 10th, 1845, when sec. 19, chap. 56, of the Revised Statutes went into force, making it the duty of the clerk to collect and pay into the county treasury the docket and jury fee. Till this act became a law the clerk was not required to collect those fees, and it is clear that he is not responsible upon his official bond for failing to do what the law did not require.

Several of the breaches assigned under the second count are however, for failing to collect and pay over these fees, since it became his special duty to make the collection, and the question arises, whether he and his sureties are liable upon his official bond for a failure to comply with a duty imposed upon him by a law passed subsequently to the date of the bond. This is an important question. It is a well settled principle that the contracts of sureties are to be construed strictly, and that their liabilities are not to be extended by implication, beyond the terms of the obligation they have entered into. If the collection of the docket and jury fees was an entire new duty, not usually appertaining to the office of clerk, which had been imposed upon him subsequent to the date of the bond, and having no connection with his previous duties, there could be no question that his sureties would not be liable for his failure to perform it. Reynolds *v.* Hall, 1 Scam., 35 ; The People *v.* Moon, 3 Scam., 123.

But such was not the character of the new duty imposed upon the clerk in this instance. The clerk had previously been authorized to collect, and required to receive the docket and jury fees and pay them over to the county treasurer. These sureties undertook that he should faithfully perform all the duties required to be performed by him as clerk ; that is, they became responsible for the faithful discharge of all duties properly appertaining to the office, whether those duties were prescribed by law at the time they signed the bond, or should afterwards be imposed upon him.

There was no implied obligation on the part of the State, at the time the bond was entered into, that the laws prescribing the duties of the clerk of the Circuit Court should remain unchanged during his continuance in office which at that time was for an indefinite period, often extending to life. On the contrary,

the sureties, in view of the frequent legislation required, by the ever changing circumstances of the country, must have anticipated that the duties of clerks would be liable to be modified and changed, from time to time, as the public interests might require. They must have entered into the bond with this understanding, and by the very terms of the obligation they bound themselves to the faithful performance, by their principal, of all the duties required to be performed by him in the capacity in which they went his security. The requirement of the law, that the clerk should collect that which was before to be paid to him, and which he was before authorized to collect, was not the imposition of such a new duty, disconnected with any duty previously enjoined upon him, as to discharge his sureties ; on the contrary, it was the imposition of a duty entirely consistent and in perfect harmony with what was before required.

In the case of the Bank of Mil. and Brandywine *v.* Wollaston, 3 Harring, 90, it was held, that the sureties of the cashier of the bank were not discharged by an increase of the capital stock of the bank subsequent to the date of the bond. The Court say, "The sphere of his duties was the same although the subject matter of his charge might be increased, which is no more than what happens from day to day from fluctuations in the amount of deposits."

It was decided in the case of White *v.* Fox, 22 Maine, 341, which was an action against the clerk of a court and his sureties upon his official bond, that a provision of law enacted subsequent to the date of the bond, by which it was declared in the case of a failure to pay over money for which the clerk was accountable, he should "pay interest thereon at the rate of twenty-five per cent.," did not discharge the sureties. It is said by the Court in that case: "The sureties were bound for the faithful performance of the duties of the office, that is, for the faithful performance of such duties, as the laws for the time being should require to be performed by the clerks of the judicial courts. If the sureties in the official bonds of persons holding offices created by laws, were to be discharged by every change of the laws relating to their duties, it would in these days of ever frequent change be to little purpose to trouble the officers to obtain sureties. There is little of similarity between such cases, and those arising out of offices or trusts, where duties are assigned or regulated by contract."

So in Kentucky it has been held, that a sheriff's bond conditioned that he will execute the duties of his office, extends to duties imposed by statute after the execution of the bond. Bartlett *v.* The Governor, 2 Bibb, 586.

The cases of Portage Co. *v.* Wetmore, 17 Ohio, 330, and of Kindle *v.* The State, 7 Blackf., 586, maintain the same doctrine.

The principle deducible from these cases taken in connection with another class of cases in which it is held, that if the creditor or obligee does any act varying the terms of the obligation the surety is thereby discharged, is this, that the sureties of an officer upon his official bond are liable for the faithful performance of all duties imposed upon such officer, whether by laws enacted previous or subsequent to the execution of the bond which properly belong to and come within the scope of the particular office, and not for those which have no connection with it, and cannot be presumed to have entered into the contemplation of the parties, at the time the bond was executed. (*a*)

It is the opinion of the court, that the defendants are liable for the failure of Ridgway to collect and pay into the county treasury all jury and docket fees, which by the use of ordinary diligence could have been collected, accruing while he was clerk, and subsequent to September 10th, 1845, the time when it was made his duty by law to collect such fees, and that they are not responsible for his failure to collect the jury and docket fees which were taxed prior to that date.

It was objected upon the argument that the declaration should aver that the docket fees claimed were legally taxed, since there are some cases in which no docket fee is allowed by law. This objection is not tenable.

The presumption is when a docket fee has been taxed, that it was legally done. If such was not the fact, it is matter of defence for the defendants to show.

The judgment of the circuit court is reversed, and the cause remanded.

Judgment reversed.

(*a*) People vs. Moon, 3 Scam. R. 126; Compher vs. People, post 295; Todd vs. Cowell 14 Ill. R. 72, ano note; Farrar vs. United States, 5 Pet. U. S. R. 373; Governor, &c. vs. Lagow, 43 Ill. R. 145.

Nelson *v.* Godfrey.

ARBA NELSON, Pltff in Error, *v.* BENJAMIN GODFREY, Deft in Error.

ERROR TO MADISON.

It is a familiar principle, that when a person exercises or enjoys a peculiar privilege productive of benefit to him alone, the law requires that he shall exercise extraordinary care to so use or enjoy such special privilege, that no injury whatever shall result through such use or enjoyment, to other parties.

This was an action of trespass on the case, brought by plaintiff in error against the defendant in error in the Madison Circuit Court. The declaration contained several counts, as follows:

The first count states tha plaintiff was possessed of a warehouse, in the city of Alton, containing goods, and merchandise; that defendant being possessed of a lot near said warehouse, did, on and subsequently to the 1st day of May, 1850, dig a cellar upon said lot, in so careless and negligent a manner, that on the 23d of May, 1850, a large quantity of rain water flowed into the same, and from thence down upon the premises of plaintiff, thereby greatly injuring the said merchandise, &c. The second count differs from the first, in stating that defendant dug a cellar under the sidewalk, on the west side of State street, and near plaintiff's warehonse, in so careless and negligent a manner, that the water flowed into it, and thence upon plaintiff's premises. The third count differs from the previous, in stating that, defendant dug said cellar, in the sidewalk aforesaid, the same being a public highway, in said city—wrongfully and unlawfully; but not alleging any negligence. The fourth count differs from the others, in stating that defendant did stop up, and entirely obstruct the gutter on the west side of State street, near the said warehouse of plaintiff; the said gutter being a public gutter, in which the water was accustomed to run, by means of which stoppage and obstruction, the water ran down upon plaintiff's pre mises and merchandise. The fifth count states that there was, on the west side of State street, aforesaid, and adjoining the sidewalk thereon, the same being a public highway in said city, a public gutter, or passage-way, for draining off the rain water which might flow down said street, and in which it was accustomed to flow, and of right ought to flow; that said gutter was paved on the bottom with stone, and on the side next the side-

walk, there was a line of curb stones placed, to protect and strengthen the sidewalk and gutter; that defendant caused the pavement to be removed from a part of said sidewalk, near plaintiff's warehouse, and did dig a cellar, in and under said sidewalk, and extending to said curbing stones and gutter, in so negligent, improper and careless a manner, that the said curb stones were left without sufficient earth to support them, and were so much injured and weakened thereby, that the rain water, running down the said gutter, forced and washed out said curb stones, at the place where said cellar was dug, and thence flowed into plaintiff's warehouse, &c. The sixth count states, that there was, on the west side of State street, adjoining the sidewalk, the same being a public highway, a gutter for draining off the water; which was paved at the bottom, and a line of curb stones, at the side of the sidewalk, so as to protect and strengthen said sidewalk and gutter; that the defendant caused the pavement to be removed from a part of said walk, near to plaintiff's warehouse, and dug a cellar in and under the sidewalk, and extending to the curb stones and gutter, in so careless, improper, and negligent a manner, that the curb stones were left without sufficient earth to support them, and were so much injured and weakened, that the water forced and washed out said curb stones, where the cellar was dug, and thus flowed down upon the warehouse of plaintiff, &c.

Damage of plaintiff, $1000.

The defendant plead the general issue.

The cause was tried before Underwood, Judge, and a jury, at August term, 1850, and resulted in a verdict for the defendant. The plaintiff moved for a new trial, which was denied. A bill of exceptions was taken, and the cause brought to this Court by writ of error.

Billings & Parson and Davis & Edwards, for Pltff in error.

The maxim, "*sic utere tuo ut alienum non lædas ulterum* is of universal application, and in this case applies with peculiar force. Sutton *v.* Clarke, 1 Com.Law Rep., 500; Hooker *v.* The New Haven & Northampton Company, 14 Conn., 146; Brighton *v.* Carter, 18 J. R. 404; Thurston *v.* Hancock *et al.*, 12 Mass., 220 and note; Runnells *v.* Bullen, 2 N. H., 532; Bush *v.* Brainard, 1

Cowan, 78 ; Law of Easements, by Gale & Whatley, pp. 163—4, 168—9, 175, 180, 184 ; The King *v.* The Com'rs of Sewers, 15 Com. Law Rep., 239 ; Broom's Legal Maxims, 25, Law Library, pp. 90, 118, 122 ; Clark *v.* Lake, 1 Scam., 229. A purchaser of a town lot designated upon a recorded plat, only acquires a title to the land included within the actual limits of the lot as designated. The Board of Trustees *v.* Haven et al., 11 Ills., 554.

W. Martin, J. Gillespie, and E. Keating, for Deft in error.

In actions for damages where the matter is peculiarly proper for the consideration of a jury, their verdict should not be disturbed, unless at first blush it appears to be erroneous, and ought not to be sustained by the evidence presented.

The verdict here should be sustained. The evidence is conflicting as to whether the defendant was chargeable with negligence in using the street, the use of which caused the damage. Although the weight of testimony is, as we think, in favor of defendant.

All the law applicable to the case was given to the jury, in the instructions, hence a new trial should not be allowed.

Caton, J. This action was brought to recover damages resulting to the plaintiff by reason of an excavation for a coal cellar made by the defendant, in the sidewalk in front of his premises on State street, in the city of Alton, through which the water from the gutter of the street passed into the defendant's cellar, and thence through several other cellars, into that of the plaintiff, and did the damage complained of. We think the plaintiff was clearly entitled to recover, and had the jury understood the law as applicable to the case, they could not have avoided rendering a verdict in his favor.

The case shows that in April last, the excavation was made in the sidewalk for the coal cellar, by which all the earth was removed from behind the curbstone which formed that side of the gutter next the sidewalk. The curbstone was at first supported in its place by wooden props and afterwards an eighteen inch wall was built up on the side of the excavation next to the street, so that a part of the curbstone rested upon the edge of the wall, which was extended up from four to eight inches against

the back or lower side of the curbstone, which was two feet in depth. This wall was sufficient to support the curbstone in its place when no extraordinary pressure was applied to it from without. In this condition the work upon the wall was suspended. This wall might have been raised to within four inches of the top of the curbstone in one day, when it would have been ready to have received the flagging for the sidewalk, and when it would have afforded a perfect support to the curbstone, and effectually secured it against accident. The work was allowed to remain in this insecure condition for ten days or more, when an unusually heavy rain occurred in the night time, and the water rushing down the gutter in large quantities, undermined and forced in the curbstone, and even prostrated the wall, which had been erected, partially under and back of it. All the witnesses agree, that if the excavation had not been made, or if the curbstone had been made sufficiently secure, the water would not have got into the cellar and no damage would have resulted.

We are not prepared to admit, that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal cellar under it, but as such a privilege is of great convenience in a city, and may with proper care be exercised with little or no inconvenience to the public, we think that authority to make such cellars may be implied in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work. (*a*) But while we infer a license thus to use a part of the public street, it is on the condition that the person doing so, shall use more than ordinary care and expedition in the prosecution of the work. Neither the public or other individuals can derive any possible advantage from such a use of the sidewalk, but it is solely for the defendant's benefit, and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible. It is a familiar principle, that when one enjoys a privilege as a matter of favor, in consideration that he alone can enjoy the benefit, he is required to use extraordinary care in the exercise of the privilege. A familiar instance of the application of this rule, is the bailment of a horse. If the horse is loaned without compensation, the bailee is bound to take extraordinary care of the horse, but if he pays for the use of the horse, he is not responsible for

(*a*) People vs. City of St. Louis, 5 Gil. R. 371.

his loss if ordinary care is exercised. In this case but for the favor extended to the defendant, the plaintiff would not have sustained this loss. The defendant alone can reap a benefit, and he ought to be responsible for all damages which might have been avoided by special vigilance and care. Here is a palpable case of the want of even ordinary care. When the work of one day would have secured everything from all danger, he suffered the work to remain in an unfinished and insecure condition for nearly two weeks. It is no excuse that he thought it secure, when he must have known that there was a liability, if not a probability of injury from it. A week before the accident occurred, the defendant was admonished of the danger in case of a heavy rain, which he admitted, and promised to provide against it. This he neglected to do ; and upon every principle of law and justice he ought to suffer the loss, rather than have it fall upon an innocent party, who could not derive any possible benefit from the work, and who had no control over it. Before the defendant disturbed the sidewalk at all, he should have had all the material on hand and a sufficient number of workmen to have finished it in the shortest practicable time. Had he done this, private property would not have been endangered, and but little inconvenience would have resulted to the public.

The judgment must be reversed with costs, and the cause remanded for further proceedings.

Judgment reversed.

DARIUS GREENUP, Appellant, *v.* WILLIAM STOKER, Appellee,

APPEAL FROM WASHINGTON.

A sale of a tract of land upon execution will not be set aside, merely because it was sold at a sacrifice, and was not offered in separate parcels; something should be shown to satisfy the Court, that the land sold, was susceptible of advantageous division, and that the sale was injudicious.

In case of a vacancy in the office of sheriff, the coroner may go on and finish the execution of a process, directed to the sheriff.

This bill was filed in the Washington Circuit Court, by Will-

iam Stoker, praying that the sale of certain lands might be set aside as being unlawful and oppressive.

The bill sets forth, that a judgment for costs was rendered against Stoker for the sum of $106.20, upon which execution was issued, and placed in the hands of an under sheriff, who levied on the south east quarter of section 35, town 1 south, range 3 west, which execution was by the under sheriff placed in the hands of the coroner, who proceeded to sell the land to the highest bidder, under the levy made by the under sheriff. The land being 160 acres more or less, was offered in a body, and struck off for the sum of ten dollars, by the under sheriff who made the levy. That the land sold is good timbered land, upon which there is a good rock quarry, and that the land was worth $800.00. That no money passed from the purchaser to the coroner, but that the purchaser applied the bid to fees due him as under sheriff. That he sent ten dollars to his brother, Jacob Stoker, for the purpose of having the land redeemed, hoping that his brother would pay the interest in addition and redeem the land, which he did not do. That complainant was absent in Mexico. That the sheriff who succeeded the sheriff that made the levy, executed a deed for the land, within fifteen months from the date of sale, to wit, in 14 months and 4 days, to a brother of the purchaser. That the father of complainant offered the purchaser of the land $20.00, to obtain a title therefor.

Greenup admits generally the allegations of the bill, says that the purchaser was not under sheriff at the time of the purchase of the land, and that the title of Stoker to the land was distrusted, and that it was only worth about $300.00; that the sheriff resigned and thereupon the coroner was authorized to act.

The cause was heard upon bill, answer and replication, and oral proof, by Underwood, Judge, at October term, 1849, and a decree entered setting aside the sale, &c. The respondent, Greenup, prayed an appeal, and assigns for error, the want of equity in the bill, and that decree should have been for the appellant.

G. Trumbull, for appellant.

G. Koerner, for appellee.

Caton, J. This bill was filed to set aside the sale under

an execution, principally for the reason, that an entire quarter section of land was sold in one tract, instead of being offered in parcels. (*a*) But the bill does not show by circumstances, nor does it even aver, that the tract was susceptible of division, or that it might have been more advantageously sold in separate parcels. It is no doubt true, that it might have been divided; and so might any tract or parcel of land, no matter how small or insignificant it may be. But the law requires something more than this. Some probability of advantage ought to be shown, before we can say that a tract of this size, and situated as this was, cannot be legally sold upon execution, without a division. The court may infer where a large tract is to be sold, or where separate parcels are levied upon, that a sale might be made to better advantage, in smaller quantities or in separate parcels; but we cannot say that the sale of a quarter section of wild land should be set aside, for the sole reason that it was not divided and sold in separate parcels, although it was sold at a great sacrifice. In such a case, very strong proof of the probable advantage of a division into parcels might not be required; but something tangible and reliable should be shown, to induce the opinion, that a sale in smaller quantities would have been more appropriate. If it was susceptible of an advantageous division, that fact could easily have been shown, or at least witnesses might have been found who would have expressed that opinion. Here no man has ventured the opiinon, not even the complainant himself, that there would have been any propriety in offering the quarter section in separate parcels. Although it would ordinarily be advisable, for officers to sell in smaller quantities, yet we are not prepared to say, that an entire quarter section of land, which has been levied upon and designated as one tract, cannot legally be sold without a division. It might require much less evidence to persuade the court that the land was injudiciously offered, where there has been an enormous sacrifice, as in this case, than where the property sold for a fair price. But we are not aware of any case, where mere inadequacy of price, has been held sufficient to set aside a sale, if it was conducted fairly and judiciously.(*b*)

Another objection was taken upon the argument. And that is, that the coroner had no authority to make the sale. But the bill is not framed with a view to obtaining relief upon that ground. The coroner was authorized to act as sheriff, in case

(*a*) Cowen vs. Underwood, 16 Ill. R., 24 and note;
(*b*) Day vs. Graham, 1 Gil. R., 452, and note.

of a vacancy in that office, and there is no averment in the bill that there was a sheriff, nor is it even averred in any way, that the coroner was not authorized to make the sale. Att'y Gen'l *v.* The Mayor of Norwich, 2 Mylne & Craig, 407,(14 Eng. Ch. Reports.)

At any rate, it was insisted, that the coroner could not go on and complete the execution of a process, which had been directed to, and partly executed by the sheriff, before the vacancy occurred. By Chap. 99, Sec. 18, of R. S., it is provided, "In case of a vacancy in the office of sheriff, by death, resignation removal, or otherwise, the coroner shall do and perform all the duties pertaining to the office of sheriff," &c. We think by a fair construction of this statute, the coroner may go on and finish the execution of process directed to the sheriff, the same as a new sheriff might, who succeeds the old one, by an election.

The decree of the Circuit Court must be reversed with costs, and the suit remanded, with leave to the complainant to amend his bill, and for further proceedings.(*a*)

Judgment reversed.

RICHARD S. ADAMS, Pltff in Error, *v.* FREDERICK MILLER *et al.*, Defts in Error.

ERROR TO JOHNSON.

The statute requiring security for costs to be given before commencing penal actions, applies to actions of that character, prosecuted before justices of the peace. Security for costs should not be given, a motion should be made to dismiss before the justice; if refused by the justice, it may be renewed in the Circuit Court; but being of a dilatory character, such an objection must be presented on the first opportunity.

This was an action commenced before a justice of the peace of Johnson county, to recover a penalty for a failure on the part of the defendants in error to discharge their duties as public millers, under the act regulating mills and millers. A judgment was rendered by the justice for a penalty of five dollars, against

(*a*) This case was tried again in the Circuit Court, which conformed to this decision. It was then taken to the Supreme Court, and the second decision of the Circuit Court reversed. Stoker vs. Greenup, 18 Ill. R. 27

the defendants below, by default. The defendant below prayed an appeal to the Circuit Court of that county.

In the Circuit Court, the defendants below appeared, and entered a motion to dismiss the suit, because the plaintiff below had failed to give security for costs, before commencing suit. The plaintiff thereupon moved for leave to file a bond *nunc pro tunc*. The Circuit Court refused the latter motion, and dismissed the suit upon the motion of the defendants. The plaintiff below prosecutes this writ of error, and assigns for error, the decision of the Circuit Court, in refusing to permit him to file security for costs *nunc pro tunc*, and in dismissing the suit.

The cause was tried by Denning, Judge.

J. JACK, for Pltff in error :

Urged that security for costs should only be given in penal actions, before the Circuit and Supreme Court. R. S., p. 126; Allen *v.* Belcher, 3 Gil., 594. That suit could not be dismissed unless it appeared that the plaintiff was a non-resident. That the statute under which the action was brought is *remedial* as well as *penal*. Hyde *v.* Crogan, Doug., 673 ; Wynne *v.* Middleton, 1 Wilson.

R. F. WINGATE, for Defts in error :

This being a penal action, the plaintiff should have filed a bond for costs, at the time of the commencement of the suit before the justice. R. S., p. 126 sec, 1 ; 5 Gil., 559.

The judgment having been rendered by default against the defendants in error, in the justice's court, they had a right to move to dismiss the suit on appeal in the Circuit Court. The defendants could not have waived their right to dismiss in the Circuit Court, since they did not appear before the justice, and the return on the summons before the justice, not being sufficient to give the justice jurisdiction over third persons, which return is in these words and figures : " Served on the defendants on the 9th instant."

TREAT, C. J. Adams brought an action against Miller and others, before a justice of the peace, to recover a penalty of five

dollars, for a violation of the statute respecting mills and millers. Process was served on the defendants, and failing to appear before the justice, judgment was rendered against them for the amount of the penalty claimed and costs. The defendants prosecuted an appeal to the circuit court, where the suit was dismissed, on their motion, because the plaintiff omitted to give security for costs. On the principle of the case of Robertson *v.* The County Commissioners, 5 Gilman, 559, the plaintiff should have given security for costs before the commencement of the action. At the time of the passage of the act of the 10th of January, 1827, which is incorporated into the 26th chapter of the Revised Statutes, justices of the peace had no jurisdiction of this kind of actions. Bowers *v.* Green, 1 Scammon, 42. But the jurisdiction was subsequently conferred on them. R. S., ch. 71, §15. And after it was conferred, the statute requiring security for costs to be given in penal actions, applied to actions of that character prosecuted before justices. If the defendants had raised the objection before the justice, the suit should have been dismissed; but it came too late for the first time in the circuit court. If urged before the justice, and overruled by him, it might have been renewed in the circuit court. Robertson *v.* The County Commissioners, *supra*. The objection is of a dilatory character, and must be insisted on at the earliest opportunity. (*a*) The defendants, by neglecting to make the motion before the justice, waived the right to interpose it in the circuit court.

The circuit court erred in dismissing the suit; and the judgment must be reversed, with costs, and the cause remanded for further proceedings.

Judgment reversed.

BENJAMIN GODFREY, Pltff in Error, *v.* The CITY OF ALTON, Defts in Error.

ERROR TO MADISON.

If the owners of land agree upon a place, and make a survey, and lay off ground for public use, as a street or landing and make sales in reference thereto, it amounts to a dedication of such ground to the public. A map is not essential to the validity of the dedication.

(*a*) Adams vs. Miller, 14 Ill. R. 71

Godfrey *v.* The City of Alton.

The statute of frauds does not apply to the dedication of ground to the public.
A dedication may be made by grant, or written instrument; it may be evidenced by acts and declarations without writing, no particular form being required to establish its validity, it being purely a question of intention.
A dedication may be made by survey and plat alone, without any declaration, either oral or on the plat; when it is evident from the face of the plat that it was intended to set apart certain grounds for the use of the public.
A dedication must be understood and construed, with reference to the objects and purposes for which it was made.
All accessions to a public landing, must necessarily attach to and form a part of it.
When an easement is granted to the public upon the margin of a navigable stream, the right to use and treat it as a landing is undoubted.
If the banks of a navigable river are dedicated, the dedicator has no interest in the bed of the stream which he can reserve, to the prejudice of the public easement over it.
After verdict found upon several pleas, one may be withdrawn, the defendant being entitled to a judgment, if the verdict can be sustained on any one of the pleas An erroneous verdict as to one plea does not vitiate the finding upon the others.

This was an action, trespass *quare clausum fregit*, brought by Godfrey against the City of Alton.

The declaration alleges that defendant broke and entered the close of plaintiff, described as follows: "A certain lot of land lying within the corporate limits of the city of Alton, and situated within Godfrey's and Gilman's addition to the town, now city of Alton; being in front of block number ninety-two, and separated therefrom by a forty foot street, and bounded on the North, by said forty foot street; on the South, by the Mississippi river; on the East, by the lot known as the Ferry lot, at the foot of State street; and on the West, by the land known as the Penitentiary Tract, in said city of Alton."

Damages, three thousand dollars.

1st Plea—Not Guilty.

2nd Plea—That the close was a public highway.

3rd Plea—*Liberum Tenementum.*

4th Plea—Dedication of said close, by Winthrop S. Gilman, to the public street.

5th Plea—Dedication of said close, by Winthrop S. Gilman and Benjamin Godfrey.

Issues to the country upon all the pleas.

Upon the trial the defendant admitted the commission of the acts, upon the premises, as set forth in the declaration; and it was proven that the damages were at least twenty-five dollars.

The plaintiff proved title to the fractional quarter section extending to the river, upon which the *locus in quo* is situated.

Abraham Breath, witness for plaintiff, testified, that Godfrey

and Gilman occupied from 1832 to 1841 the warehouses situated upon lots 1 and 2, in block 92, and in front of the *locus in quo*; used the land in front of said block—it being the *locus in quo*—for receiving and shipping goods from and on board steamboats, in common with others. That for the last two years past, Capt. Lamothe had wood upon the *locus in quo*, in several places; that he occupied the same by consent of the plaintiff.

Pork-packers used the same for shipping; Lamothe had his wood on the premises for nearly two years; the pork-packers had their barrels thereon from four to six weeks at a time; that Lamothe held the premises under the plaintiff; that the premises were used as a public landing, and by all persons; that the space between block 92 and the river, has been covered over with stone hauled by the State of Illinois.

The defendant produced George Smith, as a witness, who testified, that he had known the property in dispute for the last 30 years. That in 1832, most, if not all the land in dispute was in the Mississippi river. There was then between 40 and 50 feet of land between the warehouse on block 92 and the river, at low stage of water; at high stages of water it might have come to the warehouse. That in 1832, and since the witness had known the *locus in quo*, it had been used by the public as a steamboat landing, passage for drays, and other purposes, without interruption, until plaintiff commenced building. Buildings were commenced upon other lots in block 92, in 1835 and '36. That the occupation by the plaintiff, of the premises in question, by a building, would diminish the value of the opposite property in block 92. The landing in front of block 92 has been extended outwards, towards the river, by natural and artificial means, by the State and City.

At the date of the survey testified to by Spaulding, the title was shown to have been in Godfrey & Gilman, who had sold portions of block 92.

Lewis J. Clawson, testified, that he had known the property in dispute, since 1831; that it has continued to be a public highway. In the year 1831 the space between block 92 and the river, was from 30 to 50 feet. The first building on the west end of the block was erected in 1831; a building adjoining was put up in 1833, and a third in 1835; all the other buildings upon the block were erected in 1835 and 1836. That at this time, 8

lots of the 12 composing the block, are built upon. The levee in front of block 92, has been filled out into the river 40 or 50 feet, and raised 8 or 9 feet; part of which was done by the State of Illinois and part by the city of Alton; that it is covered with stones—a kind of rough McAdamizing; that it has been used for a street and landing. In 1832 all the ground in front of block 92 was called Front street.

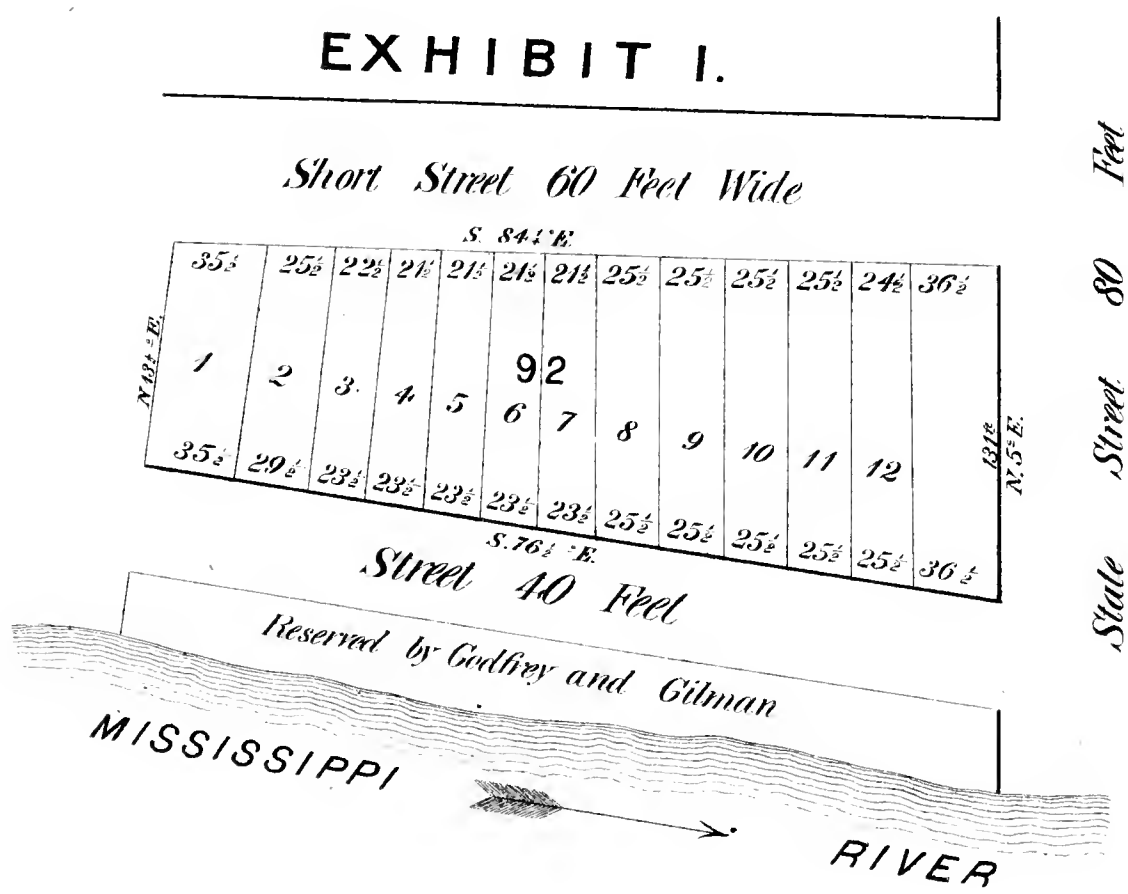
In the year 1832 the land in front of block 92 was not over 35 feet wide; it is now 60 or 80 feet wide—about 40 feet has been filled out. Godfrey & Gilman occupied a building on block 92, from 1831 to 1841; they were forwarding, commission, and selling merchants. They filled out a part of this landing in front of their store, for a steamboat landing; they threw out the spawls from their building in 1833, and that was the most convenient place to put them; and they used the same until they quit business in 1841, and so did others.

Samuel Avis, testified, that he had been acquainted with the *locus in quo* for 19 years, and during all that time it has been occupied as public property, for road and hauling; block 92 near the river, when witness first knew it, except near the west end, a rock run out into deep water; this rock is now under the landing. In the year 1837, a line 40 feet south of block 92, and running parallel thereto, would have been in the river. In the year 1837, the buildings were 30 feet from the river; they are now 70 feet therefrom; in 1832, they were 20, perhaps 30, feet distant. Godfrey & Gilman filled out a part of this land when building; they were merchants from 1832 until 1841, when they quit business; they used the landing in common with others; other persons building between Godfrey & Gilman, filled in, in front of their lots; a 66 foot road would in 1837 have taken 20 or 30 feet from the buildings.

William Hayden, testified, that he had known the premises in dispute, 18 years, occupied and used by every body as a public landing. When Lamothe was ordered off by the defendant, he asked permission of the city to continue his wood thereon. In the years 1836 and 1837, a line 40 feet south of block 92, would have been in the river; and at an ordinary stage of water, boats would have landed in the 40 foot street. Godfrey & Gilman built a bulk-head of stone, on a part of the premises.

The tax books of the county of Madison, for the years 1844,

EXHIBIT I.


Short Street 60 Feet Wide
S. 84½ E.
N 12½ E.
85½
25½
22½
21½
21½
21½
21½
25½
25½
25½
25½
24½
36½
1
2
3
4
5
92
6
7
8
9
10
11
12
35½
29½
23½
23½
23½
23½
23½
25½
25½
25½
25½
25½
36½
S. 76½ E.
82ft
N. 5½ E.
Street 40 Feet
Reserved by Godfrey and Gilman
MISSISSIPPI
RIVER
State Street 80 Feet

'45, '46, '47, and '48, were produced in evidence to show that said land had not been listed by plaintiff when called upon, as above, for a list of his property.

D. A. Spaulding, testified, that he had been acquainted with the premises for 30 years. In 1832, Alton was extended and laid off by witness, at the request of the owners, Russell, Gilman Godfrey, and Hayden. Russell came after witness, and he, and the others in interest, agreed on the plan, and witness made the survey. Front street was located as far up as the Penitentiary. The front line of Godfrey & Gilman's warehouse, was to be on the north line of Front street ; and we measured out to see how far it was to low water. Front street was to extend into the river. It was laid out for a public highway and landing. The matter was talked over. It was anticipated and understood, that Front street was to be extended out into the river. Gilman made the block 92 as near to the river as he could. Witness thought he was very anxious to crowd out into the river, and make the purchasers of lots fill up. Opposite to block 92 and between that block and the river, the ground has been used as a public landing ever since I have known it. The space between the north line of Front street and the river was in some places 20, and in some 30 feet. It would not average more than 25 feet. A street along there 66 feet wide from the river, in 1833, would extend some 40 feet into the lots, as they now exist. In the fall of 1832, the county road on this ground, a little time after this survey, was to run where the points were fixed, on the corner of lot 1, in block 92, and extend 50 feet to the river.

Joseph Burnap, testified, that he made the plot of Godfrey and Gilman's addition to the town of Alton, in the fall of 1836, embracing block 92, and at the time he made the survey, most of the buildings now on block 92 were erected. (See plat of block 92.)

L. J. Clawson, testified, that the City put on rock on premises, but he did not know who paid for it.

Verdict for the defendant upon the 1st, 2d, 3d, 4th, and 5th pleas. Thereupon defendant waived a verdict upon the 3d pea of *liberum tenementum*, and leave was given to the defendant by the Court to withdraw said plea. Plaintiff moved urt for a new trial.

The cause was heard before Underwood, Judge, and a jury

Godfrey *v.* The City of Alton.

at August term, 1850, when a judgment was rendered for the defendant. Godfrey brings the case to this Court by writ of error.

Billings & Parsons and William Martin, for Pltff in error.

1. The Court had no power to order a waiver of the verdict on the issue of *liberum tenementum*. 10 Bacon's Abridgment, Title Verdict, 362 ; 1 H. Blackstone, 79 ; 10 N. Hampshire, 304; 19 Wend., 628.

2. The possession or enjoyment on which a prescriptive title is founded, must be open, peaceable, continued, and unequivocal ; it must also be adverse, of a nature to indicate that it was claimed as a right, and not from indulgence, or of any compact short of a grant. 2 Greenleaf's Cruise, 222 and note 1 ; 14 Mass., 49 ; 2 McCord, 445 ; 5 Condsd. Rep., 243 and note ; 10 Mass., 151, 407 ; 4 Pick., 222 ; 9 Pick., 251 ; 5 Pick., 131 ; 11 Pick., 217 ; Angel on Limitations, 442.

3. A dedication in specific terms, on the recorded plat of a town, is not to be affected by parol proof of the intention of the donors. Brown *v.* Manning, 6 Ohio, 129 ; Cincinnati *v* White, 6 Peters, 441 ; Dummer *v.* The Board of Selectmen, &c., 1 Spencer, 86 ; 8 B. Munroe, 252.

It is contended in this case that the evidence was not sufficient to show that Godfrey & Gilman *intend* to dedicate the land in controversy to the public. There are two modes of establishing by evidence the fact of dedication ; one by length of public use, the other by some *unequivocal* act —showing that the owner *intended* to appropriate the land to public use. 6 Peters, 504 ; 5 Taunton, 127 ; 7 Com. Law Rep., 158 ; 11 Metcalf, 241 ; 24 Pick., 71, 80 ; 3 Metcalf, 239.

Where the width of a street, marked by right lines, is given in a town plat, surplus land, between the street and the low water mark of a river, is not thereby dedicated to the use of the town. McLaughlin *v.* Stevens, 18 Ohio, 94 ; Barclay et al. *v.* Howell's Lessee, 6 Peters, 498 ; Conner *v.* The President and Trustees of New Albany, 1 Blackf., 43.

D. J. Baker, J. Gillespie, and E. Keating, for Deft in error.

The verdict was regular, and the Court properly allowed the

defendant towaive the verdict on the plea of *liberum tenementum*. 10 Bacon's Ab., 328, 349, 330; Sutton *v.* Dana, 1 Metcalb, 382; French *v.* Hanchett, 12 Pick., 15; 19 Pick., 25; Jones *v.* Kennedy, 11 Pick., 125.

CATON, J. We shall rest our decision, upon the single claim of declaration, arising from the survey made by Spaulding without investigating the various other claims insisted upon in behalf of the City.

Spaulding swears, that in 1852, Alton was intended and laid off by him at the request of the several owners, who agreed upon the plan, and that he made the survey. He surveyed block 92, and Front street. He says, "Front street was to extend into the river. It was laid out as a public highway, and landing. The matter was talked over." Front street extended from block ninety-two, down to and into the river. No pretence seems to have been made at that time, nor until several years after, of any intention by Godfrey and Gilman to reserve to themselves, any thing south of Front street. They went on and made sales in block ninety-two, in reference to, and recognizing that street, and improvements were also made upon that block. This clearly amounted to a dedication of the space, thus made common for a street and public landing, according to the plan agreed upon among the proprietors, and the survey of Spaulding. The street and landing were laid off, and the owners of the soil proclaimed the purposes to which it should be devoted. All the other proprietors of the town, with whom the plan was agreed upon, as well as those who purchased with reference to that plan and survey, paid a consideration for the dedication, and had a direct interest in insisting upon its perpetuity. It is true, that it does not appear that any map was made of this survey, but that was not essential to the validity of the declaration. The statute of frauds does not apply to the dedication of ground to the public. Such a dedication may be made by grant, or other written instrument, or it may be evidenced by acts and declarations, without writing. No particular form is required to the validity of a dedication. It is purely a question of intention. (*a*) A dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, when it is evident from the face of the plat, that it was the intenton of the proprietor, to set apart cer-

(*a*) Green vs. Oaken, 17 Ill. R. 252, and notes; Rees vs. Chicago, 38 Ill. R. 338, and cases cited

tain grounds for the use of the public. An examination of the cases referred to on the argument, will show, that dedications have been established in every conceivable way, by which the intention of the dedicator could be evinced. And great importance is frequently attached to the fact, that investments improvements have been made, either by individuals or the public, in reference to a dedication, and with the knowledge of the proprietor.

A dedication must be understood and construed, with reference to the objects and purposes for which it was made. This is peculiarly the case with a public landing upon a navigable water course. That is necessarily *inseparable* from the margin of the water, however that may fluctuate. Without this, its enjoyment would be precarious, and often destroyed. All accretions to a public landing, must necessarily attach to and form a part of it, otherwise we should have the novel spectacle, of a public landing, separated from the water, as is in fact attempted in this case. Such a proposition does not require refutation.

The only question that arises here is, was it the intention to make this a public landing? That was the declared intention of the owners of the land, and their agreement with the other proprietors. But in the absence of any such expression, I should be equally clear, from the manner in which the ground was laid off, that it was for a public landing, as well as for a street. On the north side, it was bounded by block ninety-two, and on the south by the river, varying in width according to the meanderings of the stream. This stream was a public highway, in contract with this, another easement is granted and the very location of it, shows that it was designed for the purpose of lading and unlading freight aud landing passengers from the water communication, as much as the laying out of an interior street, would show that it was designed for the use of travelers by land. The street and landing thus laid off, was subsequently—as it had been previously—used and enjoyed by the public, and was improved and extended into the river, both by natural accretions, and by artificial means, and no pretence of any claim appears to have been set up on the part of any one, adverse to the full enjoyment of the public landing, until 1836, when the addition of Godfrey & Gilman to the town of Alton was platted by Burnap. By the marks upon this plat, we see for the first time, a

claim set up to a portion of the bed of the stream, in front of this landing. The landing has since been filled up and extended into the river, so that it now covers the place designated on that plat as claimed by the proprietors of that addition. For this claim we can see no pretence whatever. As we have already seen, long previous to this time, the entire space between block ninety-two and the river, had been dedicated for a street and for a public landing, and to separate such a dedication from the river would destroy it.

But even if there had not been any previous dedication, we think the same construction should be given to the plat made in 1836. At that time, Front street, as laid out on that plat, covered the margin of the river and extended twenty or thirty feet into the stream, and it was beyond this, that a claim was indicated, of the premises in question.

When an easement is granted to the public, upon the margin of a navigable stream, the right to use and treat it as a landing is undoubted. Having dedicated the banks of the river, this united the two easements, each of which was essential to the full enjoyment of the other; they had no interest in the bed of the stream which they could reserve, to the prejudice of the enjoyment of the public easement over it.

Exceptions were taken to the instructions. These are very numerous and some of them very long, and not very perspicuous, and may not have tended much to the enlightenment of the jury. It would be tedious and unprofitable to review them separately. Although some verbal alteration might well have been made to one or two of them, still on the whole, we think the law was not improperly laid down to the jury.

A verdict was returned for the defendant upon all the pleas, after which the plea of *liberum tenementum* was allowed to be withdrawn, and this is assigned for error. In this there was nothing improper, nor was there anything prejudicial to the rights of the plaintiff. That plea may not have been sustained by the evidence, yet the defendant was entitled to a judgment, if the verdict upon any one of the pleas could be sustained. Because the verdict upon one plea was erroneous, it would not vitiate the finding upon the others.

The judgment of the Circuit Court is affirmed, with costs.

Judgment affirmed.

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THE CITY OF ALTON, Pltff in Error, *v.* THE ILLINOIS TRANSPORTATION COMPANY, Defts in Error.

ERROR TO MADISON.

A construction which requires that an entire clause of a deed should be rejected will not be adopted, except from unavoidable necessity.

When a deed refers to a plat, which has upon its face that to which the expressions of the deed can apply, the court will connect the two, rather than reject the words of the deed.

If a deed will admit of two constructions, it should be construed against the grantor.

Public rights are not barred by our statute of limitations, which requires certain real actions to be brought within seven years after possession taken by a defendant.

When lots are dedicated to the public for particular purposes they may be improved and controlled for such purposes, but they cannot be aliened or sold, nor has a city the exclusive use thereof.

This is an action of ejectment to recover possession of an easement in a lot in the city of Alton, brought by the city to try the right of the public to the same as a public highway, landing or common, dedicated to the public use,—described as that lot which is embraced within the following boundaries, to wit: Beginning at a point on the South side of Front street, in said city, 120 feet West of the West side of Easton street, in said city; thence on the said South line of Front street, Westwardly, 120 feet; thence Southwardly, along the East line of Alby street, extended to the Mississippi river; thence down the line of said river, 120 feet; thence Northwardly, to the place of beginning." The defendants filed the plea of Not Guilty, &c.; and thereupon, a statement of facts in the case, agreed upon by the parties, was filed, and the same was submitted to the Court for its decision. The facts thus agreed upon, are substantially as follows, to wit:

1st. That fr. Secs. 11 and 14, T. 5 N., R. 10 W., were patented to Rufus Easton, on the 16th of June, 1850.

2d. That on the 1st of June, 1818, Rufus Easton, claiming to be sole owner of said land situated in Madison county, Illinois, made a plat of the same by the name of "The town of Alton," which is made a part of the record, as Exhibit (A); which plat, together with the memorandums of the same, was duly recorded on the 4th day of April, 1818, in the Recorder's office for said county.

3d. That subsequent to the recording of the plat, William B. Whitesides, James Reynolds, and others, claiming an interest in these lands, commenced a suit against Easton, concerning the same; and it was compromised by the parties, by Easton's executing and delivering to said Whitesides and Reynolds, February 25, 1821, a deed of conveyance, which was duly recorded on the 11th of December, 1821, for certain lands and lots in and at said Alton, and in said fractional section 14.

By said deed, Easton sold and conveyed to Reynolds and Whitesides, in fee, 80 acres, adjoining said town, and in said Sec. 14, expressly referring to said plat of the town of Alton, theretofore laid out by him, and recorded as aforesaid; also 107 lots laid down on said plat and embraced in the limits of said town, among which lots are Lots 3, 4 and 5, in Block 4; Lots 5 and 6, in Block 6; Lots 3, 5 and 14, in Block 7; Lots 1, 3 and 13, in Block 8; Lots 3, 6 and 7, in Block 13, &c., and "all things of right thereto appertaining." In this deed, Easton reserves to himself, his heirs and assigns, the exclusive right of ferrying across the Mississippi river to and from said lands; and therein said Easton expressly "covenants and agrees, that all the Lots for public, scholastic and religious purposes, for a public landing, or as reservations of common, East of the Fountain creek, as designated on the plat aforesaid of said town; and, particularly, the land that lies between Front street and the river Mississippi as designated in said plat, fronting on the river between the said Fountain creek and Henry street, shall be and forever remain a public landing place and shall be and remain for the use of the public as desnigated on said plat, excepting and reserving to said Rufus Easton and his heirs, forever, the exclusive right of a ferry or ferries, on and from said land so made common." Said deed contains covenants of warranty against the title and claims of Easton or his heirs, and others claiming under him or them—and states, that "It is explicitly understood and expreesly agreed, by and between the parties aforesaid; that they had conflicting claims or titles to said lands and lots, and that for the purpose of compromise, they, the said parties, agreed to mutually relinquish one to the other, the part allowed to him or them, in the compromise; and that said deed is the relinquishment of the said Easton, on his part, to the said Whitesides and Reynolds, their heirs and assigns, to the whole of the lands thereby conveyed," &c.

And as part of said compromise, by said Whitesides and Reynolds, and their respective wives, on the said 26th day of February, 1821, executing and delivering to said Easton, their joint deed of conveyance of the date last named, wherein, in consideration of $1, and also " For and in consideration that the said Rufus Easton had, by his deed of that date, conveyed and released and relinquished, to the said Whitesides and Reynolds, certain lots and parcels of land in that" (Easton's) deed mentioned and described, they sold and conveyed, &c., to said Easton, and to his heirs and assigns, forever, the following described lands, in said county of Madison, to wit: describing that part of fr. Sec. 14, lying East of Henry street, and part of the S. E. qr of Sec. 11, containing 200 acres, more or less; and the whole of S. W. qr of Sec.12; all in town 5 N., R. 10 W., containing 100 acres, with the appurtenances, &c., with " the license and right of ferrying to and from the same, obtained by said Whitesides and Reynolds and one Robert Sinclair, or that of all or either of them," with covenants of warranty that they had not granted away the land thus conveyed; providing, however, and excepting from the operation of said deed of them, all or any of the lots in the town of Alton, mentioned and contained in the deed above referred to from said Easton to said Reynolds and Whitesides, specifying them as they are specified and described in said Easton's deed to them, according to the plot of said town of Alton, made by said Easton, and recorded as aforesaid; which plot as recorded, the said Whitesides and Reynolds for themselves, their heirs and assigns, do thereby ratify and confirm in every particular; but said presents, it was expressly declared therein and thereby, were " not to be construed to convey to, or vest in, said Easton any exclusive interest in any of the streets, lots for public or scholastic or religious purposes, for a public landing, or any reservations of commons to the East of Fountain creek, in said town of Alton, as designated on the plat of said town; but that all the ground from the public landing inclusive,as designated on said plat, to Henry street,and that lies between Front street and the river Mississippi,should forever be and remain a public landing for all persons whatsoever, expect for a ferry landing; which right of a ferry landing was to be and remain in the said Rufus Easton, his heirs and assigns exclusively, forever."

In said deed it is also recited that, at some time theretofore,

tsaid Easton had, by a power of attorney, authorized Lewis Beck o sell all the lots of ground in the deed enumerated, as also ome others mentioned and situate in said town of Alton, as plotted by said Easton and recorded as aforesaid; and said Reynolds and Whitesides covenant to confirm and ratify the sales then made, or which may be made by the 1st day of April next following, by said Beck, under said authority. Reynolds and Whitesides also covenant against all claims or titles derived through or under them or either of them. The deed last named has also this clause, to wit: "And it is further explicitly understood and expressly agreed by and between the parties, that they had conflicting claims or titles to the land and lots therein expressed; and that for the purpose of compromise, the parties had agreed to mutually relinquish to the other of them the par- allowed to him in the compromise, and that the said deed is thet relinquishment, on the part of said Whitesides and Reynolds, to the said Easton, to the whole of the lands thereby conveyed by said Reynolds and Whitesides to said Easton;" provided, however, they were to be subject to the damages provided for in said deed in case they did not purchase back whatever of the lots and land therein mentioned and which they might have sold, &c., as before duly recorded April 10, 1821. Subjoined to the last mentioned deed is the written assent under seal of Nathaniel Pope, John Reynolds, Joseph Conway, John D. Cook, and Ninian Edwards, and their surrender to Easton, "all claims and pretensions which they might or could assert to the premises" in said deed "granted and conveyed."

That the grantors and grantees of said deeds together held all and every claim or title to said lands, except the rights thereto vested in the public by the making and recording of the plat of the town of Alton within mentioned, and expressly recognized by the parties to said deeds, whatever they may be; but the defendants contend that the land in plaintiff's declaration described is not so recognized, while the plaintiffs contend it *is* so recognized, and that by the execution and recording of the same plat and deed, a perfect title to the lands respectively therein described, was vested in the several grantees therein mentioned.

4th. That on the 20th of Sept., 1821, the bank of Saint Louis recovered judgment against said Easton for $1,149 debt, and $9,192 damages and costs. That on the same day, Wm. Russell

obtained a judgment against said Easton for $957.18 debt, and $26.51 damages and costs, both in the Madison Circuit Court, and executions were issued thereon, and the lands first within described, with other lands, were levied on; and that by virtue of the two executions thus issued—one on each of said judgments—Wm. B. Whitesides, then Sheriff of said county, advertised on the 8th of February, 1822, that he should expose to public sale, at, &c., on the 2d of March then next, all the right, title, and interest of said Easton to the following property, to wit: fr. Secs. 14, 11, 12, and 13, T. 5, N., R. 10; also fr. Sec. 18, T. 5, R. 9, W.; on which lands and a horse ferry boat at Fountain Ferry on the Mississippi, the Sheriff certifies that he levied on the 4th of January, 1822; that the lands were appraised as therein stated, and the sale advertised and postponed three several times; that the ferry boat was sold on the 18th of January, 1822, the time fixed for the sale, to Archibald Gamble, for $110, and the whole of the lands on the 2d of March, 1822, were sold to said Gamble for $1,415.46, he being the higest bidder; and,

5th. Thereupon, the Sheriff executed to said Gamble a deed of conveyance for the lands last above described, except a part of fr. Sec. 13, only 98 72-100 acres of which were conveyed; the remainder of said section being claimed by Charles W. Hunter; which last deed is dated on the day and year aforesaid; and is as are the other deeds, copied at length into the record, and was recorded Jan. 14, 1823.

6th. That on the 6th of January, 1825, Rufus Easton executed a deed of conveyance of that date to said Wm Russell, whereby said Easton, for the consideration of $3,451 paid by Russell to Easton, conveyed to Russell, in fee, all his estate, right, title, interest, property and demand in and to said fr. Secs. 14, 11, 13, the N. half of 12, T. 5, N., R. 10, W., with the houses, buildings and other improvements thereon, containing 1,331 15-100 acres; also, the whole of fr. Sec. 18 the N. fr. half of Sec. 19, and the N. W. qr. Sec. 20, all in T. 5, N., R. 10, W., containing 972 29-100 acres, without any recourse whatsoever on said Easton for any damage or demand should the title to said lands fail, &c.; which deed was duly recorded Nov. 10, 1829.

7th. That on the 6th of July, 1826, Archibald Gamble and his wife executed to said Russell his deed of assignment, as it is

called, whereby, in consideration of $2,075, at the entire risk and hazard of the said Russell, and without recourse on Gamble for any damages, demand or claim, whatsoever, should the title to the land therein described prove defective or wholly fail, said Gamble and wife conveyed to Russell, in fee, all their estate, right, title, interest, claim, property and demand in and to the lands described in the deed last above of Easton to Russell, excepting, however, from the said conveyance and sale, the East half of block number Eighteen, (18), in town of Alton, laid out on said fr. Sec. 14; all being the same lands which were conveyed by the Sheriff of Madison county to said Gamble, by the deed of March, 2d, 1822, above referred to. This deed was acknowledged the 25th of March, 1828, and recorded June 6, 1828.

8th. That on the 10th of April, 1828, Abiel Easton, wife of said Rufus Easton, and said Rufus Easton, executed to William Russell their deed of conveyance, wherein is a recognition of the above-mentioned deed of Easton to William Russell, of the 6th of Jauuary, 1825, for the lands therein described—and a sale by said Abiel, for the consideration of $600, of all her right, title, interest, &c., in and to those lands, tenements and appurtenances, "situate," as is said, "in and near the town of Alton, in the county of Madison, and state of Illinois," This, like the former deed from Easton alone to Russell, expresses the sale to be made "at the risk and hazard" of Russell; this was on the 10th of April, 1838, acknowledged by said Abiel, and on the 14th of April, in same year, by Easton, and recorded June 5th, 1828.

9th. That on the 7th of June, 1828, Russell executed to Gershom Flagg a deed of conveyance of that date, whereby, for the consideration of $400, he granted, bargained and sold to Flagg, in fee, the following described lots of ground or parcels of land, described, bounded, &c., situate in the town of Alton, in said Madison county, as the same is laid off upon fr. Sec. 14, T. 5, N., R. 10, W., and which lots thereby conveyed were described as "The whole of block (or an irregular square) numbered one, (1), on the plot of said town of Alton, bounded on the North by Second street of said town, on the East by Alby street, and on the Southwardly and Westwardly side and end by Front street, and by an open space of ground called "the Public Landing," at the South end of Market street, as the said block numbered one is represented on the plat of said town of Alton, of record in the

Recorder's office of said county of Madison." "Also, one other lot of ground in the said town of Alton, of precisely forty feet from West to East, and about 60 feet long, more or less, from North to South; this being the upper and Westwardly end of a large lot in said town, marked, 'Reserved,' on the aforesaid plot of said town." This deed contains full convenants of warranty of title in Russell, &c. This deed to Flagg was duly recorded on the 9th of June, 1828.

10th. That on the 13th of March, 1834, said Flagg and Jane his wife, reconveyed to said Russell the last described lot of ground, in said town of Alton, for the consideration of $170, without warranty, except liens created against it while Flagg professed to own it, and at the risk in all other respects of said Russell, and "without any recourse whatever to said Flagg or his heirs, if the title should otherwise fail to be good;" which deed was recorded March 17, 1834.

11th. That on the 17th of July, 1832, Wm. Russell executed to Isaac Prickett a deed of conveyance of that date, whereby, for the consideration of $150, he "sold and quit-claimed to Prickett, and to his heirs and assigns, forever, a certain lot in the town of Alton, in Madison county, Ill., as the same had been laid off upon fr. Secs. 11 and 14, T. 5 N., R. 10, a plat of which town is recorded in the Recorder's office of said county; which lot thereby granted, is 240 feet large from East to West, by about 140 feet large from North to South, more or less, and is specially bounded in said deed as follows, to wit: "On the North by Front street of said town, and fronts 240 feet to the same; on the South by the Mississippi river; on the East by Easton street of said town; and on the West by Alby street, as the same has been extended by said Russell to said river, with the appurtenances," &c.

"This deed," (in the words thereof) "being made with the following express and positive limitation, to wit: That said Prickett, being well and fully acquainted with the said Russell's right and title to the above described lot hereby conveyed, takes the right and title of the said Russell to said lot at the entire risk and hazard of him, said Prickett, and without any recourse whatever to said Russell, or his heirs or representatives, for, either consideration money, or costs or other damages, on account of this deed, in case the title to said lot should in any part, or

altogether, fail, or prove bad, in law or equity,—as evidence of all of which, the said Prickett accepts of and receives this deed, with this special clause, and in its present form." This deed was duly recorded July 17, 1832.

12th. That on the 13th of Oct., 1835, said Prickett and his wife executed to James Semple a deed of conveyance of that date, wherein, for the consideration of $600, said Prickett and Nancy his wife, sold and quit-claimed to said Semple a part of the lot described in the deed last above referred to of Wm. Russell to said Prickett, and being 150 feet front on Front street, and running back to the Mississippi river: being a part of the land reserved by said Easton in laying off the said town of Alton and immediately below and adjoining Alby street, as extended through the said reserve land by Wm. Russell, and bounded on the East by a lot conveyed by said Isaac Prickett to David Prickett, with a clause and limitation in the same words and to the same effect with the one above quoted from the last above mentioned deed from said Russell to Isaac Prickett. This deed was recorded in the office of the Recorder of said county, on the 31st of Oct., 1835.

13th. That on the 20th of Feb., 1847, said James Semple and Mary S. his wife, executed their deed to George C. De Kay, of the city of New York, in the State of New York, whereby, for the sum (as in said deed expressed) of $13,000, said Semple and wife conveyed, in fee, a large number of tracts, parcels, and lots of land, situate in said Alton, among which is conveyed "all the right, title, and interest which said Semple then had or possessed, in and to any and every part of what is known as the 'Reserve,' in the city of Alton, situated between Front street and the Mississippi river, and between the 'Public Square,' at the mouth of the Little Piasa creek, and the 'Common or Promenade,' at the Eastern end of the original plat of Alton," together with all the buildings, houses, and improvements, &c., reversions and remainders to the same. This is a deed without any convenants of warranty, and is recorded March 13th, 1847.

14th. That on the 22d of April, 1847, said George C. De Kay, by Washington T. Miller, describing himself as said De Kay's "Attorney in fact," (but no power of attorney to said Miller, or evidence to act as such attorney, is found in the record,) executed to "The Illinois Transportation Company," his deed of convey-

ance of that date, whereby, for the consideration therein expressed, of $75,000, he "granted, bargained, and sold" unto the said company, their successors and assigns, numerous lots, and tracts of land, among which are those contained in the last mentioned deed of said Semple to De Kay, and his interest, &c., in the last above described lot of 120 feet front on Front street, in the city of Alton. This deed was acknowledged by said Miller, April 22d, 1847, and recorded October 30, 1847.

15th. That the town of Alton was incorporated May 14, 1832.

16th. That the city of Alton was incorporated July 21, 1837, and reference is made to the act of incorporation

17th. That immediately after the deed from Prickett to Semple, he, Semple, went upon the premises described in plaintiff's declaration, and erected thereon a two story frame house, which was finished in 1837, and so soon as the house was built, Semple rented the lot or piece of ground upon which it stood, and said Semple and his grantees have continued to rent same house and lot and collect the rents, until the present time. That the tenants have had uninterrupted possession of the house as a residence; but the lot has never been enclosed or occupied by such tenants exclusively, and during the whole time of such tenancy, steamboats, flat boats, rafts, &c., have from time to time, landed upon the river side of the same, and the materials, freights and loading &c., have been landed and carried across said lot by persons generally, and freight and lumber and loading have been continually carried from below up and from above down across rear end of said lot, without obstruction or interruption, in the same manner as freights and loading, &c., &c., have been landed upon the river side of the land marked on the plat of Alton as "Common or Promenade," and hauled across said commons, as also across vacant lots in Alton, and such use of the public, since 1835, has been with the knowledge that James Semple, and those claiming under him, claimed said property as private, and insisted that it was not public property; and said Semple or his assigns have never given any assent to their rights so to do.

18th. That the town authorities of Alton, during the existence of the incorporation of the town of Alton, and the authorities of the city of Alton, since its incorporation as a city, have ever claimed an easement in, and the enjoyment of the land

described in the plaintiff's declaration, as a part of the public landing, or public grounds, and have ever refused to tax the same; but have never improved the same.

19th. That, up to the year 1834 and 1835, there were but few inhabitants in said Alton, and it has not hitherto been necessary to improve the said lot for a public landing, to supply the business wants of the city and of the public; but its situation is such as to render it susceptible of improvement for that purpose.

20th. That said Wm. Russell holds among his title papers the aforesaid deed of Wm. B. Whitesides and others, to Rufus Easton, within named.

21st. That one Thomas G. Hawley would testify that said Rufus Easton, during the year 1821, told him, that he wished to sell him lots in block 1, on the plat within named, and spoke of them as lots fronting on the "Public Landing." They were lots fronting on the upper part of the upper lot, marked on the plat of said town of Alton, "Reserve." This evidence is to be rejected, if the court consider it illegal.

22d. That said Gershon Flagg would testify, that after said Wm. Russell sold him the lots named in the deed of said Russell to said Flagg within named, the said Russell stated, he owned the whole of the property, (meaning lots marked on the plat "Reserve,")and that he, Russell, did not know that there was any question of his title, at the time he sold to Flagg, and for some time after; but having heard there was a question as to his title, he wished to retake the property, and he did, by deed of Flagg to Russell, he, Russell, paying the original consideration, $70, to Flagg. (This evidence is to be rejected, if the court consider it illegal.)

23d. That from 1818 to 1835, when Semple built, the property was unoccupied, like other vacant property, and there were no inhabitants upon it.

24th. The land described in the plaintiff's declaration is a part of the land marked "Reserved," on the plat above named, and is in the possession of the defendants.

It was further agreed, that the defendants should waive process, and enter their appearance herein, and plead the general issue, and submit this cause to the court upon the agreed statements of facts; stipulating with each other, that the original plat and deeds within named, or certified copies of the record of

the same, or the original records, might be introduced by either party, subject to comparison of the original with the record; and that, if from the whole of said agreed statement and the law arising thereon, the court is of opinion, that the city of Alton aforesaid is entitled to enjoy and exercise jurisdiction over said land in plaintiff's declaration mentioned as part of the public landing place, or for public purposes, then the judgment is to be for the plaintiff; otherwise for the defendants; that no objection should be made to the form of action or the form of pleading; and either an appeal or writ of error should lie from the decision of the circuit court to the Supreme Court; and that the defendants in such appeal or writ of error, should appear without the service of any summons—and that the decision of the Supreme Court should be upon the points of law arising upon the within statement of facts, waiving any objection which might arise to the form of action, as to the legal title in fee not being in the plaintiffs, if they or the public are entitled to enjoy the easement in the *locus in quo*, as a public landing place or as public grounds; and at the Circuit or Supreme Court, the defendants might raise any question of law (except as to the fee in the lands as above) arising from the above agreed statement of facts, the same as if especially pleaded.

The case was heard and decided at the August term of the Madison Circuit Court in the year 1850, Underwood, Judge, presiding, in favor of the defendants; and the plaintiffs have brought the case into this court, and the plaintiffs make the following points:

D. J. Baker and E. Keating, for Pltff in error.

The law prescribes no particular form or manner for the dedication of land to public uses, provided the intention of the owner of the land to dedicate it to such uses be satisfactorily established by evidence, and no particular description of evidence is required to prove such intention. Dedications of land for public purposes have frequently come under the consideration of the courts of this country; in the case of The City of Cincinnati *v.* The Lessee of White, 6 Peters, 431, 504, the question is fully discussed; 3 Kent, 450; Town of Pawlet *v.* Clark, 3 Con. R., 408 and seq.; City of Cincinnati *v.* White, 6 Peters, 431; Brown *v.* Manning, 6

Ohio, 303 ; Watertown *v.* Cowen, 4 Paige, 410 ; Hobbs *v.* Lowell, 19 Pick., 405 ; 7 Ohio, 217 ; 9 Ohio, 80 ; 3 and 4 Dev., 242 ; 1 Strange, 95 ; 3 Kent, 450 ; 19 Wend., 128 ; 1 Hill, 189, 191 : 17 Pick., 309. In order to dedicate property for public use, it is not essential that the right to use the same shall be vested in a corporate body. It may exist in the public, and have no other limitation than the wants of the community at large. The City of N. Orleans *v.* U. States, 10 Peters, 662 ; 2 Peters, 256. In the case of Barclay et al. *v.* Howell's Lessee, 6 Pet., 504, the Court held, that the "declarations of the surveyor, who was authorized by the owner of the land, to fix upon the plan of the town and survey it, made at the time of surveying and completing the plan of the same, became a part of the *res gestæ* ; they were explanatory of the act then being done, and as such, were competent evidence to charge his principal." In the case of Hunter *v.* The Trustees of Sandy Hill, 6 Hill, 411, the Court say: "The law which governs the dedication of property to the public use, is anomalous ; under it, rights are parted with and acquired in modes and by means unusual and peculiar. Ordinarily, some conveyance or written instrument is required to transmit a right to real property ; but the law applicable to dedications is different. A dedication may be made without writing ; by act *in pais*, as well as by deed." 2 Smith's Leading Cases, 180, and cases cited. The act of throwing open the property to the public use, without any other formality, is sufficient to establish the fact of a dedication to the public. Dedication may be presumed from length of time ; and the period required by the Statute of Limitations to bar a right, would, from analogy to that Statute, be sufficient, though so long a time would not always be requisite Hunter *v.* Trustees of Sandy Hill, 6 Hill, 413 ; 3 Kent, 450-1, and note *a*. In the case of Trustees of Watertown *v.* Cowen, 4 Paige, 510, it was held, that "a public square is dedicated in the same manner as a street ; that the legal title did not pass from the original owner ;" the Court considered "the corporation as the proper representative of the equitable rights of the inhabitants of the village, to the use of the public square, so as to authorize the filing of a bill in chancery by the corporation to protect those equitable rights against the erection of a nuisance. The case of Howard *v.* Rogers, 4 Harris and Johnson, 278, turned upon the construction of a deed, which was held not to

have been intended to pass anything more than the grantor's interest in the lot. Had there been a covenant, express or implied, to leave the lot open, the points would have been the same as in Trustees of Watertown *v.* Cowen, referred to in 2nd Smith's Leading Cases, 191 ; 19 Wendell, 128 ; Wright's Rep., 750 ; 1 Sup. U. S. Dig., 534, s. 348 ; 4 Devereux, 272.

Deed should be so construed as to carry into effect the intention of the parties, 2 Bacon's Ab., 576 ; effect of recital in deed construed against grantor, 4 Bacon's Ab., 526 ; parties and privies bound by recitals, 1 Greenleaf's Ev., 823 ; admissions binding on privies, 1 Greenleaf's Ev., 189, 211 ; 4 Peters, 1 ; 3 Johnson's cases, 174 ; 8 East, 487 ; 4 Cruise, 293 ; 4 Scam, 561 ; 3 Pick., 262.

Easements and incorporeal interests are not within the Statutes of Limitations. Angel on Adverse Enjoyment, 62, 76, &c. ; R. S. 1845, and Limitations. Our Statutes of Limitations, so far as they pertain to real property, were taken in all, except as to the length of time, from the English Statutes, *i. e.*, 32 Henry 8, c. 2 ; 21 James 1, c. 16 ; and 3 and 4 William 4, c. 27. The English Courts never considered these Statutes applicable to easements and incorporeal interests ; 1 Chitty's Prac., 746, 759 ; Gale & Whately on Easements, 98.

Where a right to the use and enjoyment of the easement or incorporeal interest has once become vested in the public, by grant or dedication, a non-user of that right for no length of time can bar the public. State *v.* Trask, 6 Vermont 355 ; New Orleans *v.* United States, 10 Peters, 662 ; Rowan's Executors *v.* Town of Portland, 8 B. Monroe, 250. " The dedication having been made and proved, did not require a subsequent user to establish or prove it ; Cincinnati *v.* White's Lessee, 6 Peters ; and Barclay *v.* Howell's Lessee, 6 Peters ; Angel on Adverse Enjoyment 36, 37, 38.

Laches are not imputed to counties ; 1 Scam., 70. In the case of State Bank . Brown et al., 1 Scam., 106, per curiam, "are the people then barred by the Statute of Limitations ? This question though not directly before the court, was incidentally decided in the case of Madison county *v.* Bartlett ; the court there say : It is a well settled principle, that a state is not barred by a statute of limitation unless expressly named, " and we have no reason to change the opinion thus expressed. See also, 6

Peters, 673 ; Rex *v.* St James, 2 Selwyn's *Nisi Prius*, 1334 ; Vooght *v.* Winch 2 B. and Ald., 667 ; Best on Presum p., 137, §103 ; Fuller *v.* Saunders Cro. Jac., 446 ; cited in 2 Smith's Leading cases, 178 ; White *v.* Crawford, 10 Mass., 189.

Deeds are to be taken most strongly against the makers thereof, and in favor of the other party or those for whose benefit they were made.

Although to vest a fee under our statute, it is necessary that a plat should have been made, executed, acknowledged and recorded in accordance with the statute ; a plat duly recorded, though informally executed, will vest a use in the public.

In the construction of a deed, effect should be given to every word and sentence, when such a construction would not contradict the manifest intention of the grantor, or make the instrument ridiculous or absurd, and no part will be rejected as surplusage which can consistently with the general object of the same, be retained.

Under the Recording Law of 1820, it was only necessary to record within twelve months, and an unrecorded deed was then good as against a judgment, and a purchaser under an execution then purchased only what actually belonged to the defendant.

The Court below erred in deciding that the defendant had such a title as protected him under the Statute of Limitations of 1835.

J. Semple, W. B. Scates and Wm. Martin, for Defts it error.

The defendants contend, that as the title was and is clearly vested in Easton and his assignees, such title cannot, and will not be divested by any strained construction of the acts of the owners of the land ; but that before a dedication to the public can be made out, there must be shown a clear and undoubted act of such owners placing the dedication beyond dispute. If the case is doubtful or ambiguous, the vested rights of the patentee and his assigns will not be disturbed.

The only foundation of the claim of the city, rests on the covenants in two deeds made by and between Easton on one part, and Whitesides and Reynolds on the other.

1st. By a fair and legal construction of these covenants and conditions, connected with the plat, they do not make the

"Reserve" public ground or amount to a dedication to the public.

2d. They are merely personal covenants and conditions; do not run with land, or bind the assignees of the patentee.

3d. They are void, being repugnant to the estate granted.

4th. They are void as to sales under execution.

5th. They are void as to creditors, as being voluntary and without consideration.

6th. They are void as to creditors, because the deed was not recorded until after the judgment against Easton.

7th. The seven years' statute of limitations bars the plaintiffs' claim after fifteen years' adverse possession.

1st. As to the covenants, &c. The covenant in the deed from Easton to Whitesides and Reynolds is as follows: "And the said Rufus Easton does covenant and agree that all the lots for public, scholastic, and religious purposes, for a public landing, or any reservations, of common, east of the Fountain creek, as designated on the plat aforesaid of said town, and particularly the land that lies between Front street, and the river Mississippi, or Fountain creek and Henry street shall be and forever remain a public landing place, and shall be and remain for the use of the public, as designated on said plat."

Here it is clear that the plat is made a part of the covenant, by no less than three references to it in one short sentence. Every word and mark on the plat, affecting this question, forms as much a part of the contract between the parties, as if they had all been inserted in the covenant itself. If instead of referring to the plat for an explanation of what was intended should be and remain public, the parties had gone on and inserted it all in the covenant, leaving out any reference to the plat, but inserting in lieu thereof exactly what the plat says, then the public square, the seminary square, the gospel square, the public landing, and the common, or promenade, would all have been described by metes and bounds, and all the private lots, strips of ground and this land marked 'reserved,' would have been particularly described as they are marked on the plat. In such case there would have been no doubt as to what was intended by the parties. On this point, a striking case is to be found in 3d Cond., Rep. 362.

Another case in 6 Peters, 510. The Court says: "The deed from Ormsby called for a lot, designated on the town plat 183,

bounded by Front street, the river Monongahela, and lots numbered 182 and 184."

On this same point, in 18 Ohio, Rep. 94, the court say, "When the width of a street marked by right lines is given in a town plat, surplus land, between the street and the low water mark of a river, is not thereby dedicated to the use of the town."

Also, in 1 Blackford, 44, the court says: The limit of the street as designated on the plat, is the extent of public ground, and if there is any land between that street and the river it is not granted to the town of New Albany. See also 6 Mass., 435.

It is a rule of law, that all the words of a deed or instrument must have their full operation if possible. Now the word "reserved" is, by reference, a part of this covenant, and must operate if possible.

The covenant of Easton is the only one that could make a dedication. Whitesides and Reynolds could not dedicate the land by their deed, for they had no title.

This clause is not a covenant, but a condition of non-alienation, void of itself, but particularly void as to creditors.

2nd. These are merely personal covenants and conditions; do not run with the land, nor bind the assignees of the patentee. 9th Humphries, 540; 2 Blackford, 301; 4 Cruise, 452; 10 East, 120; Coke's Reps., 135.

3rd. They are void as being repugnant to the estate granted. Sprague v. Snow, 4 Pickering, 54; 4 Gilman, 544; 4 Kent, 131; 2 Cruise, p. 5, Secs. 19, 20, 21, 22.

4th. They are void as to sales under execution. 4th Kent, 124, 129; 2 Cruise, p. 6, Secs. 25, 28; do., p. 11, Secs. 46, 47, 48; 7 J. R., 534; 15th J. R. 280.

5th. They are void as to creditors, as being voluntary, and without consideration. 4 Kent, 461; 4 Cruise, 457.

6th. They are void as to creditors, because the deed was not recorded until after the judgment lien attached.

The law of 1802, Purple's L. L., p. 298, acts 1821, p. 174, made judgment a lien on all defendants' lands. This law was in force up to 1821. The act of 1819, p. 20, Sec. 8, giving a year to record deeds, only applies to subsequent purchasers and mortgagees, and not to creditors. The protection to creditors rested in 1821

on the principles of the common law, which would give the judgment lien in this case priority to the subsequently recorded deed without notice. 4 Cruise, 482, 550.

7th. The seven years' statute of limitation bars the plaintiff's claim after fifteen years' adverse possession. Scott *v.* Ratcliffe, 5 Peters, 87 ; 11 Peters, 54 ; R. L., p. 349, Secs. 8, 9, 10, 11, p. 104, Sec. 8 ; 3 Cruise, 489, Secs. 41, 44 ; 3 Kent, 359.

CATON, J. In 1818 Easton claiming to be the owner of the land, laid out the town of Alton, upon the recorded plat of which, the two blocks, lying between Front street and the Mississippi river are marked "Reserved," and the premises in controversy was a portion of one of these blocks. Subsequently, Whitesides and Reynolds set up a claim to the land upon which the town was laid out. These parties settled their controversy, by executing and interchanging the deeds, upon the construction of which, the decision of this case depends. These deeds recite that the parties had conflicting claims or titles to the land, and that for the purpose of compromise, they had agreed to relinquish to each other, the part allowed to him or them in the compromise, in pursuance of which the deeds were simultaneously interchanged. They are therefore to be construed together as parts of the same transaction. As to the dedications, the public is to be considered the grantee, and the other parties to the deeds the grantors. Whoever subsequently purchased lots or made improvements in the town, paid to the proprietors a proportionate consideration for the dedications of land made to the public use. Easton by his deed, conveyed to Whitesides and Reynolds, certain specified lots and blocks in the town, and then, expressly "covenants and agrees, that all the lots, for public, scholastic and religious purposes, for a public landing or any reservations of common, east of the Fountain Creek, as designated on the plat aforesaid of said town ; and particularly the land that lies between Front street and the river Mississippi as designated in said plat, fronting on the river between the said Fountain Creek and Henry street, shall be and forever remain a public landing place, and shall be and remain for the use of the public as designated on said plat, excepting and reserving to said Rufus Easton and his heirs forever the exclusive right of a ferry or ferries on and from said land so made common." Here

are erased in the deed the words "or for any other purpose" between the words "common" and "east," and the words "that lies between Front street and the river Mississippi, as designated in said plat," are interlined.

Upon the plat several interior lots and blocks are marked as dedicated to the public, one for a Court House, some for religious and some for educational purposes, and upon the river and immediately east of Fountain creek, a fraction is marked for a public landing, and further east and between the blocks marked reserved, and Henry street, is a space marked "promenade or common." We are to determine what part of the town plat is by this covenant, declared dedicated to the public. In the forepart of the clause quoted, are described in clear and unequivocal terms, all of the lands and lots which are marked upon the plat as dedicated for specified purposes, and these are all, which judging from the face of the plat, I should be inclined to hold, Easton had dedicated to the public. It is insisted, that by the subsequent part of the sentence, the parties did nor intend to make any new dedication, but only to confirm what had already been designated for the public use, upon the plat. I cannot so understand the covenant. That subsequent clause, is as follows: "and particularly the land that lies between Front Street and the river Mississippi, and designated in said plat, fronting on the river, between the said Fountain Creek and Henry street, shall be and forever remain a public landing place," &c. If the parties meant what they expressed, then certainly all the land described in this clause was dedicated to the public, and the only question which can arise, is, are the two blocks marked "Reserved" embraced in this description. They are as unequivocally described, as if they had been designated by name, and yet if that had been the case, I imagine this controversy would never have arisen, notwithstanding the reference which is mdae to the plat, and which it is urged, signifies a different intention. Here the metes and bounds of certain premises which are designated for the public use, are given, and in the center of the tract included within those bounds are the two blocks, which it is now insisted were not dedicated to the public. But the covenant says, that the land that lies within those bounds, "shall be and forever remain a public landing place." If these blocks were not intended to be included in this dedication, why was this

clause inserted at all? Every other tract had been clearly and pointedly described in terms which admit of no doubt, and unless these two blocks were intended to be added to the list already dedicated, then this clause is worse than useless. A construction which requires us to reject an entire clause of a deed is not to be admitted, except from unavoidable necessity. We are not at liberty to reject this part of the deed, which clearly expresses a meaning more extended, than is manifest in other parts of the instrument. We are bound to presume it was inserted for a purpose, and has its office to perform. The rule is thus laid down in Cruise's Dig. Title 32, Deed, chap. 19, Sec. 5. "The construction ought to be made on the entire deed and not merely on any particular part of it. *Ex antecedentibus et consequentibus fit optima interpretatio.* Therefore every part of a deed ought if possible to take effect, and every word to operate." Then we are not at liberty to suppose that the parties did not mean what they have so emphatically said, in this entire and distinct clause, and that they only meant what they had previously expressed. But there is a circumstance on the face of this deed, which clearly shows that the description which embraces these two blocks was not inadvertently or carelessly inserted. I allude to the interlineation after the word "land" of the following: "that lies between Front street and the river Mississippi as designated in said plat." The description, before these words were inserted, was of the land lying on the river between the creek and Henry street, which necessarily included the two blocks, but as if to silence every doubt, they inserted the interlineation, which points directly to these two blocks; for by a glance at the plat, it will be seen that they occupy the whole space between Front street and the river so far as that street is extended and delineated on the maps. Really it would seem as if the parties had exhausted their ingenuity and command of language, in order to expel every doubt of their intention to dedicate these blocks to the public.

The only argument urged against this explicit declaration of the parties, is drawn from the expression "as designated on said plat," which it is insisted limits the description to such lands as were by the plat dedicated to the public. These are usually, if not universally, words of description and not of quality. They serve to connect the deed with the plat, so that by applying the

one to the other, the former may be rendered intelligible. They give effect to the expressions of the deed but they do not limit them. If there be that upon the face of the plat, to which the expressions of the deed can apply, then of course we must make the application, rather than reject the words of the deed, as not expressing the intentions of the parties. This reference to the maps, occurs three times in the descriptive part of the covenant. Such reference was indispensable, in the description of the premises, but was quite unnecessary for the purpose of specifying the objects or purposes of the dedication. It seems to me that it can admit of no doubt, that in the two first instances the reference is made merely for the purpose of description. In the last, it may have been designed to limit the words "shall be and forever remain a public landing place," so as to prevent them from being applied in such a sense as to make the Court House square and other interior lots, a public landing, for which they were altogether inappropriate.

But conceding that these references show that no new dedication was intended, then it is clear that the parties construed the plat as having already reserved them for the public use. If the plat is made to control the extent of the dedication, we must construe the plat as the parties understood it, and that is explained by the unequivocal expressions of the covenant. The two blocks are certainly embraced in the description of the land dedicated, and the construction contended for so far from proving that they did not intend to include them in the dedication, shows that they considered that they had already been dedicated by the plat. This construction, makes the parties say, that "these blocks shall remain reserved for a public landing, as the same are designated and set apart on said plat."

I will now advert to the other deed, from which it will appear, if possible, with still more clearness, that it was the intention of the parties to include these blocks in the dedication. As before remarked, these deeds are a part of one transaction and must be construed together. The corresponding clause in the second deed, is in the form of a reservation, and is as follows: "These presents shall not be construed to convey to, or vest in said Easton any exclusive interest in any of the streets, lots for public, for scholastic or religious purposes; for a landing, or any reservation of commons to the east of Fountain Creek, in said

town of Alton, as designated on the plat of said town. But that all the ground from the public landing inclusive, as designated on said plat, to Henry street, and that lies between Front street and the river Mississippi shall forever be and remain a public landing for all persons whatsoever, except for a ferry landing." In this deed we find the same property described in the same order, and in almost the identical language, except that that which points to these two blocks, is if possible, still more explicit than in the other. This deed says, "that all the ground from the public landing inclusive, as designated on said plat, to Henry street, and that lies between Front street and the river Mississippi shall for ever," &c. These two blocks occupy nearly the centre of the tract thus described, and if all of that tract is dedicated to the public, it is placed beyond cavil, that these two blocks are included in that comprehensive word. This seems so clear, that neither argument or illustration can make it more so. To my mind this is so manifest, both upon first impression, and after the most careful study of both deeds, that there is no room for construction. But as some understand them differently, I shall now admit that there is some ambiguity in the terms employed to express the meaning of the parties, and then we must resort to the well known rules of law for the purpose of construction.

When a deed is so drawn, that some will read it one way and some another, it is a well established rule, that that meaning shall be adopted, which is adverse to the interests of the grantor. In Cruise's Digest, Tit. 32, Deed, Chap. 19, Sec. 13, the rule is thus stated: "A deed is always construed most strongly against the grantor, *verba chartarum fortuis accipiunter contra proferentem*; *et quælibet concessio fortissime contra donatorem interpretanda est.*

For the principal of self-interest will make men sufficiently careful not to prejudice themselves by using words of too extensive a meaning. And all manner of deceit is hereby avoided in deeds; for people would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them." If there be ambiguity in this deed, in no case could this rule apply with more reason or justice. Here the parties have made their deeds and spread them upon the records of the county for the inspection of the public, whereby they have made certain dedications, the object and effect of which was, to invite purcha-

sers and improvements, and to enhance the value of the residue of the town property. In that way they expected to be remunerated for the dedications thus made and every man who purchased a lot of them, or made improvements there, paid a proportion of the consideration, for the property donated to the public. To say the least of it, these deeds were so drawn as to induce a large proportion of purchasers to believe that the premises in controversy were dedicated, and thus they have received a consideration from the public for this very land, and to allow them now to say, that they did not intend to include it, is to allow them to practice a palpable fraud upon the public, and to take advantage of their own wrong. This the plainest dictates of common honesty forbids. The law will not allow them to affect ambiguous expressions, and then permit them to put their own construction upon them. Here the words are emphatically their own, for the grantees—the public —were not there to dictate or suggest, and certainly the principle of self-interest was sufficient to make them "careful not to prejudice themselves by using words of too extensive a meaning." It is incredible to me, that intelligent parties could have used such emphatic and pointed words to include these blocks, if it was not the intention of the parties to embrace them in the dedication. It may be observed that several of the lots, set apart to Whitesides and Reynolds, are immediately in the rear of one of these blocks and their value very much depended upon having the space in front of them open to the river, rather than have it obstructed by the individual property of Easton. (*a*) And this may explain why even stronger expressions are used in the reservation contained in the deed to him, than are found in the convenant to Easton. Possibly other words might have been used, so as to have left less room for controversy in the minds of some, that the parties did intend to include these blocks in the dedication; yet this is no reason for saying, we will not believe that they intended what they have said. This would be reversing the rule of the law and throwing every doubt or uncertainty in favor of the grantor. I cannot entertain a doubt, that by every rule of law and of reason, we ought to hold that the premises in question were dedicated to the public use.

Nor do we think the rights of the public are barred by our statute of limitations, which prescribes that certain real actions

(*a*) Warren vs. President, &c., 15 Ill. R. 239

shall be brought within seven years after possession taken by the defendants. Without stopping to inquire whether the rule that laches are not imputable to the public, or that time does not run against the government, applies to inferior municipal corporations, such as towns, cities and counties, as well as to the state, we entertain no doubt that this statute has no application to the case before us. Whatever title to these public grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For those purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but she cannot alien or otherwise dispose of them, for her own exclusive benefit, nor are they subject to the payment of her debts. At most she but holds them in trust for the benefit of the public. The right to the use of the property is not limited exclusively to the citizens of Alton, but the citizens of the state generally have an equal right with them in the appropriate enjoyment of the dedication. This is not like the case of property purchased by the city for her own exclusive use, which she could dispose of at her pleasure. Whether an adverse possession would run against property thus held, we do not now propose to inquire, but we entertain no doubt that this statute does not apply to this case, and that the rights of the public in this dedication have not been forfeited by non-user, or barred by adverse possession.

Russell's judgment against Easton, under which the defendant claims to hold title, was subsequent to the deeds, and as the deeds were recorded within the time prescribed by the statute then in force, the title conveyed by them could not be perjudiced by that judgment.

The judgment is reversed and the cause remanded.

Judgment reversed.

JOHN T. KNOX, *et al.*, Pltffs in Error, *v.* JAMES E. BREED, Deft in Error.

ERROR TO FRANKLIN.

Where the verdict and judgment are to general, the judgment will be reversed.

This was an action of debt brought in the Franklin Circuit Court, by defendant in error against plaintiffs in error. The cause was tried before Denning, Judge, and a jury, at September Term, 1850, when the following verdict was found by the jury: "Upon their oaths do say $418 75, (Four Hundred and Eighteen Dollars and 75 cents,)" upon which verdict, judgment was entered as follows: "Ordered by the Court that the plaintiffs recover of the defendant, the sum of Four Hundred and Eighteen Dollars and 75 cents, together with their proper costs and charges and may have execution." A motion for a new trial was made and overruled.

Defendant below brings the cause here and assigns for error, the informality of the verdict and judgment.

CASEY & MONTGOMERY and W. B. SCATES, for Pltffs in Error.

R. WINGATE and JAMES M. WARREN, for Defts in Error.

Per CURIAM. The verdict and judgment are to general. The Case of Toles *v.* Cole, 11 Ills., 562, is precisely in point. Reverse the judgment, with costs, and remand the cause for further proceedings.

Judgment reversed.

JOHN M. WILSON, Pltff in Error, *v.* NELSON G. NETTLETON, Deft in Error.

ERROR TO WHITE.

An affidavit made by an agent of the creditor, is sufficient to authorize the issuing of a warrant by a justice of the peace to hold a debtor to bail.

A plea of privilege, that a party was a suitor and an attorney attending court, is a dilatory plea and must be interposed at the first opportunity, or it will be too late.

This was an action commenced before a justice of the peace in

White County, by a *capias ad respondendum*, and taken by appeal to the White Circuit Court. The cause was heard before Harlan, Judge, at September Term, 1850, who rendered a judgment for defendant in error. Wilson brings the cause to this Court, and assigns the following errors: The Court erred in not quashing affidavit and writ and dismissing suit because the affidavit was made by a stranger and not by the plaintiff in the suit, and for want of jurisdiction in the justice of the peace. The Court erred in giving judgment for the plaintiff on the said plea in abatement, but should have rendered judgment on such plea against plaintiff for costs, &c. The facts of the case are fully stated in the opinion of the Court.

C. Constable, for Pltff in Error.

U. F. Linder, for Deft in Error.

Treat, C. J. This suit was originally brought before a justice of the peace. The defendant was arrested on a warrant, founded on an affidavit made by an agent of the plaintiff. He moved to dismiss the action, because the writ was imprudently issued. The justice overruled the objection, and entered a judgment in favor of the plaintiff. The defendant appealed to the Circuit Court, where he renewed the motion to dismiss. The motion was denied, and he then pleaded in abatement, that he was arrested on the warrant during the sitting of the Circuit Court, which Court he was attending as a suitor, and as an attorney at law. The Court overruled this defence, and affirmed the judgment of the justice.

The only objection taken to the process, under which the arrest was made, is that it was founded on an affidavit made by an agent of the creditor. It is contended, that the oath must be made by the creditor personally, and cannot be made by a person acting on his behalf. The statute declares, "If, previous to the commencement of a suit, the plaintiff shall make oath that there is danger that the debt or claim of such plaintiff will be lost, unless the defendant be held to bail, and shall state, under oath, the cause of such danger, so as to satisfy the justice that there is reason to apprehend such loss, the justice shall issue a warrant," &c. R. S., ch. 59, § 22.(*a*) What is the real object of this provi-

(*a*) But see People vs. Fleming, 2 Comstock R. 484.

sion? It is that a debtor may be held to bail, whenever it is satisfactorily made to appear on oath, that the creditor will otherwise be in danger of losing his debt. There is no good reason why an agent charged with the collection of a debt, may not be permitted to make the oath, and sue out the process. He can ascertain and state the causes, which are to satisfy the justice of the propriety of issuing the warrant, as well as the creditor. He may have a personal knowledge of the facts, while the creditor may be ignorant of their existence; and if the latter is alone allowed to make the oath, he can only swear as to his belief of the truth of information derived from others. We think the design of the statute is equally answered, whether the oath is made by the creditor or his agent. (*a*) Any other construction of the statute might deprive a creditor, who resides at a distance from his debtor, of the benefit of its provisions altogether. The delay in obtaining correct information of the condition of his debtor, and in transmitting the necessary affidavit, might render abortive any attempt to coerce the payment of the debt. The consequences of the debtor are the same, whether the oath is made by the creditor or his agent. If he is arrested on a warrant causelessly sued out by the agent, he has a clear remedy against his principal.

The plea of privilege came too late. It was a defence of a dilatory character, not affecting the merits of the action, and should have been interposed before the justice. If there made and overruled, it might have been renewed in the Circuit Court.

It was waived by the failure of the defendant to insist upon it at the first opportunity.

The judgment is affirmed with costs.

Judgment affirmed.

WILLIAM H. WALTER, impleaded, &c., Pltff in Error, *v.* TRUSTEES OF SCHOOLS for Town two south, Range two east, &c., Defts in Error.

ERROR TO JEFFERSON.

A plea of *non est factum* verified by affidavit puts the plaintiff to proof of execution of the instrument sued on, but such an affidavit is not evidence for a defend

(*a*) Bancroft vs. Eastman, 2 Gil. R. 264.

ant. To maintain the issue raised by such a plea, the plaintiff had only to prove that defendant was liable as maker.

If a party originally authorized his name to be subscribed to a note, or participating in the consideration, ratifies the act of another in putting his name thereto, he becomes liable as maker.

Part payment of a note by the person in whose name it purports to be made, is sufficient proof, *prima facie*, of its execution by him.

This was an action commenced by the Trustees of Schools for T. 2 S., R. 2 E., before a justice of the peace, against the plaintiff in error and two others as joint makers of a promissory note. Service was only made on Walter. A judgment was recovered against Walter, who prayed an appeal to the Circuit Court of Jefferson county. In the Circuit Court, Walter filed his plea of *non est factum* properly sworn to, and upon issue thereon the cause was submitted to Denning, Judge, for trial, without the intervention of a jury, and judgment was rendered against Walter for the sum of $47. 77, at August term, 1850. A bill of exceptions was taken, and Walter brings the case to this Court. The bill of exceptions shows, that the note sued on was handed to the School Commissioner by Adams, in lieu of another note which he held against the said defendant, one Adams, and another person, the defendant not being present. That defendant paid the commissioner of schools a sum of money on account of the note, which was endorsed thereon; the same witness stated that defendant afterwards told witness, and before defendant had paid anything on the note, that he had been told that Adams had forged his name to a note, which he had given to witness in lieu of the old one, which defendant with others had signed as sureties of the said Adams. That witness had but one note in his hands, when defendant paid the money to him. That all the names to the note appeared to have been written by the same person, and that witness did not believe that the name of the defendant to the note was in his handwriting.

R. F. Wingate, for Pltff in error.

S. G. Hicks, for Defts in error.

Treat, C. J. The defendant having verified his plea of *non est factum* by affidavit, the plaintiffs were bound to prove the execution of the note. The affidavit was not evidence for the defendant, but, under the statute, it had the effect merely to

put the execution of the instrument in issue. To maintain the issue on their part, the plaintiffs had only to prove, that the defendant was liable as maker for the payment of the note. The proof showed that the signature was not in his handwriting. It was not his note, therefore, unless he had originally authorized his name to be subscribed as one of the makers, or, participating in the consideration and aware of the circumstances under which the note was made, he had subsequently ratified the unauthorized act of another in putting his name thereto. (*a*) The Circuit Judge was of the opinion, from the other facts of the case, that the defendant became a party to the note in one of these ways. We are not prepared to hold that he erred in coming to such a conclusion. Part payment of a note, by the person in whose name it purports to be made, is sufficient proof, *prima facie*, of its execution by him. Unexplained, such an act is a strong and unequivocal recognition of the genuineness of the note. It is a solemn admission that he excuted the note, and is liable for its payment. It dispenses with proof either that the signature is genuine, or that it was subscribed to the note by his authority. Here, the defendant made a payment to the school commissoner, which was credited on the note is controversy. It was the only obligation that the commissioner then held against him. There had been another note in his hands, but it had been given up, and this note substituted in its place. Before the payment was made, the defendant was informed by his co-surety that a new note, purporting to be signed by the same parties, had been given to the commissioner in lieu of the old one. It was a fair inference, from these circumstances, that he designed the payment to be applied on the new note, and not on the old one, which he had good reason to believe had been cancelled.

The judgment of the Circuit Court is affirmed, with costs.

Judgment affirmed.

(*a*) Delahay vs. Clement, 2 Scam. R. 577; Handyside vs. Cameron, 21 Ill. R. 590.

Borah *v.* Curry and Owen.

GEORGE M. BORAH, Pltff in Error, *v.* THOMAS CURRY and JAS. L. OWEN, Defts in Error.

ERROR TO WAYNE.

A note given for *money*, which may be paid in any article of personal property, not within the statute governing notes payable in *personal property other than money*; and when the maker of such note, elects to discharge it by the payment of the personal property, the property must be tendered at the place of residence of the payee at the time the note was given.

This was an action originally commenced before a justice of the peace, and taken by appeal to the Circuit Court of Wayne county. The cause was there tried efore Harlan, Judge, and a jury, at March term, 1849, when a verdict was found and a judgment thereon entered for the defendant. The note sued on is set out in the opinion of the Court. The bill of exceptions taken in the case, shows that the defendants resided together when the note was given, that when the note became due they had over 400 bushels of corn ready to measure, but no one came to receive it; that the corn was not measured out, but was in cribs with other corn; that about a week before said note became due Curry hauled one load of corn to the place where Crews, the payee of the note, lived, which he refused to receive, and the corn was hauled back by Curry. Plaintiff below told defendants, he would not receive said corn unless they would haul all the corn to the place where payee lived when note was given, which defendants refused to do. Plaintiff proved that he demanded the corn on the day the note became due, that defendants offered to pay one half of corn at Crews' and one half at Owen's, which plaintiff refused, and demanded that it should all be paid at Crews'.

The jury found a verdict for defendants, plaintiff moved for a new trial which was denied, and the plaintiff below brings the cause here for review, by writ of error.

E. BEECHER, for Pltff in error.

The note was made payable at the residence of the payee. R. S., p. 386, §12; 2 Kent's Com., 507–8.

There was no tender of the corn. To have constituted a ten-

der, the corn should have been measured out and set apart from other corn, so that plaintiff could see what was his property. 2 Greenleaf's Ev., §600, 609 ; Chitty on Contract, 727, note 1 ; 2 Kent's Com., 496, 507—8 ; 4 Scam., 331 ; 7 Conn., 110.

There was no waiver of the tender. There can be no waiver of tender of personal property other than money.

C. CONSTABLE, for Defts in error.

1. The place of tender was the debtor's residence or farm, inasmuch as the note was payable in farm produce. 2 Kent's, Com., 508 ; Lobdell *v.* Hopkins, 5 Cowen, 516 ; Vance *v.* Bloomer 20 Wend., 199 ; 2 Greenleaf's Ev., §609.

2. A question of tender is a question of fact to be found by the jury, and unless clearly against evidence, their finding will not be disturbed ; and if the jury had sufficient evidence before them to satisfy them, that the defendants in error offered to deliver the corn as the plaintiff should direct, at their farm, the verdict was right and should not have been set aside. Slingerland *v.* Morse et al., 8 John., 474.

3. The case has been twice tried by juries, once by a justice, and reviewed and adjudged in effect by the Circuit Court, and the result has always been against plaintiff in error, and this court will not disturb the judgment, inasmuch as the burden of proof was on said plaintiff. Cunningham *v.* Magoun, 18 Pick., 13 ; Wheeler *v.* Sheilds, 2 Scam., 348 ; Eldredge *v.* Huntington, 2 Scam., 535 ; Goode *v.* Love, 4 Leigh, 635.

TRUMBULL, J. This action was originally commenced before a justice of the peace upon the following note : "On or before the twenty-fifth of December next, we or either of us promise to pay Nathan Crews forty dollars, which may be discharged in good sound corn at twenty cents per bushel, for value received of him, this 18th day of April, 1848." The note was subscribed by the defendants, and had been duly assigned by Crews, the payee, to the plaintiff.

In the Circuit Court, the defendant had judgment, the correctness of which depends entirely upon the question, whether the makers of the note could discharge it by a tender of the corn at their place of residence, or whether they were bound to take it to the residence of the payee.

Borah *v.* Curry and Owen.

Both parties resided in the county at the time the note was given, as well as when it fell due. It is insisted on the part of the defendants that corn is a ponderous article, and that under the statute, they had the right to discharge the note by a tender of the corn at the place where they resided, at the time the note was given.

Sec. 12, ch. 73, R. S., declares, that instruments of writing "for the payment or delivery of personal property, other than money," when no place is specified for the payment or delivery of such property, may be discharged by a tender of the property, at the place of residence of the payee, at the time the instrument of writing was executed. Provid ed, however, that if the personal property be too ponderous to be removed, or the payee had not a known place of residence in the county at the time the contract was executed, then the property may be tendered at the place where the maker resided when the contract was entered into.

The note in question is not, however, within the statute. It is not a note for the payment of personal property other than money but a note for the payment of money, with a privilege to makers to discharge it in corn at a certain price.(*a*)

The right to have the note paid in money or corn, was not left to the payee, but the makers reserved that privilege to themselves.

Had corn at the time the note fell due, been worth fifty cents to the bushel, the payee could not have compelled its delivery, while he would have been compelled to take it if tendered, though its value should fall to ten cents.

The note was payable at a particular time, and in such case no demand is necessary to entitle a party to sue. The makers, to have discharged themselves by the payment of the money, would have had to seek the payee, or assignee in this instance, at his place of residence ; and there is no reason why they should be allowed to discharge themselves by a tender of the corn, which was a privilege inserted in the note wholly for their benefit, by a tender at a different place, from the one where they would have been compelled to tender the money, had the note remained in the hands of the payee.

This note is not like the case of a contract payable in trade generally, without time or place, where it was held that a spe-

(*a*) Belderback vs. Burlingame, 27 Ill. R. 342.

cial demand was necessary, and the property deliverable at the residence of the debtor. Woods *v.* Dial—post 72.

The general rule is, that the person to be discharged from liability upon a contract by the performance of a certain act, is impliedly bound to do the act which is to exonerate him. Chitty on Contracts, 727.

It was held in the case of Goodwin *v.* Holbrook, 4 Wend. 377, that the place of payment of a note payable in salt, was the residence of the creditor, when the time of payment was fixed by the contract, but the place was not designated. That case is analagous to the present. To have discharged the note, the defendants should have tendered the corn at the time the note fell due, at the place where the payee resided when it was given, and as the record shows that no such tender was made, the verdict of the jury was wrong.

Judgment reversed and cause remanded.

Judgment reversed.

THOMAS SELBY, Pltff in Error, *v.* PHILIP GEINES, Deft in Error.

ERROR TO LAWRENCE.

Relief will not be granted upon a bill, where the answer denies the allegations of the bill, if the proof is loose and unsatisfactory.

The bill of complaint filed in this cause by Geines, shows that he was indebted to Selby in December, 1842, in the sum of $200, on a note drawing twelve per cent. interest, which Selby wished to have secured by a mortgage on a farm, which was agreed to be given upon the conditions, that if Selby should attempt to enforce payment by foreclosure, that the land should be sold in a body, after it had been appraised by three disinterested individuals, and provided it brought two-thirds of its appraised value. That it was agreed by Selby that these conditions should be inserted in the mortgage, and that instructions were given to the person who drew the mortgage, to insert them, but that they were omitted, that Geines not being able to read the English language, misunderstood its terms. That both parties supposed the

valuation laws were then in force, but their constitutionality being doubted, it was believed that the insertion of the terms of the law in the mortgage, would be binding. That Selby attempted to foreclose his mortgage in 1846, when Geines obtained an order from the Court, directing that Selby should comply with the above conditions; that thereupon Selby dismissed his bill, and obtained a judgment upon the note by a suit at law, and is seeking to evade the terms of the mortgage, by selling the land upon execution without appraisement, which proceeding this bill prays may be enjoined. A master in chancery allowed the injunction.

Selby's answer admits the indebtedness of Geines, the recovery of the judgment, the attempt to sell upon execution, but denies the other charge in the bill, and insists that the mortgage contains all that the parties agreed upon, and truly sets forth the contract, and concluded with a prayer for a dissolution of the injunction.

The testimony on the part of Geines, shows that there was some dispute between himself and Selby, as to what the mortgage should contain. Geines insisted upon the insertion of the conditions, and Selby refused to admit them, but that the party who drew the mortgage, is not certain whether it contained precisely the conditions insisted upon by Geines, but that he insisted that they should be there, and that he executed the mortgage with that understanding.

The testimony on the part of Selby, shows that the money was loaned, upon the condition that its payment should be secured by a mortgage, without such conditions as Geines pretends, Geines observing at the time, that real estate in Illinois was the same as personal property in Ohio, that it could be sold for anything, that was bid for it; that Selby should have a mortgage on lands and chattels worth $1200.00, and that it would at any time sell for enough to pay the debts of Geines.

At the Sept. term, 1850, of the Lawrence Circuit Court, the injunction was perpetuated by Harlan, Judge, and a decree entered, directing the sale, *en masse*, of the lands mortgaged, after the same shall have been appraised, &c., &c. To reverse this decree Selby sued out this writ of error, and assigns for error the perpetuation of the injunction, and the decree directing that the lands shall be appraised, &c., &c.

Selby *v.* Geines.

C. Constable & A. Kitchell, for Pltff in Error.

The plaintiff in error, had a right to pursue his remedy at law on his note, or by foreclosure of the mortgage, or both at the same time, and deft. had no right to set up the mortgage, in restraint of the judgment, or compel him to collect it out of the mortgaged land only. Dunkley *v.* Van Buren, 3 John. C. R. 330. Jackson *v.* Hull, 10 John. R. 482; Delahay *v.* Clement, 3 Scam. 20

The bill was insufficient, because the complainant had no right. to change the terms of the mortgage by parol evidence. There is no pretence of fraud, and there is no such mistake shown as entitles the complainant to change the mortgage by parol evidence. 1 Greenleaf's Ev. § 276, § 282.

The testimony of one witness is not sufficient to overthow the answer of deft. Greeley's Eq. Ev., 4–5 ; Greenleaf's Ev., § 260.

U. F Linder & J. G. Bowman, for Deft. in Error.

Treat, C. J. The bill sets up, as the ground for relief, an express agreement of the parties—omitted by mistake to be inserted in the mortgage—to the effect that the mortgaged premises, in case of default in the payment of the note, should not be sold unless they would bring, *en masse*, two-thirds of the apprais ed value. The answer denies the allegation, and insists that the real agreement of the parties is correctly set forth in the mortgage. The proof is altogether too loose and unsatisfactory to justify a decree reforming the m ortgage, by the introduction of the provision alleged to have been omitted. At most, it only shows that the co mplainant was very anxious that the provision should be incorporated in the mortgage, and contended that such was the agreement of the parties, while the defendant insisted that no such agreement had been made. The mortgage was then drawn in the usual form, and executed by the conplainant. It may, perhaps, have been his impression at the time, that the mortgage contained the condition in question, or that the legal effect of the instrument would be what he desired, but there is no satisfactory proof of fraud or unfairness in the execution, or that it did not embrace all of the stipulations actually assented to by both of the parties.

The decree of the Circuit Court will be reversed, and the bill dismissed with costs.

Decree reversed.

Woods *v.* Dial.

JAMES WOODS, Pltff in Error, *v.* DAVID DIAL, for the use of John Williams, Deft in Error.

ERROR TO JEFFERSON.

The statute regulating the place of delivery of personal property, in certain cases where the contract is in writing and payable at a particular time, without designating the place of delivery, has no application to a contract not in writing.

A contract payable "*in trade*," without time or place for payment is payable on demand, or within a reasonable time thereafter, according to the nature of the thing demanded.

The promisee of such a contract, should make a demand at the residence or place of business of the promisor and notify him what kind of trade he is ready to receive, and if he seeks to enforce the payment of the contract in money, he should show that he has made a proper demand, or some excuse for not having done so. (*a*)

In the absence of all testimony to show where the contract was made, or where the parties resided, the presumption is that they resided in the county where the action was instituted. But if it be shown that the debtor had no fixed place of residence or of doing business or was a non-resident, the rule governing the demand would be different, and in some cases, the demand would be wholly dispensed with.

The promisee in such a contract undoubtedly has the right to select the *kind of trade* he would receive, confining himself however to such articles as the parties had in view at the time of the making of the contract, and to the pursuit or business of the promisor.

Where the promisor in such a contract was a merchant, the promisee would be confined to such articles as the promisor usually traded in, and the place of demand and delivery would be at the place of business of the promisor. If the promisor was a farmer the promisee would be confined to farm produce, to be demanded and delivered at the farm of the promisor.

This was an appeal from a justice of the peace to the Circuit Court of Jefferson County.

The facts of the case are fully set out in the opinion of the Court. The cause was heard before Denning, Judge, and a jury, at the August Term, 1850, of the Circuit Court, and resulted in a verdict for the plaintiff, and a judgment for $40 and costs. A motion for a new trial was overruled. A bill of exceptions was taken, and the defendant below brought the case to this Court by writ of error.

W. B. SCATES and R. F. WINGATE for Pltff in Error.

S. BREESE and L. F. CASEY for Deft in Error.

TRUMBULL, J. This record shows, that Woods agreed with Dial to give him forty dollars in trade, for his improvement on Congress land—Dial to keep possession of the place for one year—that he left the premises in the spring, and brought suit for the forty dollars for which he had judgment.

(*a*) McPherson vs. Gale, 40 Ill. R. 368; McPherson vs. Hall, 44 Ill. R. 264; Marshall vs. Gidley, 46 Ill. R. 247.

The agreement was by parol, and the evidence of its terms, as shown by the record, is exceedingly meagre. Neither the kind of trade, the time or place for its delivery, the residence of the parties, except that one of them resided on Congress land, nor the business that either followed, appears in the case. The Circuit Court refused to instruct the jury that proof of a demand was necessary to entitle the appellee to recover.

The courts have felt some difficulty in construing contracts of this character, and their decisions are somewhat conflicting.

In this State, we have a statute regulating the place of delivery of personal property in certain cases, when the contract is in writing and payable at a particular time. The statute however has no application to this case, as the contract was not in writing.

When the contract is payable in trade generally, and no time or place is specified for its delivery, it is but reasonable that the promisee before bringing suit, should notify the promisor what kind of trade he will have, and when he is ready to receive it, or show some excuse why he has not done so.

A contract payable in trade without time or place, is payable on demand, or within a reasonable time thereafter, according to the nature of the thing demanded. Upon a contract payable in farm produce, it was held in the case of Lobdell *v.* Hopkins, 5 Cowen, 516, that a special demand was necessary. The case of Vance *v.* Bloomer, 20 Wend., 196, is to the same point.

We are disposed to adopt the rules as settled in New York, and hold that a special demand was necessary in this case.

In the absence of all testimony to show where the contract was made, or where the parties resided, the presumption is, that they resided in the county where the suit was brought. In such case the demand should be made at the debtor's residence or place of doing business. If he had no fixed place of residence or doing business, or was a non-resident, the rule would be different and perhaps in some instances the demand might be dispensed with.

The creditor in this case undoubtedly had the right to select the kind of trade he would have, confining himself however to such articles as the parties had in view at the time of making the contract. If the case showed that the debtor was a merchant, there could be no question that the creditor would be confined in his selection to such articles as his debtor usually traded in,

and that he would be bound to make the demand and receive the goods at his store, and at the usual prices. 2 Kent's Com., 505; 2 Greenleaf's Ev., § 609.

The subject matter of the agreement is however the only circumstance that appears in this record, from which to ascertain what the parties meant by trade. In such a case the custom and usage of those who enter into similar contracts ought to govern its construction.

A debtor who wished to discharge such a contract, would have the right to call upon his creditor to select the property and name a time and place for its delivery, and upon his failure to do so, it would then be the right of the debtor to select property subject to the same restrictions as the creditor would have been under, had he made the selection, and tender the same at some reasonable time and place in discharge of his obligation.

As the case will have to be reversed, on account of the refusal of the Court to instruct the jury that a special demand was necessary, and it is probable that further testimony will be adduced upon another trial, it is unnecessary to pursue this discussion further.

Judgment reversed and cause remanded.

Judgment reversed.

NATHANIEL BUCKMASTER, Appellant, *v.* JOHN COOL, Appellee.

APPEAL FROM MADISON.

A bill of exceptions, which professes to give only "an outline of all the testimony in the case," is not sufficient to authorize the Supreme Court to inquire into the propriety of the refusal by the Circuit Court to grant a new trial.

The Supreme Court will not inquire into the correctness of instructions, when the record does not furnish evidence that they were excepted to.

If there is an outer and an inner fence to a field, a party not having an exclusive right in the field, cannot remove the inner fence, although he is the owner thereof, without subjecting himself to the consequences of exposing the crops to danger. Nor is it any defence to an action of trespass growing out of the removal of the inner fence, to show, that the complaining party was bound to keep the outer fence in repair, or that he might have repaired the same at small expense.

This was an action of trespass *quare clausum fregit* commenced

in the Madison Circuit Court, by appellee against appellant, and charge that the trespass complained of was committed on the 1st day of September, with a *continuendo* to the 1st day of February, 1850.

The appellant pleaded the general issue and two special pleas. Issue was taken upon the pleas, but as the decision of the court does not turn upon the pleadings, it is unnecessary to recite them. The cause was tried by Underwood, Judge, and a jury, at March term, 1850, and a verdict was found and judgment entered, in favor of appellee against the appellant, for $345.00.

A bill of exceptions was taken by the appellant, who brings the cause to this court, and he assigns for error the refusal of the court below to admit certain evidence offered by him, the giving of improper instructions, and the refusal to grant a new trial.

W. Martin and E. Keating, for appellant.

The master is not liable for the willful disobedience of his servant. Ferguson *v.* Terry, 1 B. Monroe, 56; McManus *v.* Cricket, 1 East, 106 ; Lyons *v.* Martin, 8 Adol and E., 512.

In assessing damages in an action of trespass *quare clausum fregit*, only the direct damages of the trespass can be allowed. Loker *v.* Damon, 17 Pick., 284 ; 2 Greenleaf on Ev., p. 258 ; Sedgwick on Dam., 98 ; Miller *v.* Mariner's Church, 7 Greenleaf, 51 ; Thompson *v.* Shattuck, 2 Metcalf, 615.

J. Gillespie with Billings & Parsons, for appellee.

1. In actions of trespass, where the testimony is often and perhaps usually circumstantial, the court will rarely, if ever, disturb a verdict, where there is anything in the record tending to support the finding of the jury. Young *v.* Silkwood, 11 Ills., 36.

2. If the plaintiff have possession of that part of the close upon which the trespass was committed, although trespass was committed upon other parts not in the possession of plaintiff, he can maintain his action. 6 East, 39 ; 2 Stark. Ev. 1098.

3. A party can only take advantage of a non-joinder of plaintiff, by a plea in abatement. 2 Stark. Ev., 1103.

4. A party to avail himself of an exception to the decision of

the Circuit Court, must take an exception at the time the decision is made, and the bill of exceptions must affirmatively show that the exception was taken at that time. 11 Ills., 72, 580, 586.

5. The bill of exceptions in this case, sets forth that it is only an outline of the testimony produced on the trial below. This court will not examime into the evidence unless it appears to have been all the evidence produced on the trial.

TREAT, C. J. We cannot inquire into the propreity of the decision of the Circuit Court refusing to grant a new trial. It does not affirmatively appear, as it should in order to present that question, that all of the material evidence is in the record. It is stated in the conclusion of the bill of exceptions, that it contains "an outline of all the testimony in the case." This language does not imply, that all of the facts proved on the trial, and which may legitimately have been considered by the the jury, are previously set forth. It is not equivalent to the usual statement in a bill of exception, that it contains the substance of the testimony given on the trial.(*a*)

Nor can we inquire into the correctness of the instructions complaned of. The record furnishes no evidence that the defendant excepted to the giving of the instructions.

It remains to be considered, whether the court erred in excluding certain testimony offered by the defendant. The case showed, that several persons raised crops in a common field surrounded by a defective fence. During the season, one of them erected an inside fence sufficient to protect the crops. In September, the plaintiff purchased eighteen acres of corn growing in the field; and, in November, the servants of the defendant removed a portion of the inner fence, by means of which stock entered into the field and destroyed the corn. The action was brought to recover the value of the corn thus destroyed. The defendant offered to prove, that the plaintiff was bound to keep the outside fence in repair. We cannot perceive, how the admission of this testimony could have benefitted the defendant. The fact that it was the duty of the plaintiff to keep the outer fence in proper condition, did not justify the defendant in removing the inner one. For aught appearing in the case, the plaintiff had an undoubted right to rely on the inside fence for the protection of his property. The defendant proposed to prove, in

(*a*) Love vs. Mayneham, 16 Ill. R. 279; Reed vs. Bradley, 17 Ill. R. 327; Mooley vs. Fry, 30 Ill. R. 162; Ottawa, &c. vs. Graham, 35 Ill. R. 346; Kindig vs. Smithes, Admr; 39 Ill. R. 300; Ill. C. R. R. vs. Garish, 39 Ill. R. 371; Miner vs. Phillips, 43 Ill. R. 129; Allen vs. Coffil, 42 Ill. R 293; McPherson vs. Nelson, 44 Ill. R. 128.

mitigation of damages, that the plaintiff might, after the taking away of the inner fence, at a small expense and by the exercise of ordinary care, have saved his corn. This evidence was properly excluded. If the fence was removed by the direction of the defendant, he was responsible for all of the consequences directly resulting from the act. (*a*) He could not avoid that responsibility, by showing that the plaintiff failed to repair the breach that his servants had committed. It was not a trifling trespass, as in the case of the opening of a gate, which the owner sees open before any injury ensues, and neglects to close. The defendant also offered to prove the price which the plaintiff paid for the corn, at public auction, two months prior to its destruction. This testimony may not have been wholly irrelevant, but, we think, it had too remote a connection with the real question in issue, to justify the reversal of the judgment, because of its exclusion. The corn was standing in the field when purchased by the plaintiff, but was cut and put in shock by him before it was destroyed. The price that he paid for it, was not, therefore, any just or certain criterion of the value at the time of its destruction. The defendant further proposed to prove, that he had the right to go upon the field. Such right, if it existed, did not authorize him to remove the fence, or relieve him from liability for the consequences. The gist of the action was the removal of the fence, not the entry on the close.

The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

JOHN WALSH, Pltff in Error, *v.* THE PEOPLE OF THE STATE OF ILLINOIS, Defts in Error.

ERROR TO RANDOLPH.

Appeal bonds in criminal cases, are governed by the 99th section of the 59th chapter of the Revised Statutes, and cannot be amended.

This was a proceeding instituted before a justice of the peace, upon a complaint for an assault and battery. A trial was had

(*a*) McCormick vs. Tate, 20 Ill. R. 337 ; Stoner vs. Shugart, 45 Ill. R. 78.

and a fine of ten dollars was inflicted upon the plaintiff in error; whereupon he prayed an appeal to the circuit court, which was allowed. A bond was executed in the penal sum of $42.00, reciting that the judgment was for a like sum. In the circuit court, a motion was made to dismiss, because the appeal bond did not conform to the requisitions of law. The circuit court, Underwood, Judge, presiding, sustained the motion, and dismissed the appeal. The defendant below brings the cause to this court. The defendant below moved for leave to amend his appeal bond, which was denied by the circuit court. The refusal to allow an amendment of the appeal bond is the error complained of.

W. J. A. Bradford, for Pltff in Error.

P. Fowke, District Attorney, for the People.

Treat, C. J. Walsh prosecuted an appeal from the decision of a justice of the peace, imposing upon him a fine of ten dollars for an assault and battery. The appeal bond was in the penalty of forty-two dollars, and recited a judgment for the same amount.

The circuit court refused leave to amend the bond, and dismissed the appeal. Those decisions are assigned for error. The bond was clearly defective. It did not clearly describe the judgment appealed from. There was a material variance between the judgment rendered by the justice, and the one referred to in the condition of the bond. The court properly refused to allow the bond to be amended. The sixty-fifth section of the fifty-ninth chapter of the Revised Statutes applies only to appeals in civil cases. Appeal bonds in criminal cases are governed by the provisions of the ninety-ninth section of the same chapter, which do not authorize them to be amended. The case of Swafford *v.* The People, 1 Scammon, 289, is directly in point. The present statute is precisely like the one under which that decision was made.(*a*)

The judgment is affirmed with costs.

Judgment affirmed.

(*a*) Laws of 1853 p. 125; Ham vs. People, 15 Ill. R. 30; Rider vs. Bagby, June Term, 1868, Ill. Sup. Ct.

MOISE TOUPIN and others, Appellants, *v.* OLIVER GARGNIER, Appellee.

APPEAL FROM ST. CLAIR.

Where the parties to a suit agree to dismiss the same in the absence of all reasonable doubt as to the making of the agreement, the Court shall carry the agreement into effect; whether it be reduced to writing and signed by the parties, or exists in parol. (*a*)

This was an action of trespass, *vi et armis*, brought in the St. Clair Circuit Court by the appellee, which was tried by a jury, Underwood, Judge, presiding, at the September term, 1850. A verdict was found for the appellee for sixty dollars. A motion for a new trial was entered by appellants. Before judgment, the appellees entered a motion to dismiss the suit, and produced and filed two affidavits in support of the motion, showing that an agreement had been made between appellee and one of the appellants, that the case should be dismissed as to all the appellants and that each party should pay his own costs. This motion was resisted, upon the ground that the verdict had been assigned by the appellee, and affidavits were produced and filed with the assignment of the verdict, showing the date of the transaction. The motion to dismiss was overruled, and judgment was rendered upon the verdict. Thereupon the defendants below instituted this appeal.

G. KOERNER, for Appellants.

J. UNDERWOOD, for Appellee.

TREAT, C. J. In our opinion the Court erred in not sustaining the motion to dismiss. It clearly appeared that the parties had agreed, while the case was pending and undetermined, and before the assignment to Underwood and Snyder was executed, that the suit should be dismissed, each party to pay his own costs. Two witnesses swore positively that such an agreement was made, and there was nothing in the case calculated to impeach the correctness of their statements. The existence of the agreement was not even denied by the plaintiff, as it probably would have been, if there had been any question respecting the true character of the transaction between the parties. The

(*a*) Chapman vs. Shattuck, 2 Gil. R. 49; Hinchey vs. Chicago, 41 Ill. R. 136; Coultas vs. Greer, 43 Ill. R. 277.

Court, in the absence of all reasonable doubt as to the making of agreement, was as much bound to carry it into effect as if it had been reduced to writing and signed by the parties.

The judgment of the Circuit Court must be reversed, with costs; and the cause will be remanded, with instructions to that Court, to enter an order of dismissal, pursuant to the agreement of the parties.

Judgment reversed.

JOHN HAHN, Appellant, *v.* HENRY RITTER, Appellee.

APPEAL FROM ST. CLAIR.

It is a general rule in actions for torts, that matters in discharge or justification of the alleged tort, must be specially pleaded, and cannot be given in evidence under the general issue.

In actions of trespass, a former recovery must be specially pleaded, and cannot be insisted upon under the plea of not guilty.

On the 7th of June, 1849, plaintiff below, filed his declaration in trespass *quare clausum fregit*, against defendant below, containing two counts.

1st count, charges that defendant on the 1st day of June, 1845, and on divers other days between that day and the commencement of this action, broke the close of plaintiff, &c., broke down the fence and erected buildings, &c.

2nd count, charges that on the 1st day of June, A. D. 1848, and at divers other times, from that time until the commencement of this action, deft broke the close of plaintiff, &c.

Defendant filed three pleas.

1st. General issue.

2nd. That plaintiff as to any trespass prior to the 21st day of March, 1848, (when the first action was commenced,) *actio non*, because of the committing of the said supposed trespass, plaintiff sued for the same in trespass, and defendant was acquitted.

3d. *Liberum tenementum.*

Plaintiff joined issue on first plea.

Replied to second, that the trespasses in the first count mentioned, are not the same for which judgment was obtained.

Replied to third plea by general traverse.

The case upon these issues being submitted to the jury, they found a general verdict of not guilty for the defendant.

Plaintiff moved for a new trial, which motion was overruled, and judgment given for costs in favor of defendant.

The cause was heard before Underwood, Judge, and a jury, at April Term, 1850.

The plaintiff below prayed this appeal, and assigned for error, that judgment was for the defendant. That the court erred in giving instructions, and in overruling the motion for a new trial. That the court erred in submitting the issue arising on the second plea, to the jury.

G. KOERNER, for Appellant.

The evidence not only preponderated in favor of the pltff, but was all in his favor. The jury mistook the law and the facts of the case, and the court will give a new trial in such a case. 11 Ill. Rep., 142.

The first instruction was clearly erroneous, because it presented to the jury a question of fact, as to whether the same trespasses were complained of in the same suit between the same parties; and one of law, as to whether the title was distinctly put in issue at the former trial. This latter question was to be collected from the legal character of the pleadings, and was a question for the court to decide. In an action of trespass *quare clausum fregit*, neither the general issue, nor *liberum tenementum* puts the title to the freehold in issue.

In order to create a bar, in an action *quare clausum fregit*, by plea of former acquittal, an issue must have been taken and found upon a traverse of a precise fact, material to the right in question. 3 East., 2d. of new edition, 174 & 8, 182, notes; 15 Pickering, 276; 4 Conn., 276; 5 Conn., 127.; 3 Wend., 35, 36, 38, 40; 8 Wend., 20, 23, 24, 25; 2 Gilman, 355; 6 Price, 146.

3. The second instruction, as well as the first, is erroneous, because they contain at best mere abstractions; had not a particle of testimony to rest upon, and were eminently calculated to mislead.

As to the second instruction in particular, the mere agreement would be void under the Statute of Frauds. 2d Gilm., 423. Instructions entirely abstract are erroneous. 1 Dana, 35, & 273 ; III. U. S. D., 568, §485, §504 ; 3 A. K. Marshall, 86.

G. TRUMBULL for Appellee.

An agreement by parol, for the settlement of a boundary line is effectual, and not liable to any objections on the score of the statute of frauds and perjuries. Jackson *v.* Dysling, 199, 200 ; Boyd's lessee *v.* Graves et al.,4 Cond. R., 525 ; 4 Philips Ev., 232 ; 12 Wend., 130 ; Law Library, vol. 38, top p. 65; Crowell *v.* Mangles, 2 Gil., 423. That the award is conclusive ; Doe, &c., *v.* Roper, 2 East., 23 ; Jackson *v.* Gager, 5 Cow., 383, 387 ; 4 Phil. on Ev. 232, and cases there cited ; Law Library, vol. 38, p. 338, 342.

The defendant under the general issue may show title in himself. 2 Greenleaf's Ev. p. 583, 8 T. R., 403.

When a former recovery is given in evidence, it is equally conclusive in its effect, as if it were pleaded by way of estoppel. 1 Greenleaf's Ev. 635 and note, and p. 636 ; 10 Wend., 82, 84; 4 Phil. Ev. p. 31, 32 up to 35. Such is the rule in Virginia and Maryland. Brockway *v.* Kinney, 2 John., 210 ; Gardner *v.* Buckbee, 3 Cow. 127 ; Shafer *v.* Stonebreaker, 4 Gill. & John, 345; 7 Cranch, 565 , 8 Wend., 21, 43, 45. To show that same matter was in issue in both cases, 5 Conn., 550.

A judgment will not be reversed, because the court has given a mere abstract legal proposition, or because the jury found against the weight of evidence. Corbin *v.* Shearer, 2 Gil., 483; Pate *v.* the People,ibid, 661 ; Granger *v.* Warrington, ibid, 310; Bates et al. *v.* Bulkley, 2 Gil., 394.

Ancient reputation and possession, in regard to boundaries of streets in a town, are entitled to more respect in deciding on the boundaries of lots, than any experimental survey that may afterwards be made. Ralston *v.* Miller, 3 Rand, 44.

TREAT, C. J. In March, 1848, Hahn brought an action of trespass *quare clausum fregit*, against Ritter. The latter pleaded not guilty, and *liberum tenementum*. The case resulted in a ver-

dict and judgment in favor of Ritter. In June, 1849, Hahn brought another action for trespass on the same premises. The declaration contained two counts ; in the first, the acts complained of were laid as committed before the first action was commenced ; in the second, as committed after the bringing of that action. Ritter pleaded *liberum tenementum* to both counts, the former recovery to the first count, and not guilty to the second count. The proceedings in the former action were read in evidence on the trial. The court, at the request of Ritter, charged the jury " that if they believe from the evidence, that the former suit was brought for the same identical trespass, for which this action is brought, and that the title to the land was then distinctly put in issue by the parties, they must find for the defendant." The verdict and judgment were for Ritter, and Hahn brings the case into this court.

It is a general rule in relation to actions for torts, that matters in discharge or justification of the action, must be specially pleaded, and cannot be given in evidence under the general issue. A former adjudication of the same cause of action falls directly within this principle. It is distinctly held in the action of trespass, that a former recovery must be specially pleaded, and cannot be insisted upon under the plea of not guilty. 1 Chitty's Pl., 10th Am. Ed., 506 ; Coles *v.* Carter, 6 Cowen, 691. Apply this rule to the present case, and the instruction was clearly erroneous. Ritter only relied on the former adjudication, as a bar to a recovery on the first count of the declaration. The proceedings in the first action, were only admissible in evidence to sustain the plea to that count. The jury had no right to take them into consideration, in determining the issues on the second count. The instruction should, therefore, have been restricted to the first count. It was erroneous, when applied to the whole declaration. But, if specially pleaded to both counts, the recovery in the first action, constituted no defence to the acts committed after that action was commenced. The finding, in that case, was general. It may have been for the defendant on the issue of not guilty. But if on the other issue, it did not necessarily determine the question of title to the close, further than at the time of the commission of the acts complained of. The plea of *liberum tenementum*, in the former action, simply alleged that the *locus in quo* was the close of the defendant. It may have been his close when-

the trespass in that suit was committed, and yet his rights therein may have wholly determined before the suit was tried. The plaintiff may have had no interest whatever in the premises, prior to the bringing of the first action, and still have acquired an estate in fee-simple, before the commission of the second trespass.

The judgment of the circuit court is reversed, with costs, and the cause remanded for further proceedings.

Judgment reversed.

AMY DAVIDSON, Admtx, &c., *et al.*, Pltffs in Error, *v.* BENJAMIN BOND, *et al.*, Defts in Error.

ERROR TO CLINTON

A party may have his judgment reversed, if the judgment below was *exparte*, and the errors which render it inoperative are patent.
It is error to render judgment against a part of the defendants, while the cause remains undisposed of as to the others.

The record in this case shows, that William Russell, now deceased, in his life time, by his attorney filed in the office of the clerk of the circuit court of Clinton county a precipe and declaration in assumpsit, on the 16th day of June, 1846, against several defendants. A summons was issued, returnable at the September term, 1846, of that court, which was returned served, on four of six defendants, on the return day of the summons, and returned not served on the other two. On the following day, an appearance was entered for four of the defendants, and subsequently a default for failing to plead was entered, and judgment was rendered against four of the defendants without making any order as to the other two.

The plaintiffs below sued out this writ of error, to procure a reversal of their own judgment.

G. TRUMBULL, for plaintiffs, made the following points:

The court erred in rendering judgment at the return of the process against the defendants in the judgment, they not having been served with process ten days before the commencement of the term of court, and the ten days' notice not having been waived by the defendants against whom the judgment was

entered. Gore *v.* Smith, Breese, 206 ; R. S. 1845, p. 413, Sec. 5 Teal *v.* Russell et al., 2 Scam., 321 ; Tidd's Prac., 1188.

It was error to render judgment against part of the defendants, and make no order as to the other defendants who were served with process. Ladd et al. *v.* Edwards, Breese, 139 ; O'Connor, et. al. *v.* Mullen, 11th Il ls. Reps., 116.

That a plaintiff may reverse a judgment for his own errors, see Capron *v.* Van Nordon, 1 Cond. Reps., 370 ; 2 Scam., 321 ; Jones et al. *v.* Wright et al., 4 Scam., 338 ; 2 Tidd's Prac., 1134.

S. Breese, for Defts in Error.

Caton, J. On the return day of the summons it was served on all of the defendants. During the term to which the summons was returnable the appearence of four of the defendants was entered. At the same term a default was entered and judgment rendered against the four defendants whose appearance had been entered, and no notice taken of the other two defendants who had been served with process. This was unquestionably erroneous. At the common law, in action upon a joint contract or obligation, the judgment must be rendered against all or none of the defendants, and this has only been changed by our statute, by allowing the plaintiff to take judgment against a part of the defendants, who alone had been served with process. This case should have been continued until the next term, when all of the defendants might have been proceeded against.(*a*)

Here there was an error, for which the defendants might, at any time within five years from the rendition of the judgment, bring the case to this Court, and have the judgment reversed. And while this is the case, it is not an open question in this court, since the decisions in the cases of Teal *v.* Russell et al., 2 Scam., 319, and Jones *v.* Wright et al., 4 Scam., 338, that the plaintiffs may bring the record here, and rid themselves of a judgment, which while it presents a bar to their obtaining a regular one, still affords them no sufficient security. (*b*)

Inasmuch however, as their intestate was chargeable with the error which renders the judgment defective, they must pay the costs of getting it reversed. Jones *v.* Wright et al., 4 Scam., 338.

Let the judgment be reversed at the costs of the plaintiffs to be paid in due course of administration.

Judgment reversed.

(*a*) Evans vs. Gill, 25 Ill. R. 117.
(*b*) Fuller vs. Robb, 26 Ill. R. 248 ; Thayer vs. Finley, 36 Ill. R. 264.

Knox *et al. v.* Light *et al.*

JOHN T. KNOX *et al.*, Pltffs in Error, *v.* DANIEL B. LIGHT *et al.*, Defts in Error.

ERROR TO FRANKLIN.

Where a plea of tender alone is interpesed,but the money is not brought into Court,and the defendants refuse to compiy with the order of the Court directing money to be brought in, the Court will either disregard the plea, or strike the same from the Court, and enter up judgment, as by default.

This was an action of debt, brought by defendants in error, upon a promissory note, in the Franklin Circuit Court- A plea of tender was interposed, which was disposed of as stated in the opinion of the court. A judgment was rendered for defendants in error, before Denning, Judge, at the April term, 1850. The defendants below sued out this writ of error.

W. K. PARRISH and CASEY & MONTGOMERY, for Pltffs in error.

R. F. WINGATE, for Deft in Error.

TRUMBULL, J. This was an action of debt upon a promissory note. All the questions in the case, arise out of the proceedings upon a plea of tender.

The plaintiffs in the circuit court after filing a replication to the plea, to which the defendants demurred, asked and obtained leave to withdraw their replication, and obtain a rule upon the defendants to pay the money into Court as alleged in their plea. The defendants refused to comply with the order, whereupon, the Court disregarding the plea, entered judgment against the defendants. In all this there was no error.

It was clearly within the discretion of the Circuit Court to allow the plaintiffs to withdraw their replication, and enter their motion for a rule upon the defendants to pay the money into Court. When they refused to comply, it would be strange indeed if they could still have the benefit of their plea of tender. To make a tender good, the party must at all times have the money ready, so that the creditor may at any moment receive it and stop the litigation.

To allow a party to defeat a recovery upon the ground that he had tendered and was then ready to pay the demand against him, when at the same time he refused to pay over the money when requested, would be trifling with the rights of the creditor.

The question whether the money was ready in court, as stated on the plea was not a question of fact, to be determined by the jury, but a question to be determined on inspection by the court.

When the court saw that the money was not present and the defendants refused to produce it, it was manifestly right and proper for the court, either to strike the plea from the files or disregard it altogether.(*a*)

Judgment affirmed at the cost of the plaintiffs in error.

Judgment affirmed.

WILLIAM S. BURKETT, Pltff in Error, *v.* JOHN BOND, Deft in Error.

ERROR TO EDWARDS.

In an action, the gist of which is carelessness, negligence, or imprudence on the part of a defendant, it is proper to admit any testimony, which tends to prove that a prudent man would have acted in the same manner.

The correctness of instructions asked in the Circuit Court will not be inquired into, unless they were excepted to at the time.

Burkett sued Bond in an action of trespass on the case, for so negligently and carelessly driving a mare out of his close, in which she was trespassing, as to cause her death. Bond filed a plea of the general issue. The cause was heard before Harlin, Judge, and a jury, at the April term of the Edwards Circuit Court, when a verdict was found and a judgment rendered for the defendant.

A motion for a new trial was denied. The plaintiff filed a bill of exceptions and brings his case to this court, by writ of error. Errors assigned, are the admission of improper testimony, the refusing to give instructions to the jury, and refusing a motion for a new trial.

C. CONSTABLE, for Pltff in Error.

The evidence of character of animal, that she was breachy, was calculated to mislead the jury, and much more so when the judge intimated his opinion of its bearing to the jury, by saying that

(*a*) Sloan vs. Petrie, 16 Ill. R. 262 ; Marine Bank of Chicago vs. Rushmore, 28 Ill. R. 463 ; Webster & vs. Pierce & 36 Ill. R. 263 ; Stow vs. Russil, 36 Ill. R. 35.

it was material. Reel *v.* Reel, 2 Hawks, 63 ; Sneed *v.* Creath, 1 Hawks, 309.

The instruction asked by plaintiff, refused by the court, was such as should have been given. 2 Sup. U. S. Dig., p. 445, Sec. 349 ; Walton *v.* Stallings, 4 Dev., 56.

The new trial should have been granted for the causes assigned in the Court below.

1st. Because court admitted improper testimony. Ellis *v.* Short, 21 Pick., 142 ; Clark *v.* Vorce, 19 Wend., 232.

2d. Because court refused a legal and proper instruction, and because verdict was contrary to evidence. Wendall *v.* Stafford, 12 N. Hamps., 171 ; Grimke *v.* Housman, 1 McMullen, 131 ; Williams *v.* Barfield, 9 Serg., 270 ; Gordon *v.* Crook, 11 Ill., 142.

U. F. Linder, for Deft in Error.

Caton, J. This action was brought to recover the value of a mare which belonged to the plaintiff. The evidence shows that the mare was in the defendant's corn field. The defendant told one of the witnesses, that in scaring her out of the field he turned his coat over his head and ran at her, and wished she might break her neck. In jumping the fence she broke her thigh. Where she jumped the fence it was eight rails high ; in other places the fence was poor. In the opinion of the witnesses the mare was worth from forty to forty-five dollars. The jury returned a verdict of not guilty. In the course of the trial, one Orr, testified that the mare was breachy, that she was raised on his place "as a trespassing animal ;" and that he told the plaintiff so when he bought her. The plaintiff requested the court to withdraw this testimony from the consideration of the jury as irrelevant ; which the court refused to do, saying "it was material." To this the defendant excepted. We are of opinion with the circuit court, that this evidence was material. The ist of this action was carelessness, negligence or imprudence, on the part of the defendant in driving out the mare.

We understand a breachy horse to be one which is in the habit of jumping ordinary fences. It is manifest that a prudent man might not hesitate to drive an animal over a fence which he knew it was in the constant habit of jumping, when he would not think of frightening one, to attempt such a leap, which he

knew was not unruly. It certainly was not improper to allow the defendant, to show that a prudent man might have driven the mare over the same fence, and this evidence tended to show that fact and was properly admitted.

An objection was made to the refusal of the Court to give an instruction asked for by the plaintiff, but as the dicision of the Court refusing the instruction was not excepted to, it is not before us for examination.

As to whether the defendant acted imprudently in driving the mare out of his field, was a question peculiarly appropriate for the consideration of the jury. It was a subject with which the jurors are probably better acquainted than we are, and we feel no disposition to disturb their finding. We cannot say that they decided erroneously.

The judgment of the Circuit Court must be affirmed with costs.

Judgment affirmed.

HAMILTON WADE, Appellant, *v.* NELSON WADE and HARVEY D. BROWN, Appellees.

APPEAL FROM PERRY.

A party may lay the foundation by his own oath for the introduction of secondary evidence, to prove the contents of a note which has been lost.

A Court of Equity will not interfere to set off an unliquidated claim against a judgment, except under special circumstances; though it may interfere to set off one judgment against another, if a party be unable to enforce his judgment at law.

This was a bill in chancery filed by appellant in the Franklin Circuit Court, but the judge of that Circuit having been of counsel for one of the parties, the venue was changed to Perry county, where by consent of parties, the cause was heard by S. Breese, Esq., sitting as Judge, and a decree was pronounced dismissing the bill at the cost of complainant, at October term, 1850.

The bill shows that Nelson Wade, one of the respondents, recovered a judgment against the complainant on the 3rd of September, 1845, in the Franklin Circuit Court, for the sum of

$843.75. That before and at the time of the rendition of that judgment, Nelson Wade was indebted to complainant in the sum of $2121.33, upon a promissory note made on the 14th day of August, 1841, payable twelve months from its date, which still ramains unpaid. That after the commencement of the suit against complainant by Nelson Wade, in which judgment was obtained, and before the judgment was obtained, complainant "searched diligently among his papers and could not find said note for the reason that the same was mislaid. And that since the said trial and judgment, by accident the said note has been found, and can now be produced." That Nelson Wade does not live in this state, and has no property herein, and unless complainant is permitted to set off the amount due on the note against the judgment in favor of Nelson Wade, he will in all probability lose the same. That after the rendition of the judgment in favor of Nelson Wade, an execution was issued thereon, upon which the lands of complainants were sold, and that H. D. Brown, the other appellee, became the purchaser thereof, with full knowledge of all the facts set out in the bill, and that the bill was read to him before the purchase, and that Brown paid nothing for said lands of his own funds.

The bill prayed that the amount of this note should be set off against the judgment of Nelson Wade, and for general relief, &c.

Nelson Wade did not anwser. Brown answered, admitting the judgment, the issuing of execution, the sale of the land, the purchase thereof by himself as alleged in the bill, but denies that he paid nothing of his own funds for the land, admits that he had notice of the fact alleged in the bill, but alleges that he bought the judgment in question of Nelson Wade, and that on the thirteenth of May, 1846, the same was assigned to him by a written assignment, and that from that time he, Brown, has been the sole and absolute owner of said judgment, and that he never knew that complainant had a claim against Nelson Wade, until the day the land was bought at sheriff's sale.

Proof was made of the execution of the note, which was an exhibit in the cause, and also that Nelson Wade was not a resident of the state, nor had he been for six years past, and that it was not known that he had any property within the state.

Hamilton Wade prayed the appeael, and assigned for error, the dismissing of the bill without granting the relief prayed.

W. H. UNDERWOOD, for Appellant.

The ground upon which the bill was dismissed in the court below, was that the complainant should have filed his bill immediately after suit brought against him and before judgment. I do not find any case that goes thus far. In the early case of Gainsborough *v.* Gifford, 2 Peere Williams, 425-6, no such extreme diligence was required. Nor in the case of Buckmaster *v.* Grundy, 3 Gil., 631. Courts of Equity will relieve against a judgment at law, where there has been fraud or injustice done, not attributable to the laches or neglect of the defendant. Abrams *v.* Camp, 3 Scam., 291. To a set off, which, by accident, could not have been presented in the suit at law, or where the defendant has no redress within the jurisdiction, equity will give relief. Simpson *v.* Hart, 14 John., 64 ; 6 B. Monroe, 119, 120 ; Hughes *v.* McCann's admr, 3 Bibb, 254, 248 ; Pond *v.* Smith, 4 Conn., 302 ; Lindsay *v.* Jackson, 2 Paige, 581 : Davis *v.* Tileson et al., 6 Howard, 114.

The assignee of a chose in action, as a judgment, is in no better position than his assignor. Chamberlain *v.* Day, 3 Cowen, 353 ; Webster *v.* Wise, 1Paige, 319; Gay, *v.* Gay, 10 Paige, 376, 377 ; Scott *v.* Schrieve, 6 Condst. R., 664-5 ; Brashear *v.* West, 7 Peters, 616 ; Livingston *v.* Hubbs, 2 John., 511. The right of the complainant to a set off existed anterior to the obtaining of the judgment, and the supposed assignment thereof. And it was out of his power to set off his note on the trial, as it was mislaid, and not lost. Rogers *v.* Miller, 4 Scam., 334.

The plaintiff in the judgment at law, was and is a non-resident, and had no property within the jurisdiction, whereby the only remedy afforded the complainant is by bill in chancery. Lindsay *v.* Jackson, 2 Paige, 583 ; Robbins *v.* Hawley, 1 Monroe, 194 ; Prior *v.* Richards' admr., 4 Bibb, 356.

R. WINGATE, for Appellees.

CATON, J. No satisfactory reason is shown by this bill, why the complainant did not set off his note in the action at law in which the judgment was obtained against him. The reason which he assigns for not having done so is, that he "searched diligently among his papers and could not find said note, for the

reason that the same was mislaid." If this was not sufficient to lay the foundation for the admission of secondary evidence of the contents of the note, it was certainly in his power, by making a more thorough search to have done so. His own oath was sufficient for this purpose, and he does not pretend that he was unable to prove the existence and contents of the note. This is not a case in which it is necessary to prove the destruction of the note, as in Rogers v. Miller 4 Scam., 333. In the present case the note was made payable to the complainant or his order, was over due at the time of the recovery of the judgment against him, and had not been assigned, so that there was no danger that the maker would be made liable to pay the note a second time. With proper diligence the present complainant might have set off this note in that action; he had the option of doing so. He does not state any circumstance in his bill, which shows that his right to enforce the payment of the note, is not as available now, as it was then. It is alleged that the respondent is not a resident of the state, and that he has not any means from which the amount of the note can be collected, but we have not anything presented to us, which shows that this was not equally the case when the judgment was rendered. The demand sought to be set off against the judgment is unliquidated and open to controversy, and we are asked first to try the suit upon the note and then to set off the amount found to be due, against the judgment. It is not within the ordinary jurisdiction of this court to try an action of assumpsit upon a note, and then set off the judgment recovered upon it against another judgment, merely because the maker of the note has not available means to satisfy his creditor, and this will not be done unless some special circumstance is presented to justify the proceeding.(a) If the party seeking to make the set off, shall have established his claim at law, we will in accordance with the decision in the case of Buckmaster v. Grundy, in 3 Gilman, 626, set off one judgment against another, if one party is unable to enforce his judgment at law. In the case referred to, other claims were investigated and the amount ascertained to be due was set off, but the claims so investigated partook of the nature of partnership transactions between the contesting parties, and although they might possibly have been within the jurisdiction of a court of law, yet

(a) State Bank vs. Stanton, 2 Gil. R. 354; Heinrichsen vs. Reinback, 27 Ill. R. 300; Heinrichsen vs. Van Winkle, 27 Ill. R. 337; Raleigh vs. Raleigh, 35 Ill. R. 512.

they were not inappropriate for the consideration of an equitable forum.

We think the Circuit Court decided correctly in dismissing this bill, and therefore its decree is affirmed with costs.

Decree affirmed.

JOHN PURCELL, Pltff in Error, *v.* NINIAN T. STEELE *et al.*, Defts in Error.

ERROR TO CRAWFORD.

A forthcoming bond given by the defendant in an attachment suit, which stipulated that if he "failed to substantiate his claim, shall render up and have forthcoming the said property attached, &c., is in effect a statutory bond, and is assignable. A person claiming the property attached, should interplead, when a jury will enquire into the right of property, and if the finding shall be for the claimant, it will furnish a good excuse for not surrendering the property.

This was an action, brought in the Crawford Circuit Court by the pltff in error, against the defendants in error, upon a forthcoming bond. The facts of the case are set out in the opinion of the Court. The plaintiff standing by his demurrer to the plea, the Circuit Court, Harlan, Judge, presiding, at Sept. term 1850, gave judgment for the defendant, dismissing the suit.

C. CONSTABLE, for Pltff in Error.

The condition to substantiate claim, though not required by the Statute, does not vitiate the bond, such condition not being ille, gal ; and the only result is, that, no breach of such condition ca- be assigned and recovery had on such breach, and it is to be taken as not expressed in the bond. No performance, or readiness to perform such condition can be pleaded in discharge of bond. Un S. Dig. Vol. 1, § 55, p. 435 ; Hall *v.* Cushing, 9 Pick.,40; 4Peters C. C. R. p, 47 ; 1 Pen., 120 ; 2 Pen., 500 ; United States *v.* Hipkin, 2 Hall's Am. Law Jour., 80 ; 1 Gallison, 87 ; Sanders *v.* Rives 3 Stewart, 109.

Part of condition to this bond is prescribed by the Statute, and is easily divisible and very distinct from that part not prescribed,

and we can recover on such prescribed condition after breach, U. S. Dig. Vol. 1, § 62, p. 335 ; Vroom *v.* Smith, 2 Green's N. J R., 479 ; 7 Monroe, 317 ; Wash. C. C R. 620 ; 1 Gallison C. C. 99 ; 2 Bailey, (So Car.) 541.

U. F. Linder, for Defts in Error.

Treat, C. J. Purcell sued out an attachment against Bogard which was levied on a quantity of corn. Steele and Harness, as principals, with Bishop as surety, executed a forthcoming bond to the Sheriff, the condition of which, after reciting the issuing and levying of the attachment, and stating that Steele and Harness claimed to be the owners of the corn, is as follows : " Now if the said Ninian J. Steele and Andrew P. Harness fail to substantiate said claim, shall render up and have forthcoming the said property, attached as aforesaid, to answer the judgment which shall be rendered by the court, in the said suit instituted by the said John Purcell against the said Harrison H. Bogard, in the said county of Crawford, then, and in that case, this obligation to become void, otherwise to be and remain in full force and virtue." Purcell recovered a judgment in the attachment suit ; and, as assignee of the Sheriff, brought an action against Steele and Harness on the forthcoming bond. The declaration assigned for breach, that Steele and Harness did not substantiate their claim to the property, and did not surrender the same to the Sheriff to answer the judgment. The defendants pleaded that the corn, when levied on by the Sheriff, was their property. The court overruled a demurrer to the plea, and judgment was entered for the defendant.

It is insisted by the defendants, that the declaration shows no cause of action, and therefore, that the demurrer was properly overruled, without reference to the character of the plea. They contend, that the bond does not pursue the statute, and is therefore, not assignable, so as to authorise the plaintiff to sue thereon in his own name. The 9th section of the 9th chapter of the Revised Statutes provides, that the officer serving an attachment shall retain the custody of the property attached, unless the person in whose possession the same may be found, shall enter into bond to the officer, conditioned that the property shall be forthcoming to answer the judgment that may be rendered in the suit;

and the 10th section provides, if the bond be forfeited, that the officer may assign the same to the plaintiff, who may bring an action thereon in his own name. The bond in question complies with the requisitions of the Statute in all respects, except in the addition of the provision that the obligors may substantiate their claim to the property. But, the insertion of this clause does not vitiate the bond, or change its legal effect. The rights of the parties would be precisely the same, if it was omitted. A bond pursuing the Statute exactly, would imply every thing that is contained in this instrument. The 21st section of the chapter before referred to, authorizes any person, other than the defendant in the attachment, to interplead and claim the property attached, and, in such case, the court is required to direct a jury to be empannelled to inquire into the right of property. Under this secton, the defendants might have had their claim to the property investigated before the judgment was rendered against Bogard, or at least, by interpleading before the judgment was entered, they might have avoided a forfeiture of the bond, until the right of property was determined. They had this right independent of the peculiar provision in the bond. The provision secures them no additional or greater right. It does not mean that the doctrine of the right of property, shall be a condition precedent to the forfeiture of the bond. Nor does it reserve to the defendants the right to substantiate their claim to the property, in an action on the bond. If they had interpleaded in the attachment suit, and claimed the property, and the right had been found in their favor, the finding would have been a good excuse for not surrendering the property, and could have been pleaded in bar of an action in the bond. But, neglecting to interplead and in that way substantiate their claim, they were bound to deliver the property to the Sheriff, to answer the judgment recovered against Bogard. The declaration is good, and the plea is no sufficient answer to the breach assigned on the bond. Whether the defendants may not still put the right of property in issue, in an action of trespass against the Sheriff or the plaintiff, for the seizure of the corn, is another question which does not now arise.

The judgment of the Circuit Court must be reversed, with costs, and the cause remanded for further proceedings.

Judgment reversed.

MOSES G. ATWOOD, Appellant, *v.* ALBERT G. CALDWELL *et al.*, Appellee.

APPEAL FROM MADISON.

The laws for the liquidation of the Bank of Illinois, were designed to vest the assignee with authority to sell the real estate of the bank at public or private sale, and they are not bound to sell to the person who first offers to pay the appraised value. And if the assignees exercise the right within a reasonable time and offer to sell, there is then no cause of complaint with their action.

The bill in question was filed for an injunction against the assignees of the Bank of Illinois, to prevent their selling certain lands, and to enforce a conveyance of title of the same lands to the complainant, plaintiff in error.

The bill states, that in accordance with the 12th section of an act of the legislature, passed Feb. 25, 1843, entitled "An act to reduce the public debt," &c., the Judge of the Madison Circuit Court appointed appraisers to appraise the real estate of the Bank of Illinois, in Madison County. That a majority of said appraisers, appraised on the 16th day of Oct., 1849, Blocks 30, 31, and 32, in Smith's addition to the city of Alton. That on the 19th of Oct., 1849, complainant tendered said appraisement with $500, (being more than the amount of the appraisement,) of the certificates of said Bank, to defendant, Smith, for himself, and assignees, and demanded a deed for said blocks. That said assignees refused to make a deed, and afterwards advertized for sale and struck off said Blocks, to other persons, as purchasers. That complainant gave notice of his rights at the time of last pretended sale. Bill prays an injunction to prevent execution of deeds to any other person than complainant, and that said assignee make complainant a deed of said Blocks.

The answer of Caldwell et al., assignees, &c., denies that the appraisement was made in compliance with said 12th section of the statute—because not made at the instance of the assignees, but that of complainant, defendant Dow, and one Robert Smith; and because the certificate of surveyor does not give the quantity of land in each Block; states that complainant made no tender personally, but admits that said Smith did make tender as the agent of complainant; denies violation of said statute in refusing to make deed, &c.; states that assignees, about the 30th of November, 1849, caused an appraisement of said Blocks by two

of the appraisers, who appraised the same at $25 per acre; which assignment was returned duly to said assignees; that said Blocks were advertised and sold at public sale, to wit:

Block 30,	to defendant	Ingham,	for - - - -	$1589 25
" 31,	"	Dow,	" - - - - -	382 50
" 32,	"	Garbut,	" - - - - -	150 75

Payable in Bank certificates; that deeds are partly made out for such purchasers, &c. The purchasers of the above lots are all made parties to the bill.

Agreement made in case.

"It is agreed between the parties in the above entitled cause that the appraisement set forth in complainant's bill, was made at the request of the complainant and not at the instance of the assignees of the Bank. It is also admitted, that the tender was made by complainant to said assignees, as is set forth in said bill.

Upon this agreement of facts, it was submitted to the Court whether, under the 12th section of the act putting the Bank of Illinois into liquidation—approved Feb. 25th, 1843—the complainant is entitled to a deed from the said assignees for the property mentioned in complainant's bill.

Cause heard by agreement on Bill and Answer. Bill dismissed, and Appeal taken by complainant.

The 12th section of the act putting the bank in liquidation, above referred to, is as follows:

"The real estate of said bank shall be appraised by three householders, or a majority of them on oath, to be appointed by the Judge of the Circuit Court of the county where the real estate may be situated; said real estate, when so appraised, shall be subject to sale, and shall be sold whenever thereafter the appraised value shall be offered for the same; the real estate of the said Bank shall not be sold on execution for less than two-thirds of its appraised value, to be ascertained as aforesaid."

Bill heard before Underwood, Judge, at March term, 1850, of Madison Circuit Court.

Billings & Parsons, for Appellants.

Statutes are to receive such a construction as must evidently have been intended by the legislature; and to ascertain this, the Court called upon to give the construction may look to the object

in view—the remedy intended to be afforded, and the mischief intended to be remedied. Winslow *v.* Kimball, 25 Maine, 493; Kilby Bank Petitioners, 23 Pick., 93.

As to the true construction of the 12th section of the act, "to reduce the public debt one million of dollars, and to put the Bank of Illinois into liquidation. Laws of 1842–3. Reference is made to section 10 of said act, and sections 8 and 10 of an act entitled, "An act to put the Bank of Illinois into liquidation." Laws 1842–3, p. 27. Also to the ninth section of an act entitled, "An act to diminish the State debt, and put the State Bank in liquidation." Laws 1842–3, p. 21, Sec. 10 of an act supplemental to an act to reduce the public debt, &c. Laws of 1845, p. 246; Webster et al. *v.* French et al., 11 Ills., 274–5.

Davis & Edwards and D. A. Smith, for Appellees.

Treat, C. J. We are satisfied with the decree of the Circuit Court. The bill proceeds on the ground, that the assignees have no discretion in disposing of the real estate of the corporation, but are bound to sell the same to the person who first offers to pay the appraised value. We cannot acquiesce in such a construction of the several laws providing for the liquidation of the Bank. It would prevent the assignees from realizing the benefit of any advance upon the appraisement, and might materially lessen the amount which the creditors and stockholders of the institution would otherwise receive. In our opinion, the legislature designed to vest the assignees with authority to sell the real estate of the Bank, either at public or private sale, as they should deem most beneficial to those interested in the settlement of its affairs. The assignees having the right to sell the land in question, at public auction, and having exercised that right within a reasonable time, and thereby afforded the complainant an opportunity, to become the purchaser, he has no just cause to complain of their action in the matter.

The decree is affirmed with costs.

Decree affirmed.

CHRISTIAN KEAGGY, Appellant, *v.* ANDREW HITE, Appellee.

APPEAL FROM MARION.

When the record discloses a case in which the jury have manifestly found against the evidence, the verdict will be set aside.
Accounts cannot be adjusted, nor will a set off be allowed, in an action of trover
In trover, if the plaintiff recover, he is entitled to a verdict for the full value of the property converted, at the time of the conversion.

This was an action in trover brought by the appellee in the Marion Circuit Court, for the value of a promissory note for $412, and a mortgage to secure the same, given to one Marshal Wautland, by appellant, and assigned by Wautland to Hite, which came into the hands of appellant, in the manner set out in the opinion. To the declaration the appellant filed the general issue, and a verdict for $200 was found for appellee.

The cause was tried before Denning, Judge, and a jury, at August term, 1850. A motion for a new trial was denied. The defendant below prayed the appeal.

W. B. SCATES and T. F. HOUTS, for Appellant.

The court erred in permitting plaintiff below, to ask his own witness for his own declarations and the witness to answer. 1 Greenleaf's Ev., p. 255, §201 ; 1 Phil. Ev., 340–1.

The instruction given for Hite was erroneous, the measure of damages in trover was the value of the property converted. 4 Pick., 467 ; 17 Pick., 1 ; 1 Metcalf, 172 ; 8 Wendell, 508 ; 8 Pet., 191 ; 3 Carr and Paine, 344 ; 2 Hill, 132 ; 8 Dana, 192 ; 2 Tidd's Prac., 872–3. A new trial should have been granted; the verdict is against the evidence ; 12 John., 346–7 ; 9 Cowen, 53–5 & 6 ; 15 John., 205, 349 ; 16 John., 159 : 1 Hanp., 199 ; 1 Yeates, 19 ; 3 S. & R. Rep., 509 ; 3 Stephens' N. P., 2702 ; 2 Camp, 5 ; 1 T. R. 153.

J. D. HAYNIE, for Appellee.

If a part of a conversation is given, the party calling a witness, as well as the other party, is entitled to have the whole conversation stated. 1 Phil. Ev., 340–1.

The instruction was, "if the jury believe that the notes in

controversy were delivered as a pledge or security for money, yet if there has been an actual conversion by defendant, the jury must find for the plaintiff damages," &c. This was proper. Any use, misuse, or assumption of property in the goods of another is a conversion; and this, although a party have legal possession of the property of another, misuser of it is a conversion, and trover will lie. A bailee cannot put property bailed beyond his control; if he does, trover will lie. 1 Chitty's Pl., 154; 6 Ship., 382; 12 N. H., 382; 2 U. S. Dig., 879, §122; 16 Vermont, 390; 2 U. S. Dig., 876; 1 Chit. Pl., 154.

A verdict will not be set aside on account of an instruction which cannot prejudice the party complaining. 23 Wend., 79; 21 Wend., 354.

To induce the granting of a new trial, there should be strong probable grounds to believe that the merits of the case have not been fully and fairly tried, and that injustice has been done. 2 Scam., 348; 7 Miss., 601; 2 Scam., 535; 4 Ship., 200; 3 How. Miss., 219.

TRUMBULL, J. Hite sued Keaggy in trover for a note and mortgage, executed by the latter to one Wautland, and by him assigned to Hite, who delivered the same to Keaggy. Whether the note and mortgage were delivered to Keaggy as a pledge or security for a debt, or absolutely to be cancelled and accounted for, in a future settlement between the parties, is the main point in controversy.

The only evidence, tending to show that the note and mortgage were delivered to Keaggy as a pledge, is that of a single witness, who testified as follows: that "she knew they were given up to the defendant; that the reason why plaintiff gave them to defendant, was, that defendant was calling upon plaintiff for money; that during the conversation she heard something said about security, but did not know what was intended to be secured, but that they were given up as security, and that defendant said at the time, that if upon a final settlement he fell behind anything, he would make it good to the plaintiff."

This evidence, by itself, leaves it extremely doubtful in what capacity Keaggy got possession of his note and mortgage. While the witness in one part of her testimony says, that "they were given up as security," it would appear from the statement of the

defendant made at the time, that he received them on account of the claim he was endeavoring to collect, and was to account for them on a final settlement between the parties. Independent of any evidence, the presumption of law would be that a note was satisfied when it was given up by the holder to the maker.

The case thus left in doubt by the evidence of the plaintiff, is made perfectly clear, by the testimony subsequently introduced by the defendant.

Two witnesses testified that they were present when the plaintiff demanded the note and mortgage of the defendant; that defendant refused to deliver them up, and requested plaintiff to state how defendant came in possession of them, which plaintiff declined to do; and when asked by defendant, if the note and mortgage had not been given up to him, for what plaintiff owed him on the estate of John Hite, deceased—the balance, if anything, was due on final settlement, to be made good by defendant—he admitted that such was the contract.

How the jury with this evidence before them, could return the verdict they did, is matter of surprise. The testimony as it appears in the record, preponderates altogether in favor of the appellant, and though this court is reluctant to set aside a verdict as contrary to evidence, which the judge who presided at the trial has refused to disturb, yet when the record discloses a case in which the jury have found so manifestly against the evidence as in this instance, it would be doing injustice to permit their verdict to stand.

As this question disposes of the case, it is unnecessary to pass upon the propriety of the instruction given to the jury. It may not, however, be amiss to remark, that the defendant cannot be allowed a set off, nor the accounts between the parties be adjusted, in an action of trover. (*a*)

The plaintiff, if entitled to recover at all, is entitled to a verdict for the full amount due upon the note and mortgage, at the time of the conversion. Costelyon *v.* Lansing, 2 Caines' Cases in Error, 200. (*b*)

The judgment of the Circuit Court is reversed, and the cause remanded.

Judgment reversed.

(*a*) Stow vs. Yarwood, 14 Ill. R. 427, and note; Otter vs. Williams, 21 Ill. R. 120, *contra*.—

(*b*) The Am. E. Co. vs. Parsons, 44 Ill. R. 312.

The People *v.* Wells.

THE PEOPLE OF THE STATE OF ILLINOIS, *ex relatione*, HENRY L. BRUSH, *v.* JOSEPH B. WELLS, State Trustee of the Illinois and Michigan Canal.

A feeder of the Illinois and Michigan Canal was constructed in 1838, and passed across the land of B. The act of 1843, under which the canal was transferred to the Board of Trustees, authorized the State Trustee to settle existing claims, for damages arising from the construction of the canal, by issuing certificates of state indebtedness to the claimants. A law of 1847 required all unliquidated claims against the state, for damages growing out of the construction of the canal, to be proved before the State Trustee, and filed with the Secretary of State, before the first of January, 1849. In 1848, B. made application for damages to the State Trustee, who heard the proofs, and made a certificate stating that B. produced satisfactory proof that he was the owner of the land, and that the same had been injured by the construction of the feeder, in a certain amount. The proof and certificate were filed in the office of the Secretary of State before the 1st of January, 1849. *Held*, that the State Trustee in hearing the proof, and making the certificate, acted under the law of 1847, and not under the act of 1843; and that B. could not, by mandamus, compel him to issue a certificate of state indebtedness *Held*, also, if a settlement was designed, it was not so far perfected, as to be binding on the state.

This was an application for a peremptory mandamus. The factso f the case sufficiently appear in the opinion of the Court.

This application was made to the Court, in the Third Division, but by consent of parties it was heard and decided in the First Division

N. H. PURPLE, J. C. CHAMPLIN, and GLOVER & COOK, for the Relator.

JUDD & WILSON, for the State Trustee.

TREAT, C. J. It was made the duty of the Canal Commissioners, by an act passed on the 2d of March, 1837, to "construct a navigable feeder from the best practicable point on Fox River, to the Illinois and Michigan Canal, at the town of Ottawa." Acts of 1837, p. 41, §8. By the 8th section of that act, and the 16th section of the "Act to amend the several laws in relation to the Illinois and Michigan Canal," approved February 26th, 1839, it was made the duty of the Judge of the Circuit Court of each county, through which the canal passed, to appoint a board of assessors, for the appraisement of all damages, which might arise from the construction of the canal. The assessors were required to make a written report in each case to the Circuit Court, and, if the report was approved by the Court, an order

was to be entered directing the commissioners to pay the damages awarded.

The 4th section of the "Act to amend the several laws in relation to the Illinois and Michigan Canal," approved February 1st, 1840, declares: "It shall be the duty of the commissioners, when any person or persons claim damages that they may have sustained, by the construction of the Illinois and Michigan Canal, to settle with any such person or persons, for the damages they may have received, and pay the same: Provided, if the commissioners are of the opinion the claim is too high, and the claimant will not take a fair compensation, they shall call the appraisers, as required in the act to which this is an amendment, and they shall proceed as required in said act."

By the provisions of the "Act to provide for the completion of the Illinois and Michigan Canal, and for the payment of the Canal debt," approved February 21st, 1843, the canal and the unsold lands and lots belonging to the canal, were granted to the "Board of Trustees of the Illinois and Michigan Canal," as security for the payment of the loan authorized by that act. Two of the trustees were to be appointed by the subscribers to the loan, and the other by the state. The trustees were to possess all the powers, and perform all the duties imposed on the canal commissioners by previous laws. Trustees were appointed, to whom the canal property was conveyed. The 10th section of that act, after exempting from the operation of the grant to the trustees, the lands and lots previously sold by the canal commissioners, povides, that the state trustee "is hereby authorized and required to settle all accounts due to contractors and others (except for such damages as are hereinafter provided for) by issuing certificates of indebtedness, which, together with the certificates of indebtedness, scrip, and acceptances heretofore issued by the canal commissioners, shall be received by said trustee, or other officer or officers, in payment for said lots and lands, whenever they may be presented for that purpose." The exception, referred to in this section, embraced the prospective damages of contractors.

The "Act to authorize the bringing of suits against the state trustee of the Illinois and Michigan Canal," approved February 28th, 1847, provides, that in cases where individuals or corporations had a right, under the former laws of this state, or any

of them, relating to the Illinois and Michigan Canal, to prosecute suits against the board of commissioners of said canal while said board was in existence, such individuals or corporations shall hereafter have the right to prosecute suits in all competent courts of this State, against the "State trustee of the Illinois and Michigan canal, by that name and style," and "judgments obtained against said trustee shall be of the same nature and have the same effect as judgments heretofore rendered against said board of commissioners.

The 1st and 2d sections of the "Act to limit the time to bring claims against the State of Illinois," approved March 1st, 1847, are as follows: "Sec. 1. That all persons having unliquidated claims against the State of Illinois, from any cause whatever, shall make out all the vouchers, and present the claim together with his own affidavit of the correctness of the same, previous to the first day of January, eighteen hundred and forty-nine, and have the same filed in the office of the Secretary of State, so that future legislatures may know what unliquidated claims do exist against the State, and the grounds upon which they are founded." "Sec. 2. The unliquidated claims arising from the canal, shall all be proved up by witnesses, before the State trustee on said canal, which shall embrace all the testimony relating to said unliquidated claims, and no further testimony shall be allowed to be brought in to substantiate said unliquidated claims, after they are once filed as above." By the 3d section, all unliquidated claims growing out of the internal improvement system and other causes, are required to be proved before the Auditor of Public Accounts, and filed with the Secretary of State. By the 4th section, all unliquidated claims against the State, that are not so proved and filed, before the 1st of January, 1849, are barred. The 5th section provides, that "the person hereby empowered to hear testimony, shall certify all proceedings had before him, under his hand."

In May, 1837, Henry L. Brush became seized in fee simple of one undivided half of the east half of the south-east quarter of section 2, in township 33 north, range 3 east, in La Salle County containing eighty acres. The Fox River feeder, which was constructed in 1848, passes across this tract of land.

In December, 1848, Brush presented his claim for damages to the state trustee, when the following proceedings were had:

The People *v.* Wells.

"Application of Henry L. Brush for damages done by the Fox River feeder of the Illinois and Michigan Canal, to the undivided half of the east half of the south-east quarter of section two (2,) town thirty-three, (33,) north, range three (3,) east, 3d P. M. The said Brush exhibited to me satisfactory evidence of his title to said tract, being the certificate of the Register of the land office, of the entry of said tract by John Bascom, and the deed of said Bascom to him. Henry L. Brush sworn, says, that the For River feeder of the Illinois and Michigan Canal runs diagonally across the said tract of land; that about thirty acres of the eighty lies on the north side of the feeder, and the balance, about fifty acres, on the south side; that the land where the feeder crosses said tract is underlaid with a strata of coal, from eighteen inches to two feet in thickness; that witness has been informed, and has no doubt of the truth of the information, that the coal found in the prism of the feeder was taken out, by or under the direction of the agents of the State, and sold for the benefit of the canal fund; that the coal upon an acre of said tract, will not vary or fall short of a hundred thousand bushels; that the coal in the ground is worth, at least, the sum of a cent and a half per bushel; that much of the coal has been sold by this affiant, for two cents per bushel in the ground; that the coal so sold lay on the north side of the feeder, and the mining of it was and is rendered more difficult, in consequence of the construction of the feeder, by reason of the water being dammed up in the land, and continually leaking through the ground from the feeder; that about two and one half acres of the coal has been either actually used by the feeder and its banks, or rendered useless or valueless, by reason of earth taken from the prism of the feeder, having been piled up on both sides of said feeder; that the said undivided half of said eighty is also injured by the construction of said feeder, by reason of it separating said tract into two parts, rendering the north part of comparatively little value, and by reason also of the large quantity of surplus earth placed along its banks; that the feeder, not being navigable, is of no benefit whatever to the land; that the feeder aside from the coal is of, at least, one thousand dollars damage to the said forty acres, making an aggregate damage to said part of land of, at least, four thousand seven hundred and fifty dollars. HENRY L. BRUSH."

Subscribed and sworn to before me, this 20th day of December, A. D. 1848. CHARLES OAKLEY, *State Trustee.*

"John V. A. Hoes sworn, says, that the statements and facts set forth in the above affidavit of Henry L. Brush, are true, to the best of his knowledge, information and belief.

JOHN V. A. HOES."

Subscribed and sworn to before me, this 20th day of December. A. D. 1848. CHARLES OAKLEY, *State Trustee.*

"STATE OF ILLINOIS, } Set.
La Salle County, }

I, Charles Oakley, State Trustee of the Illinois and Michigan Canal, do hereby certify that on the 20th day of December, 1848, the above named Henry L. Brush, claimant, appeared before me and adduced his title papers, and satisfactory evidence that he was and is the owner of the said tract of land, and also satisfactory proof that the said land had been injured, by the construction of said feeder, in the sum of four thousand and seven hundred and fifty dollars.

CHARLES OAKLEY, *State Trustee.*

THESE proceedings were filed in the office of the Secretary of State, before the 1st of January, 1849.

During the June term, 1850, Brush presented a petition to this Court, setting forth the foregoing facts, and alleging that his claim for damages was settled and adjusted by the former State Trustee, under and by virtue of the 10th section of the act of February 21, 1843; that said trustee promised to issue a certificate of indebtedness for the amount of the claim, but died without doing it; that the present State Trustee refuses to recognize the settlement, and petitioner therefore prays that he may be compelled by mandamus, to issue a certificate of indebtedness. He also makes the following affidavit a part of his petition.

"John V. A. Hoes sworn, says, that he was present at the taking of the proof and settlement of the claim of the relator, by the said Charles Oakley, on the 20th day of December, A. D. 1848, referred to in the petition herein; that George H. Norris, surveyor of La Salle county, Joseph H. Wagoner, deputy surveyor, William Reddick, and this affiant were produced as witnesses by the relator, in support of his said claim; that the said

affidavit of the said relator filed herein, does not embody all of the testimony adduced by the relator, in support of his said claim; that the material facts set forth in the said affidavit of the said relator, in support of his said claim, were proven by one or all of the said witnesses above named; that the affidavit of the relator was not intended to embrace the proof submitted, but only a statement of the claim, and the grounds upon which it was based, to be filed in the office of the Secretary of State, to avoid the running of the statute of limitations of March 1, 1847, against him; that the relator regarded his claim as settled and liquidated by said Oakley, by his said certificate, and by his said verbal promise to pay the amount on his return from Springfield, made in the hearing of this affiant, at the time of signing said certificate. JOHN V. A. HOES."

Subscribed and sworn to before me.

PHILO LINDLEY, Cl'k La Salle Cir. Court.

An alternative mandamus was issued and served on the State Trustee, who appeared and entered a motion to quash the same.

Without undertaking at this time to determine the question, whether the act of the 1st of March, 1847, did, by necessary implication, take away the authority of the State Trustee, to settle claims for damages growing out of the construction of the canal, and issue certificates of indebtedness in payment therefor—and we should, as at present advised, be strongly inclined to hold the affirmative, if the result of this case was to depend on the decision of that question—we are well satisfied, upon the case made by the relator, that there has been no adjustment of his claim that is binding on the State, or the present State Trustee. It seems very clear to us, that the former State Trustee, in entertaining the application of the relator, and in hearing the proof adduced by him, was acting solely under the provisions of the act of March 1st, 1847; and not by virtue of any authority conferred by the 10th section of the act of February 21st, 1843, to settle claims of this character, and issue certificates of indebtedness in liquidation thereof. We entertain no doubt, but that he heard the proof under the 2nd section of the act of March 1st, 1847, and certified the same under the 5th section, for the information and action of the Legislature. There is nothing on the face of the proceedings, or in the acts of the

parties, to indicate that the certificate in question was regarded as a final settlement of the claim, which was to conclude the State, or the Trustee. If the Trustee intended to adjust the claim, why was not the certificate of indebtedness then issued, and a receipt taken from the relator for the amount? If a settlement was designed, and anything interfered to prevent its consummation at the time, it may fairly be inferred, that the intention would have been manifested, by some unequivocal declaration to that effect in the certificate delivered to the relator. If the relator understood it to be a final adjustment of his claim, for the satisfaction of which he was entitled to receive from the Trustee a certificate of indebtedness, why did he forward the proceedings to the Secretary of State? In such case, the filing of the papers with that officer was wholly unnecessary and not required by any existing law. Indeed, his office was not the proper depository for them. They properly belonged to the office of the state trustee, and should have been placed on the files of that office. The limitation contained in the act of March 1st, 1847, did not apply to claims of this character, unless that act, by necessary implication, repealed so much of the 10th section of the act of February 21st, 1843, as conferred power on the state trustee to make settlements. The certificate annexed to the proof is but a statement of the trustee, that the relator exhibited satisfactory evidence that he was the owner of the land, and as such had sustained damages to a certain amount by the construction of the feeder. It contains no intimation that he had settled the claim, and agreed to issue a certificate of indebtedness in discharge thereof. The fact that he admitted the proof to be satisfactory, does not, of itself, show that he was adjusting the claim. It can only be considered as an expression of opinion by the trustee, that the relator was entitled to receive from the state a certain amount in the way of damages; and not as an undertaking on his part to pay the same. There is, in addition, very strong evidence on the face of the proceedings, that the trustee did not consider himself as concluding the state by his action in the matter. While the relator in his application only claimed to be the owner of an undivided half of the land, the estimate of damages covers the entire injury to the whole tract. We cannot avoid the conclusion, that the claim would have been more closely scrutinized, and the certificate

more guarded and pointed in its terms, if the trustee had regarded his action as obligatory on the State. And yet, it is seriously insisted by the relator, that he is entitled, by force of this certificate, to recover from the canal fund, on account of damages sustained by him as the owner of a moiety of the land, the sum of $4,750, when in point of fact, and upon his own showing under oath, before the former trustee, that amount embraced the aggregate of damages to the whole tract. The evidence fails altogether to convince us, that there was any adjustment of the relator's claim, that can be enforced against the present trustee. On the other hand, we cannot look upon the action of the former trustee in any other light, than as a hearing of the proof produced by the relator in support of his claim, and a certifying of the same for the consideration of the legislature.

But, if a settlement was ever designed, the case fails to show that it was so far perfected, as to be binding on the State, or the trustee. The statute prescribed a particular mode, in which a settlement was to be made. It was to be done "by issuing certificates of indebtedness" to the claimant. The issuing of a certificate of indebtedness was a necessary part of a valid settlement. Without it, a settlement would be essentially incomplete and imperfect. No rights could vest in the claimant, until the settlement was consummated by the delivery of the certificate of indebtedness. Up to that time, the negotiation would be open and unconcluded, and it would be in the power of the trustee to break it off entirely, and refuse to proceed further in the matter.

In the opinion of the court, the present state trustee was acting strictly in the line of his official duty, in declining to regard the action of his predecessor as a settlement of the claim, and issue a certificate of indebtedness to the relator. The latter must seek relief at the hands of the legislature.

The motion of the defendant will be sustained, and the proceeding dismissed, with costs against the relator.

Petition denied.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

DECEMBER TERM, 1850, AT SPRINGFIELD.

JOHN LEE, Pltff in Error, *v.* STEPHEN ABRAMS, Deft in Error.

ERROR TO SCOTT.

In an action of account under our statute, the Court is not authorized to enter judgment on the declaration for the amount claimed therein, or for any amount; nor is the plaintiff limited in his recovery by the amount stated in it. The judgment upon the declaration is interlocutory, that the defendant account, and the final judgment is upon the report of the auditors.

In pleading to this action, the better rule is to require the defendant to file before the Court in the first instance, every defence which shows that he is not then liable to account.

The Circuit Court has the right to approve or disapprove of the report of the auditors, and to re-commit the case to them.

After the interlocutory judgment to account is rendered, a party cannot discharge himself from accounting, by proof that he has before fully accounted; or that he is not indebted, but he may show by his account that the plaintiff has been paid, or that he owes him nothing; but he cannot allege a fact and thereby avoid rendering an account.

To sustain the plea of *plene computavit*, the pleader must show an actual accounting, and a balance struck no matter which way, between the parties. To sustain the issue of nothing in arrear, the party must show by an exhibition of the accounts that nothing is due the plaintiff.

By omitting to file the plea of *plene computavit*, the defendant loses the benefit of a settlement which may have been made, and must account anew before the auditors. The auditors are not bound by any previous accounting of the parties, though if parties had agreed upon particular items, or if rests had been made in a running account and balances struck, but no final accounting had taken place, the auditors would be concluded by the balances as struck by the parties, and to carry unpaid balances into the future account.

Although it is not competent for a party to prove before the auditors, that he has had a final settlement, and is therefore not bound to account; yet he may prove a payment on account, which should be deducted from any sum due the plaintiff.

A plea of payment may be interposed before auditors; but formal pleadings are not advisable.

A judgment of *quod computet* does not determine that all the allegations in a declaration are true; beyond a liability to account, nothing is determined, nor is anything except this admitted, by suffering such a judgment to go against a party.

Lee *v.* Abrams.

Abrams sued Lee in an action of account, alleging in his declaration, that they had been mercantile partners, that at the dissolution, Abrams left Lee in possession of all the assets of the firm, which consisted of goods, wares, &c., money, and produce to a large amount, and a great number of claims, consisting of notes, bills of exchange and books of account. That Abrams sold all his interest in the goods then in the store, and to the accounts unpaid on the store books for goods actually sold, and agreed to and did receive $900.00 for his interest in said goods and accounts, and a release of all the accounts and claims, that said firm had against Abrams individually. That in addition to said goods and accounts, the said Lee received at the said dissolution, a large sum of money on hand, and a large amount of produce, and cash notes, and bills receivable. That the agreement of said Abrams and Lee at said dissolution was, that Lee should collect said demands and sell said produce, and render an account of sales, and an account of said money on hand, and the sums collected to the said Abrams, and to pay the one-half thereof to him, so soon as said sales could be effected, and collections made. Avers that Lee has sold all the produce, and collected the demands, to the amount of $5,000.00, but that Lee refuses to account to Abrams or to pay him his half, &c. Concludes with a prayer for an account, &c.

At the appearance term, Lee filed two pleas, one of which was dismissed on demurrer, the other sustained. The plea sustained was to the effect that the $900, referred to in the declaration, was in full of all the right, title, and interest of Abrams of, in and to the effects of the late firm. Lee afterwards withdrew this plea, and gave notice that he should rely upon it, in defence before the auditors. Interlocutory order of *quod computet* wa then made, and auditors appointed. The parties rendered thei accounts and appeared before the auditors with their witnesses Lee by his counsel filed the same plea, previously filed before the court, Abrams objecting thereto, no issue of law or fact was taken on the plea.

The auditors reported that Lee contracted with his partner to buy him out entirely, and that if Abrams reserved anything, the reservation was not expressed in the contract, and that Lee owed Abrams nothing.

The circuit court set aside this report of the auditors and

overruled the motion for Abrams, for judgment for $2,500.00, and again referred the case to the same auditors, to state the accounts according to the demands of the declaration in this case, as to the indebtedness of the defendant to the plaintiff, for the money on hand and the account of produce and cash notes, and bills receivable, received on the dissolution of the partnership, not being a part of, or included in the goods in the store, nor the accounts unpaid on the store books, for goods actually sold by the parties before their dissolution.

At the same term of the circuit court, Lee filed two special pleas, one similar to that above referred to, and the other that he had fully accounted before the auditors, and moved for a rule upon plaintiff to reply. The court refused the rule and struck these pleas from the files.

Afterwards two of the auditors re-stated the account, with reference to the restricted instructions of the court, finding that the items referred to in the declaration as excepted to, amounted to $850.00, and that Lee had paid Abrams $425.00 for the one-half of $900, and that according to the claims of the declaration, Lee owed Abrams nothing.

On the coming in of this report, on motion of Abrams, the court struck out so much of it as surplusage, as stated that Lee was entitled to a credit of $425, and gave judgment against Lee for that sum.

Cause heard before Woodson, Judge, at September term, 1850. Lee appealed to this court, and by agreement both parties assigned errors. Lee assigned for error, the setting aside the first report of the auditors and re-referring the cause to them. In striking his pleas in bar from the file. In not rendering final judgment in favor of Lee on the first report of the auditors. And in entering a judgment in favor of Abrams for $425, when it appeared from the report of two of the auditors that Lee was not indebted to Abrams in any amount. Abrams assigns for error, the overruling of his motion for a judgment for the sum claimed in the declaration, after overruling the first report of the auditors. The sending of the case back to the auditors without the request of the parties, instead of giving Abrams a judgment for the half of five thousand dollars claimed by his declaration.

D. A. Smith, for Pltf in Error.

Lee *v.* Abrams.

The action of account is so rare in the proceedings of our courts, although allowed by statute, I think it not amiss to direct the attention of the court to 1 Bacon's Ab., 43 ; Greenleaf's Ev. Tit. Account. As to judgment *quod computet* and practice in account. 1 Bacon's Ab., 52, 53, 54 ; 2 Greenleaf's Ev., Tit. Acc.

In a decree to account, both parties are actors, and the party to whom a balance is due is entitled to final decree for such balance. 3. Atkyns, 692 ; 3 P. Williams, 263. Under our statute title Accounts, §10, both parties are actors and " the auditors or a majority of them, shall liquidate and adjust the accounts, and state the balance and to whom due. "

I suppose that Lee had the right to have his pleas tried, unless it should be answered that that was a matter in the mere discretion of the court. This right especially applies to the plea of *plene computavit* before auditors, which is a good plea. 2 Greenleaf's Ev., p. 28, note at bottom of page.

M. McConnell, for Deft in Error.

Defendant in error claims, that the plea filed before the auditors, was a plea in bar, which should have been filed before the court, and tried before a jury. That after a judgment declaring that defendant should account, he could not go behind the judgment and deny before the auditors that he was bound to account. That by filing said improper plea before the auditors, defendant refused to obey the interlocutory order of the circuit court, and thereby the plaintiff became entitled to have the court make the interlocutory a final judgment in favor of the plaintiff, for the sum claimed by his declaration. Godfrey *v.* Saunders, 2 Wilson, 90 to 117 inclusive ; 7th section R. S. in relation to the action of account.

If this court should be of opinion that the circuit court had power, after overruling the plea filed before the auditors, and setting aside their report made thereon, to re-commit the cause to the auditors, to be considered and reported upon by them, then the court had power and authority to give the judgment it did give, and to disregard that portion of the report of the auditors, wherein they depart from the questions referred to them, and disobey the order of the court under which they were then adjudicating.

Lee *v.* Abrams.

TRUMBULL, J. Abrams sued Lee in account alleging in his declaration that they had been mercantile partners; that the partnership was dissolved; that he, Abams, for $900 which had been paid him, sold to Lee all his interest in the store goods and accounts for good sold, and that by agreement of parties, there was reserved from the sale a large amount of produce, money, bills receivable, and cash notes, for which Lee was to render an account.

Lee having appeared to the action, there was judgment by *nil-dicet* that he account, and auditors were appointed to take and state the account between the parties. Both parties appeared before the auditors, and Lee filing a plea, alleging that the $900, admitted by the plaintiff in his declaration to have been received was in full of all his interest in the partnership.

The plaintiff objected to the filing of this plea and no issue was taken upon it, but the parties produced their respective accounts and were examined on oath. Other witnesses were also examined, and the auditors made an elaborate report setting forth the dealings of the parties from the commencement of the partnership to its dissolution, and showing that the fair value of each partner's interest in the concern at the time of dissolution was about $900. They conclude their report by awarding that the defendant had "fully accounted to his said co-partner as alleged in his plea."

Upon the coming in of the report, the plaintiff moved to set the same aside; that the plea filed before the auditors be sticken from the files, and for final judgment against the defendant for one-half of five thousand dollars, the amount claimed in the declaration. The court set the report aside, struck the plea from the files, refused to enter final judgment as asked, and recommitted the cause to the auditors with directions to audit and state an account according to the demands of the declaration. Upon a second examination of the parties and their witnesses, the auditors stated the account between the parties showing that the plaintiff's interest in the partnership property, exclusive of the goods in the store and unpaid accounts upon the store books for goods sold, amounted to $425, and that he had received a like amount from the defendant on account thereof, being part of the $900 agreed to be paid at the time of dissolution They accordingly reported that the defendant was not indebted to the plain-

tiff. On this report, the court upon plaintiff's motion, gave judgment in his favor for $425.

By agreement both parties have assigned errors in this court.

We will first dispose of the error assigned by the appellee, which is, that the court erred in refusing to enter judgment upon the first report of the auditors, for the half of five thousand dollars demanded by the plaintiff in his declaration, and in re-committing the case to the auditors.

There is no foundation for this assignment of error, and to have entered the judgment demanded would have been most manifestly unjust. The plaintiff in his account before the auditors only claimed a balance in his favor of $1,492.25, and to have given him a judgment under such circumstance for $2,500 would have been palpably erroneous as well as unjust.

The statute, in case the defendant refuses to account before the auditors, authorizes them to receive a statement of the account from the plaintiff, and award to him the whole sum he claims to be due. R. S., ch. 2, § 8. In no event would the court be authorized to enter judgment for the amount claimed in the declaration or for any amount upon the declaration; nor is the plaintiff limited in his recovery to the amount stated in his declaration. 1 Bac. Ab., title accompt G.; Gratz *v.* Philips, 5 Binney, 564.

The judgment upon the declaration is interlocutory, that the defendant account, and the final judgment is upon the report of the auditors. Assuming for the present, that the Circuit Court committed no error in setting aside the first report of the auditors, it certainly had the power after the report was set aside to re-commit the case to them. The case of Spencer *v.* Usher, 2 Day, 116, is a direct authority to this point.

The appellant complains that the court erred in setting aside the first report of the auditors, in striking his plea from the files, and in rendering the judgment for the plaintiff upon the last report.

In disposing of these assignments of error, it becomes necessary to inquire somewhat into the nature of this action. The elementary books which treat of the action of account, and almost every reported case of account, inform us that it is an action seldom brought. In England it seems to have fallen almost entirely into disuse, and although expressly authorized by our statute, a case is seldom to be met with in our courts; nor is it

surprising that the action should have become nearly obsolete, when the obstacles and delays incident to its prosecution are considered.

As to the pleadings in the action, and what should be pleaded in bar before the Court, and what may be pleaded before the auditors, there is much confusion in the books.

The authorities all agree, that such defences as deny the character in which the defendant is sued, or his liability at any time to account, must be pleaded before the Court and cannot be insisted upon before the auditors. It is also laid down as a rule by some authorities, that all defences which admit that the defendant was once liable to account, but go in his discharge, must be insisted upon before the auditors and cannot be pleaded in bar of the action. 1 Comyn's Dig., tit. accompt E.; 1 Bac. Ab., tit. accompt E. and F. The difficulty arises in the application of these rules. It is said in Bacon, that "*Plene computavit*, and a release, are the only pleas which admit the plaintiff to be accountable, that can be pleaded in bar to the action; and these are allowed because they are total extinctions of the right of action." This is the rule laid down in the case of Godfrey *v.* Saunders, 2 Wilson, 114.

In another paragraph in Bacon under the same title, it is said that an award may be pleaded in bar.

In the case of Bishop *v.* Baldwin, 14 Verm., 145, it was held, that if the party was once liable to account, all defences must be pleaded before the auditors, except *plene computavit*, release, arbitrament and award, former recovery, accord and satisfaction, and the statute of limitations.

In this confusion of authorities we feel at liberty to adopt that rule which appears to us most conducive to the ends of justice, and in so doing, we prefer following the most liberal rule as to the allowance of pleas in bar before the Court, and for this reason: To require a party to plead a matter in discharge before the auditors, is at last but to bring the plea before the Court; for if an issue either of law or fact is taken upon it, the auditors cannot dispose of the question, but must refer it to the Court and await its determination before proceeding to state the account. Bac. Ab., tit. accompt F.; Crousillot *v.* McCall, 5 Binney, 432.

This is allowing the defendant to work in a circle and to protract the case to an indefinite period, and is probably one reason

why the action has so generally and justly fallen into disuse. The better rule, undoubtedly, is to require the defendant to file before the Court in the first instance every defence, which shows that he is not then liable to account to the plaintiff, whether it be that he never was so liable, or that some act has been done which has discharged him from that liability, admitting that it once existed. (*a*)

The plea filed by the defendant in this case before the auditors was of this character. An issue upon it, if found in his favor, would have been decisive of the case, and no judgment to account could have been rendered against him. The plea was therefore properly stricken from the files, when attempted to be made before the auditors, after the judgment of *quod computet* had been entered.

The Circuit Court undoubtedly had the right in the exercise of a sound discretion, to approve or disapprove the first report of the auditors. The statute declares, that "if such report shall be approved by the Court, the Court shall render judgment for the amount ascertained to be due." Why say, if the report shall be approved by the Court, if the Court has no power over it, but is bound to enter up judgment at all events as the auditors shall report? The Court may not have the power to remodel or change the report so as to alter the result, any more than it would have to alter the verdict of a jury, but it is certainly within its province to approve or disapprove it. Such is moreever the well settled practice. Spencer *v.* Usher, 2 Day, 116; Smith *v.* Brush, 11 Con., 359.

The only remaining question, is as to the correctness of the judgment as entered. To determine this, it becomes necessary to inquire as to the effect of the judgment, *quod computet*, and how far a defendant who has suffered such a judgment to go against him, is precluded from availing himself of a defence which he might have had the advantage of, by filing a proper plea in bar before the Court.

The judgment to account, as before remarked, is merely interlocutory. It establishes nothing, except the defendant's liability to account. This he cannot afterwards deny before the auditors, nor can he discharge himself from rendering an account by proof that he has before fully accounted, or of any other fact which shows that he is not then indebted to the plaintiff. He may

(*a*) No formal pleadings to be filed before such auditors. Laws 1861, p. 9.

show by his account that the plaintiff has been fully paid, or that he owes him nothing, but he is bound to show it in that way, and cannot allege a fact and thereby escape from rendering an account. By filing the plea of *plene computavit* before the court, the defendant would, if the issue was found in his favor, be entitled to a judgment against the plaintiff for costs, and the plaintiff would be driven to seek redress in another form of action, although the proof should show, that a large sum had been admitted to be due him upon such accounting.

The difference between the proof necessary to sustain the plea of *plene computavit* on the part of the defendant, and that which is requisite to sustain the issue of nothing in arrest, is this: In the former case, the defendant must show an actual settlement or accounting between the parties and a balance struck, it matters not in favor of which party, while in the latter case, he must show by an exhibition of the accounts, that nothing is due the plaintiff. Pickett *v.* Pearsons, 17 Verm. 470.

By omitting to file the plea of *plene computavit*, the defendant loses the benefit of a settlement which may have been made, and is compelled to account anew before the auditors. They are not bound by the accounting which the parties may have had, though if the parties had agreed upon particular items of the account, or if rests had been made in a running account at particular periods and balances struck, but no final accounting of all the dealings of the parties had taken place, and the auditors would no doubt be concluded by the balances as struck by the parties; and it would be their duty, if such balance remained unpaid, to carry them into the future account. Smith *v.* Brush, before cited; also 16 Verm. 169. So in this case, although it was not competent for Lee to prove before the auditors, that he had a final settlement with Abrams, and thereby discharge himself from his liability to account, yet he was at liberty to prove as he did, that he had paid Abrams $900 since the dissolution; and when the auditors found upon a statement of the accounts of the parties, that part of this $900 was paid on account of the plaintiff's interest in the matters about which the defendant was adjudged to account, it was their duty to deduct such part from the sum due the plaintiff. They made such deduction, and showed by a statement of the accounts and their report, that nothing was due the plaintiff. The court, however, disregarding the credits allowed the de-

fendant, gave judgment against him for $425. In this we think there was error.

The judgment, *quod computet*, did not determine that the $900 mentioned in the declaration was paid on account of the goods in the store, and the accounts on the store books for goods sold. The defendant admitted nothing upon that subject by suffering such a judgment to go against him. The rights of the parties were precisely the same, as if the declaration had been silent upon the subject of the sale of the store goods and accounts to the defendant. That part of the declaration was surplusage, and really had nothing to do with the case. It was surely competent for the defendant, when called upon, to account for certain money, produce, bills and notes in which the plaintiff had an interest, to show that the plaintiff had received all that he was entitled to; and it would be strange indeed, if the defendant was to be precluded from showing that fact, because the plaintiff had thought proper to insert in his declaration a matter that had no business there. The authorities all agree, that the plea of payment may be interposed before the auditors, and that it cannot be pleaded in bar before the court, unless the payment has been received in satisfaction, when it would amount to a settlement of the account, In this case it was not allowable for the defendant to plead before the auditors, that the $900 paid the plaintiff, was received by him in full discharge and satisfaction of his interest in the money, produce and bills, and thereby avoid accounting in reference to those matters; but he was obliged to account, and when he did so, was entitled to claim credit for all the money that he could show that he had paid the plaintiff whether it was paid upon a final settlement between the parties, or without any settlement. By omitting to plead the receipt of money by the plaintiff, in satisfaction of his interest in the subject matter of the account, the defendant lost the benefit of the purchase or settlement, if any had been made, but he did not lose the benefit of the money he had paid. The plaintiff cannot be permitted to say to the defendant in one breath, you must account to me for my interest in certain property, and in the next, refuse the defendant credit for any money he may have paid, because it was received by the plaintiff in discharge and satisfaction of his interest in such property. The case will be better understood, y laying entirely out of view what is said in the declaration,

about a sale of the store goods and accounts to the defendant for $900, for it is this allegation in the declaration, which is mere surplusage, that seems to have embarrassed the case. The case then is this: The defendant is called upon to account for certain produce,&c. He omits to plead a matter before the court which, if true, would have discharged him from rendering such account, and thereupon judgment, *quod computet*, passes against him. In rendering his account before the auditors, he claims a credit for $900, which he shows that he has paid the plantiff. This he certainly has the right to do, and this is the whole case on the part of the defendant. The plaintiff, however, says you paid me this $900 for something else, and the question is then for the first time raised by the plaintiff, as to what account the $900 was received upon. The auditors inquire into this fact, and find that part of it was paid on account of the plaintiff's interest in the property about which the account is sought, and upon giving the defendant credit for that part, they find that the defendant is not in arrear. When the case is viewed in this light, which is really the whole of this branch of it, no one can doubt that the auditors properly gave the defendant credit for so much of the $900, as properly applied to the matters for which he was adjudged to account. In this case no formal plea was filed nor was it necessary. The defendant, in the statement of the accounts, was entitled to credit for all payments he had made on account of the matters about which he was sued, without filing a plea for that purpose. Had such a plea been filed and issue taken upon it, the issue, according to the authorities, must have been referred to the court for trial. The better practice would seem to be for the parties, in stating their accounts before the auditors, not to make up formal pleadings, otherwise the proceedings in this action may become interminable.

The judgment of the circuit court is reversed, and in accordance with the stipulation of the parties, a judgment will be entered in this court against the appellee for the costs of this and the circuit court.

Judgment reversed.

Williams *et al. v.* Blankenship *et al.*

JOHN WILLIAMS *et al.*, Exrs of GEORGE TROTTER deceased, Pltffs in Error, *v.* ELI C. BLANKENSHIP *et al.*, Admrs of ARCHIDALD TRAILOR, deceased, Defts in Error.

ERROR TO SANGAMON.

A probate justice of the peace, when acting in that capacity, must affix the sea of that court to the process issued by him; when acting as an ordinary justice, he is governed by the rules applicable to proceedings before such officer.
Justices of the peace, in actions against executors or administrators, have only jurisdiction to the amount of twenty dollars. Consent cannot confer jurisdiction(*a*)

The opinion of the Court contains a statement of the case. The judgment appealed from was rendered by Davis, Judge, at the January term, 1850, of the Sangamon Circuit Court.

LINCOLN & HERNDON for Pltffs in Error.

Justices of the peace have jurisdiction only where the statute gives it, and as against executors or administrators, where the claim falls below twenty dollars. R. S., p. 316, § 11; 1 Scam., 249; 3 Gilman, 286; 5 Pike, 385; R. L. of 1833, p. 415.

This judgment was for fifty dollars, therefore, the court below had no jurisdiction, and the judgment is void. 1 Scam., 249; 3 Gilman, 286; 1 Scam., 237.

S. T. LOGAN for Defts in Error.

TREAT, C. J. The administrators of Trailor brought a suit against the executors of Trotter. The process was in the prescribed form of a justice's summons, and was subscribed "Thomas Moffett, Pro. Justice Peace. L. S." After a hearing of the parties, he rendered a judgment in favor of the administrators, for $43.18. He kept a separate docket for the entry of suits before him as a justice of the peace, in which the proceedings and judgment in this case were entered. He supposed that he had jurisdiction of the action as an ordinary justice of the peace, and considered himself as acting in that capacity. A citation subsequently issued out of the county court, requiring the executors to show cause why they should not pay the judgment. They appeared and moved to dismiss the proceeding, because the justice had no authority to render the judgment. The county court refused the motion, and made an order directing the executors to pay the

(*a*) This case explained. Miller vs. McCray, 37 Ill. R. 429.

judgment. They appealed to the Circuit Court, and that Cour on an agreed state of facts, as before set forth, affirmed the order of the county court. The executors assign that decision for error

The only question in the case is, whether the officer rendering the judgment had jurisdiction of the action; and that depends altogether on the fact, in what capacity he was acting. If in the exercise of his functions as judge of the probate court his right to hear the case and enter the judgment cannot be questioned; but, if in the character of a justice of the peace, there was an excess of jurisdiction, and the judgment is a nullity. It was decided in the case of Dunlap *v.* Ennis, 3 Gilman, 286, that the powers of a probate justice are of a two-fold character; first, he is to perform the duties pertaining to the probate court, and when acting in that capacity he must affix the seal of that court to the process issued by him, or his private seal, where no public seal has been provided; second, he is vested with the jurisdiction of justices of the peace in civil cases, and when exercising these powers, he is to be governed by the rules applicable to proceedings before such officers. Applying the principle of that decision to this case, it is manifest that the officer was not acting in the capacity of judge of the probate court, but was acting strictly in the character of a justice of the peace. The seal of the probate court was not attached to the process, and the proceedings were entered in the docket kept by him as a justice of the peace. Besides, he considered himself as engaged in the discharge of duties properly belonging to an ordinary justice. There is nothing in the case to indicate that he was exercising any authority vested in him as judge of the probate court.

The only remaining inquiry is, had he jurisdiction of the case as a justice of the peace. The statute, after conferring jurisdiction in general terms on justices of the peace, in all actions for the recovery of debts and demands, in which the amount claimed does not exceed one hundred dollars, and for which debt or assumpsit will lie, declares that they shall also have jurisdiction "in all actions in which an executor or administrator is plaintiff or for property purchased at an executor's or administrator's sale, where the amount claimed does not exceed one hundred dollars;" and "in all actions in which an executor or administrator is defendant, where the amount claimed does not exceed twenty dollars.' R. S., ch. 59, § 17. If these two clauses had been left out of the

statute, the preceding provisions might be construed as conferring jurisdiction on justices of the peace, in actions by or against executors or administrators, to the extent of one hundred dollars; but being introduced, they must be understood as qualifying and restraining the operation of the general provisions, to cases in which neither executors nor administrators are parties. As the law stood before the revision, justices of the peace had jurisdiction of actions against executors and administrators, to the amount of twenty dollars. From the manner in which previous laws were incorporated into the Revised Statutes, we are satisfied the Legislature did not design to increase the jurisdiction of justices in this respect. The justice, therefore, exceeded his jurisdiction. The fact that the parties appeared before him and contested the merits of the case, can have no bearing on the proper decision of his question. It is a familiar doctrine that consent cannot confer jurisdiction.

The judgment of the Circuit Court is reversed, with costs against the administrators to be paid in due course of administration.

Judgment reversed.

WILLIAM B. WARREN, Pltf in Error, *v.* GEORGE M. CHAMBERS, *et al.*, Defts Error.

ERROR TO MORGAN.

When defendants who are sued as partners upon an instrument in writing, file a plea verified by affidavit denying its execution, such plea also puts in issue the fact of joint liability.

In all cases, whether the action be upon contracts express or implied in writing by parol, defendants who are sued as partners, can only put that fact in issue by a plea in abatement, specially denying the partnership or joint liability.

When such a plea in abatement is filed the burthen of proving the partnership devolves on the plaintiff.

If several are sued upon an instrument in writing, and wish to deny their joint liability, as well as the execution of the instrument, the joint liability of all will be admitted, who do not join in the affidavit denying the execution of the writing.

But if the joint liability is put in issue by a plea in abatement, it will be sufficient to verify the plea by the affidavit of one of the defendants, or a third person.

This action was commenced in assumpsit, in the Morgan Circuit Court, by the plaintiff in error against the defendant. The

defendants filed the plea of the general issue, verified by the affidavits of all the defendants. At the trial the plaintiff insisted that he was not bound to prove the partnership, that fact not having been put in issue by the plea. This position was controverted by the defendants, who insisted that the plea of non-assumpsit, verified by oath, put the partnership in issue, the circuit court so decided, and the plaintiff was forced to make proof of the partnership. The declaration declared against the defendants as partners. A verdict was found for the defendants, and judgment was entered accordingly. The cause was heard before Woodson, Judge, and a jury, at September term, 1850. The questions raised upon the instructions, not having been considered by this court, are omitted in the statement.

M. McConnell and Wm. H. Herndon, for Pltff in Error.

If the plea is the general issue, it is insufficient and uncertain. The plea should set out some facts, so as to let the court judge, as to the law arising upon those facts, as to what constitutes a partnership, and of the liability for the act of one. 3 Kent's Com., 23, 40, 43, 44, and 46; 15 Conn., 57; 7 Iredell, 4.

If the plea is the general issue, proof of partnership is unnecessary. R. S., p. 233, §8; 2 Gilman, 715.

The statute required that a plea in abatement, verified by affidavit, shall be filed to put the partnership in issue. And if a plea in abatement was designed, it was waived by filing it with the general issue. Both cannot be pleaded at once. 1 Chitty's Pl., 457–8; 1 Green's Iowa Ref., 165; 1 Eng. Ark., 173.

D. A. Smith, for Defts in Error.

Trumbull, J. The declaration in this case is in assumpsit against the defendants as partners, and contains only the common count for money paid and advanced. The defendants pleaded the general issue, and annexed thereto their affidavits of its truth.

The record shows that the money was paid to one of the defendants, and the point in controversy was, as to the liability of the other defendants with him as partners. Both parties offered evidence upon the question of partnership, and the jury

found a verdict for the defendants, who had judgment accordingly.

The correctness of the proceedings in the case, depends upon the construction of Sec. 8, Ch. 40, R. S., which declares: "In actions upon contracts express or implied, against two or more defendants, as partners, or joint obligors or payors, proof of the joint liability or partnership of the defendants, or their christian or surnames shall not, in the first instance, be required, to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or the filing of pleas denying the execution of such writing, verified by affidavit, as required by law." The foregoing section, as incorporated into the Revised Statutes, is a literal copy of the second section of an "Act regulating evidence in certain cases," approved February 17th, 1841, except that in the original act the section concludes with the words, "as required by the act concerning practice in courts of law, approved January twenty-ninth, one thousand eight hundred and twenty seven," in the place of the words "as required by law," which conclude the section in the Revised Statutes. The change of these words cannot in the least alter the construction to be put upon the act. It is clear, therefore, that the phrase, "the filing of pleas denying the execution of such writing," has reference to the plea required to be filed by Sec. 14, Ch. 83, R. S., to put in issue the genuineness of an instrument of writing upon which suit is brought. This court so understood and treated the words under consideration in the case of Stephenson *v.* Farnsworth, 2 Gil., 715.

It was held in that case, that the statute in question "was intended to change the rule of evidence respecting the proof of partnership, and place it on the same footing with the proof of the execution of written instruments."

This language of the court, must of course be understood with reference to the case then under consideration, and as applying only to a case where the action is brought upon an instrument of writing, the execution of which, is put in issue as required by the practice act. When, therefore, the defendants, who are sued as partners upon an instrument of writing, file a plea verified by affidavit, denying its execution, such plea, according to the statute, also puts in issue the fact of the joint liability of the defendants.

In all cases, except when the foundation of the action is an instrument of writing, the execution of which is denied by plea verified by affidavit, whether the action be upon contracts express, or implied in writing or by parol, defendants who are sued as partners can only put in issue that fact by filing a plea in abatement, especially denying the partnership or joint liability.(*a*)

In this case no such plea was filed, consequently all the evidence upon the subject of the partnership of the defendants was improperly admitted to go to the jury, as no such question was in issue.

The Legislature has an undoubted right to change the rules of evidence and to declare that a fact which the plaintiff, to entitle himself to recover at the common law, would have been obliged to prove in the first instance, shall be taken as admitted, unless its existence is denied by the defendants in a particular manner. When the plea in abatement is filed, the burden of proving the partnership devolves on the plaintiff, as was the case at the common law, when the general issue simply was pleaded.

When several are sued upon an instrument of writing, and they wish to deny their joint liability as well as the execution of the writing, according to the case of Stephenson *v.* Farnsworth, the joint liability of all the defendants will be admitted, who do not join in the affidavit denying the execution of the writing.

The rule, however, would be different, when the joint liability was put in issue by plea in abatement. In such a case it would be sufficient to verify the plea by the affidavit of one of the defendants, or a third person.

In the view taken of this case, it becomes unnecessary to pass upon the sufficiency of the evidence to warrant the verdict of the jury, but we have looked into the proofs as contained in the record, and are satisfied that a verdict the other way would have been quite as consistent with the evidence.

As the plea required to put the partnership of the defendants in issue, though in form in abatement, goes to the merits of the case and defeats forever the right of actions against the defendants jointly, and as both parties treated the plea filed on the former trial as putting this fact in issue, it will be proper when the case comes off again before the Circuit Court, to allow the

(*a*) Dwight vs. Newell, 15 Ill. R. 336 and note ; Gordon vs. Bankard, 37 Ill. R. 147; Siltlson vs. Hill, 18 Ill. R. 263 ; Shufeldt vs. Seymour, 21 Ill. R. 525 ; Ring vs. Haines, 23 Ill. R. 342 ; McKinney vs. Peck, 28 Ill. R. 177. What proof necessary when some of defendants who are sued jointly file plea verified by affidavit. Degan vs. Singer, 41 Ill. R. 58.

defendants to withdraw the plea filed, and deny their partnership by plea in abatement, if they shall be so advised.

The judgment of the Circuit Court is reversed and the cause remanded.

Judgment reversed.

TREAT, C. J. I do not concur in the construction put upon the statute. In my opinion, it was the real design of the legislature to permit defendant to put in issue the question whether they are liable as partners, either by plea in abatement or in bar, the truth thereof being verified by affidavit.

JOHN M. MCCONNEL, Appellant, *v.* JOSHUA GIBSON, *et al.*, Appellees.

APPEAL FROM CASS.

The Court will look at the material averments of a bill and from thence determine its true character, and if the averments show that the complainant is entitled to relief, and the payer will authorize the Court to grant the relief which he shows himself entitled to claim, no matter what name is given to the bill.

A commissioner in chancery, appointed to sell, cannot become a purchaser at his own sale, either in his own name or in the name of a third person; if he should do so, the sale will be set aside at the instance of the person whose rights have been sold, if the application for that purpose is made within reasonable time.

A fiduciary cannot be both seller and buyer at the same time, and a sale under such circumstances may be avoided, but not by the fiduciary.

A sale fraudulently made, on a day different from that named in the notice of sale, would furnish ground for setting aside the sale.

A bill which seeks to set aside a sale, and an order confirming such sale upon the ground of fraud, if filed within a reasonable time after the fraud is discovered is not obnoxious to a demurrer.

This was a suit in chancery brought by Saunders as treasurer of T. 18 N., R. 12 W., of Cass county, against W. W. Babb, and this appellant and others, in the Cass Circuit Court, to foreclose a mortgage, given by Babb to one John T. Jones who was school commissioner of Morgan county. Said mortgage is set out in this record and is upon a tract of land in T. 15 N., R. 12 W.

The appellant was made a party to this suit, and it was charged that Babb, subsequently to the giving of the mortgage to Jones, had given a mortgage to the appellant upon the same land.

To sell 67

Appellant filed his answer to said bill and alleged, that he had a mortgage given by Babb and set it out, showing that the land named in his mortgage was in T. 18 N., R. 12 W.

The bill filed by Saunders set out the same land described in McConnel's mortgage, and a decree was subsequently rendered in the case to sell the land described in McConnel's mortgage to pay the debt due to Jones, and no notice was taken of the fact that the land mortgaged to Jones was a different tract of land, and did not appear from Jones' mortgage to be situated in Cass county. A final decree to sell said land was made at the May term of the Cass Circuit Court in 1841, and one Edward Tull was appointed Master in Chancery to sell said land. At the October term, 1841, Tull reported that he had sold the land to one Lippincott for $950.000, and paid Jones' debt and costs with the money, but had not made a deed to the purchaser. At the May term, 1843, one Atwater was appointed to complete said sale by making a deed to Lippincott. At the May term, 1845, of said Court, Atwater reported that he had completed said sale by the making of a deed, which report was approved by the Court, and thus on the 19th of May, at said May term, the decree of sale was finally carried into effect, and the suit was ended. On the 7th of March, 1849, McConnel and Babb, two of the original defendants in said cause, filed this bill, called by them a "petition," in the Cass Circuit Court, praying that the orders of the Court, approving the making of the sale and of the deed be reviewed, and that they be set aside, for the following causes: 1st, Said petitioners, long after the 19th of May, 1845, and not before, ascertained that said Tull, who had been appointed by the Court to sell said land, had fraudulently and falsely reported to the Court, that he had advertised said land in the nearest newspaper, and had sold it to Lippincott on the 27th of September, 1841, as the highest bidder, when in fact Tull was himself secretly the purchaser, and knocked it down to Lippincott fraudulently, and that the land was advertised in a newspaper out of the county 55 miles distant, when there was a nearer paper 25 miles distant; and that no money was paid for the land. 2d, The land was sacrificed at the sale by Tull, which was made at a different time and place than that specified in the notice of sale. That these facts were unknown at the time and have been recently discovered.

McConnel *v.* Gibson *et al.*

The defendants severed in their defence, some of whom demurred, one moved to dismiss, and another pleaded, that more than five years had elapsed between the final decree, and the filing of the petition. The circuit court, Woodson, Judge, presiding, at March term, 1850, dismissed the bill.

M. McConnell, for Appellant.

This petition should be regarded as an original bill in the nature of a bill of review, impeaching the order of the Court affirming the sale and deed, for fraud, which bill may be filed without leave of the Court. Story's Pleading in Equity, p. 340, § 426, and note 2, also p. 342, § 428.

The limitation fixed as to the time for sueing out a writ of error, has no application to this case. This bill is not filed to reverse the order of the Court, for anything apparent of record. Story's Pleading in Equity, p. 325, § 410, and pages 583–4, § 575, also p. 591, § 784; Hawley *v.* Cramer, 4 Cowen, p. 718; Coxe *v.* Smith, 4 John Ch. Rep. 271; Hanison, admtr, &c., *v.* Picket, 2d Hill, 353.

The allegations of the bill, being that the officer of the Court of Chancery had been guilty of fraud in the sale of the land, and had become the purchaser at his own sale, at a reduced price, to the injury of defendant Babb, who owned the land, and of McConnell a mortagee, the facts not coming to their knowledge until the filing of this bill; and all these allegations being admitted by the pleadings, the bill should not have been dismissed, but the sale should have been set aside. 4 Cowen's Rep., p. 781; 4 U. S. Condensed Rep., 142; 3 Gilman's Rep., 2., Story's Pl. in Equity, p. 625, § 815.

Wm. Thomas for Appellees.

Caton, J. We must look at the substance of this bill, and the grounds of equity set up in it, to determine its true character. It commences in the form of a petition, but subsequently assumes the form and substance of an original bill or of a bill of review, and is by the pleader sometimes called one thing, and sometimes another; but we must look at the material averments of the bill and from them determine its true character. Although

me pleader may have given it a wrong name, still if the averents show that the complainant is entitled to relief, and the rayer will admit of our granting that which he shows himself ntitled to claim, he ought not to be turned out of Court unheard.

Although many of the supposed irregularities in the sale and report may be quite unimportant, so far as the validity of the sale is concerned, yet some of the facts stated in the bill are of a more serious character, and if true, must vitiate the sale and consequently the order of the Court confirming the report of that sale. The bill states substantially that Tull, the commissioner, was in fact the purchaser at his own sale. That although Lippincott was the ostensible purchaser, in fact he purchased not for his own benefit, but for that of Tull. This, if true, was a fraud in law, and will avoid the sale, at the instance of the party whose property was sold or of one holding under him, if their remedy is sought within a reasonable time after the fraud is discovered. The law will not allow a man, who acts in a fiduciary capacity, to be both buyer and seller at the same time. (*a*) It is true that such a sale is not absolutely void, for it may be confirmed by the party whose interest is affected or title transferred by such sale ; and this acquiescence may undoubtedly be presumed, by the absence of any complaint for an unreasonable length of time, after the mode of sale is known. The purchaser cannot avoid the sale, for he shall not be allowed to complain of his own fraud or mis - conduct. These principles are too familiar to require authority for their support.

There is a charge also, that the sale was fraudulently made on a day different from that stated in the notice, and different from the time stated in the report. If these things were done for a fraudulent purpose, then they would afford sufficient ground for setting aside the sale and vacating the order confirming the report. (*b*)

The true object of this bill, is to set aside the sale, and to review, reverse and vacate the order of the Court confirming the report of the sale, whereby the final sanction of the Court was given to the sale. This is asked upon the ground of fraud. The bill shows, that a fraud was practiced upon those interested in the mortgaged premises, and upon the Court, which, had it been known to the Court at the time, would have prevented that

(*a*) Thorp vs. McCullum, 1 Gil. R. 626 and note.
(*b*) Stewart vs. Cross, 5 Gil. R. 444.

court from making the order approving the report of the sale, and would have induced the court to have set it aside. This bill comes precisely within the definition of an original bill in the nature of a bill of review, as laid down by this court in the case of Gregg et al., *v.* Gear, 3 Gilman, 2; and in Story's Eq. Pl., §426. The bill was filed in a reasonable time after the fraud was discovered. It was therefore not obnoxious to the demurrer. The same relief substantially might, and undoubtedly would have been, obtained by a purely original bill, setting forth the fraud, and seeking to set aside the sale alone, without asking to have the final order of the court approving of the report and confirming the sale to be reviewed and reversed; for a decree setting aside the sale, would necessarily have destroyed the effect of that final order. The difference between such a bill and the one before us, is only nominal when founded upon such facts as are stated here.

The authorities above referred to, show that the leave of the court was not necessary to file the bill. It should not therefore have been dismissed for that reason.

So of the objection as to parties. The bill shows that all who could have had any interest adverse to the relief sought, or indeed in the question at all, were brought in.

The decree of the circuit court is reversed with costs and the suit remanded with leave to the defendants to answer to the merits of the bill.

Decree reversed.

SAMUEL WIGGINS, Pltff in Error, *v.* EDWARD LUSK, Deft in Error.

ERROR TO MORGAN.

In an action of ejectment, the patent is conclusive evidence of title, higher and better than a register's certificate of prior purchase. In equity, a certificate of purchase will prevail against a patent, if the right on which it is based is prior in point of time, to that on which the patent is founded.

To render a deed operative to pass title, in addition to signing, sealing and acknowledging, delivery and acceptance are essential to its validity.

Where a deed after being acknowledged was retained by the grantor and found among his papers after his decease, it could not become operative by a delivery after his death.

Wiggins *v.* Lusk.

This case is fully stated in the opinion of the Court. The judgment was rendered by Woodson, Judge, at September term, 1850, of the Morgan Circuit Court, and the plaintiff below appealed. The errors assigned, are, the receiving the testimony of Waldo, stating conversations between the witness and I. J. C. Smith, at the time the deed was executed by said Smith, to McDowell; the receiving as testimony the record of the suit between Edward Lusk and Mary Lusk, against the heirs of Smith; in deciding that the plaintiff was only entitled to recover an undivided half of the land in controversy.

Wm. Thomas, for Pltff in Error.

The patent to Smith is conclusive evidence of title. Illinois Statutes of 1838, p. 196; Wilcox *v.* Jackson, 13 Peters, 498; Bagnell *v.* Broderick, ibid, 450; Patterson *v.* Winn, 5 Peters, 240.

That if there was any fraud in the purchase by Smith from the United States, the only remedy of the injured party, by that fraud, is by suit in Chancery. Isaacs *v.* Steele, 3 Scam., 47; agnell v. Broderick, 13 Peters, 450.

That Wiggins not being a party to the supposed fraud of Smith, either in purchasing or selling the land, and being a *bona fide* purchaser without notice of any fraud, is not affected by the fraud, if any existed. Boon v. Childs, 10 Peters, 210; 1st Story's Eqt. Pl., 415; Prevo. v. Walters, 4 Scam., 38.

That neither Wiggins or McDowell being parties to the suit in Chancery in favor of Lusk and wife, the record of that suit is not evidence against them. 1 Greenleaf, 590.

M. McConnel, for Deft in Error.

The deed from Smith to McDowell was void, never having been delivered. If not void for that reason, it could not take effect until McDowell acted upon it and made the quit-claim deed to Wiggins on the 15th of March, 1839, up to which time the land remained the property of the heirs of Smith, and therefore the decree in favor of Lusk and wife having intervened, took all right from them and McDowell, and left him nothing to convey. Strobhart's Eqt., 349; Hulick v. Scovil, 4 Gilman, 159, 175–6;

Richards *v.* Jackson, 5 Cowen, 617; Church *v.* Gilman, 15 Wend., 658; Jackson *v.* Phillips, 12 John R., 418; Herbert *v.* Herbert, Breese, 282; Church *v.* Gilman, 15 Wend., 556; Bryan *v.* Wash., 2 Gil., 557.

TREAT, C. J. This was an action of ejectment brought by Wiggins against Lusk, to recover the possession of eighty acres of land, situated in Morgan county. On the trial, the possession of the defendant was admitted, and the plaintiff introduced the following evidence:—1st. A patent from the United States to Isaac J. C. Smith, dated the 15th of October, 1834, for an undivided half of the land. 2d. A certificate of the Register of the land office, showing the purchase by Winny Boswell of the whole tract, on the 3d of July, 1832; and likewise showing, that Smith proved a right of pre-emption to the land, and purchased an undivided half thereof, on the 23d of January, 1833. 3d. A deed from Smith to McDowell, for an undivided half of the land dated the 27th of April, 1833, and recorded on the 26th of October, 1836. 4th. A quit-claim deed from McDowell to the plaintiff, dated the 15th of March, 1839, for an undivided half of the land. 5th. A deed from the defendant and wife to the plaintiff, dated the 5th of March, 1839, for an undivided half of the land.

The defendant produced the following evidence:—1st. A deed from Winny Boswell to Isaiah Stiles, for the whole tract, dated the 15th of September, 1833, and recorded on the 4th of February, 1834. 2d. Proof that Stiles died intestate in September, 1834, leaving the wife of the defendant his sole heir at law. 3d. Proof that Smith died intestate in the year 1834. 4th. Proof that when the deed to McDowell was acknowledged, Smith stated to the justice, that he owed McDowell, who was his brother-in-law, and wished to secure him; that he wanted the matter kept secret, for he feared some claims would follow him from Indiana, and he wished to place the property out of the reach of those having the claims; that McDowell, who resided in Indiana, or the eastern part of this State, was not present, and the deed was returned to Smith; that after Smith's death, his widow intermarried with John Ayers, who found the deed to McDowell among the papers left by Smith, at his decease, in the possession of the widow, and placed the same on record, and received it from the recorder. 5th. The record of a suit in

chancery in the Morgan Circuit Court, commenced in March 1836, in which the present defendant and his wife were complainants, and Ayres, and the widow and heirs at law of Smith were respondants, and in which a decree was entered requiring the respondants to convey to the complainants, all their right, title, and interest in the premises now in dispute. On their failure to perform the decree, the master in chancery conveyed their interest in the land to the complainants.

Upon this evidence, the court gave judgment in favor of the plaintiff, for an undivided half of the land; and in favor of the defendant, for the other half. The plaintiff brings a writ of error.

In this action, the patent was conclusive evidence of title in Smith, to an undivided half of the land. It was higher and better evidence of title, than the register's certificate of a prior purchase by Boswell. Wilcox *v.* Jackson, 13 Peters, 498. In Equity, a certificate of purchase will prevail against a patent, if the right on which it is based is prior in point of time, to that on which the patent is founded. Isaacs *v.* Steele, 3 Scam., 97. But, at law, in the absence of fraud in the obtaining of the patent, the title derived from the patent is paramount.

If the deed from Smith to McDowell was ever delivered, so as to vest the legal estate in the latter, and that estate was not defeated, by the failure to record the deed, before the suit was commenced by the heirs of Stiles to divest the title, then the plaintiff, by virtue of the conveyance from McDowell and the defendant and wife, acquired the complete legal title to the whole of the premises in controversy. In our opinion, however, there was no valid delivery of the deed to McDowell. To render a deed operative to pass title, there must be something more than the mere signing, sealing and acknowledging. A delivery of the deed by the grantor, and an acceptance thereof by the grantee are essential to its validity. The grantor must deliver the deed to the grantee, or to some one acting on his behalf. It must be accepted by the grantee, or by some one for him. It may be delivered to a stranger for the use of the grantee, and the acceptance by the latter will be presumed, where he claims under it. But the grantor must part with all control over the deed. It cannot take effect while it remains in his possession, and is subject to his control. In this case, McDowell claimed

title under the deed and it was in the possession of his grantee. This raised the presumption of a delivery to, and acceptance by him. And the presumption could not be overcome, except by clear proof that there had been no actual delivery of the deed by the grantor. The evidence introduced on the part of the plaintiff showed, that the deed, after being acknowledged, was retained by the grantor, and was found among his papers, after his decease. The grantee was not present when the deed was executed, and it is very evident that he was not aware of its existence, until after the death of the grantor. It is an irresistible inference from this proof, that the grantor never parted with the control over the deed; in other words, it effectually rebuts any presumption arising from the other facts of the case, that the deed was ever delivered to the grantor, or to any one for his use. It was no doubt, at one time, the intention of the grantor to convey the land to McDowell, but he died without carrying the intention into effect. His design was but in part executed; it was never consummated, so as to give the deed any legal operation. It could not take effect while it remained subject to the control of the grantor. It went into operation while he was in life, if at all. If there was no delivery by the grantor, the deed could not become operative by a delivery after his death. It was mere waste paper, and it was not in the power of Ayers to give it vitality, by placing it on record, or delivering it to the grantee. [*a*] The case of Herbert *v.* Herbert, Breese, 278, is strongly in point. In that case, T. F. Herbert executed a deed to his brother, J. C. Herbert, to whom he was largely indebted, and had the same acknowledged and recorded. The deed was found among the papers of the grantor after his death, and was delivered by his administrator to a third person. The Court held that there had been no valid delivery of the deed. It said: "It is most manifest that there could have been no delivery of the deed to the grantee, so as to pass the estate. The act of recording a deed, cannot amount to a delivery, when there does not appear an assent or knowledge by the grantor of the act. In this case, there is not a scintilla of evidence calculated to lead the mind to the belief, that the grantee ever knew of the existence of the deed until after the death of the grantor. There could then have been no acceptance by the grantee because the possession of the deed, if such had been the fact, derived after the death of

(*a*) Younge vs. Guilbean, 3 Wal. U. S. R. 636.

the grantor, could not amount to one, there having been no delivery during the life of the grantor."

The judgment of the Circuit Court must be affirmed, with costs.

Judgment affirmed.

INMAN H. TRIPLETT, Pltff in Error, *v.* DAVID SCOTT, Deft in Error.

ERROR TO HANCOCK.

A. recovers judgment in his name for the use of B., the former cannot receive satisfaction of the judgment, although the legal interest is in his name, and if suit is brought on that judgment, it must be brought in his name.
A payment to a nominal plaintiff, is not a satisfaction of the debt.

This suit was originally commenced by Triplett in his name alone, against Scott, before a justice of the peace in Hancock county.

The foundation of the suit was a judgment rendered before the same justice, entered in the name of "Dennis Clancey for use of Inman H. Triplett." Triplett obtained judgment in his own name against Scott for the sum of $4.00, the amount of the judgment sued on.

Scott appealed to the Circuit Court. In the Circuit Court of Hancock county, Minshall, Judge, presiding, the cause was submitted to him upon an agreement of this substance:

That the plaintiff was the owner of a note made by the defendant to one Clancey or bearer. That plaintiff sued it in the name of Clancey to his use. That Clancey, the nominal plaintiff, without the knowledge or consent of Triplett, the real plaintiff, receipted the judgment upon the docket of the justice.

The Circuit Court, at September term, 1850, dismissed the suit. Triplett sued out this writ of error and seeks to reverse the judgment of the Circuit Court.

G. EDMONDS, jr., submitted the cause *exparte*.

CATON, J. Triplett brought a suit against Scott in the name

of Clancey, the record showing that it was for the use of Triplett. Without the knowledge or consent of Triplett, Scott paid the amount of the judgment to the nominal plaintiff, and took his receipt therefor. Triplett then brought this suit upon that judgment in his own name, which the Circuit Court decided he could not maintain; and we think properly. It is true that the payment by Scott to the nominal plaintiff was made in his own wrong, and it may be admitted, did not satisfy the judgment. Still the legal title to the judgment remained in the nominal plaintiff, and Triplett could no more recover in his own name in a suit upon that judgment, than he could have sued in his own name upon the note upon which the first suit was brought. That note was payable to Clancey, and was transferred to Triplett without endorsement. Hence, Triplett had to sue upon that note in the name of Clancey because the legal title still remained in him, although the equitable title had passed to Triplett. The legal and equitable titles to the judgment were the same as they had been to the note, and Triplett was under the necessity of enforcing his rights in the same way, that is, by the use of the name of Clancey, the trustee. The receipt of Clancey for the amount of the judgment could present no more impediment to the recovery in his name upon the judgment, than a receipt given by him for the amount due on the note, would have defeated a recovery on the note.(*a*)

The judgment is affirmed with costs.

Judgment affirmed.

THE PRESIDENT AND TRUSTEES OF THE TOWN OF JACKSONVILLE, Appellants, *v.* MURRAY MCCONNEL, Appellee.

AGREED CASE FROM MORGAN.

A corporation, being a mere creature of the law, can only exercise such powers as are conferred upon it by the act creating it.

A power to assess and collect a tax upon all personal estate, includes the power to tax money loaned.

Under our constitution the legislature has not the power to exempt one species of personal property from taxation, while it collects a tax from another within the same jurisdiction.

(*a*) Hodson vs. McConnell, post 170; Payne vs. Frazier, 4 Scam. R. 56.

The agreed case, filed herein, is substantially as follows:

An act the better to provide for the incorporation of the town of Jacksonville, passed by the legislature of said State, provides as follows: ' The board of trustees shall have power and authority to assess and collect taxes uniform in respect to persons andproperty for corporate purposes, upon all the real aud personal estate within said town, not exceeding one-half per cent. per annum upon the assessed value thereof, as ascertained and returned by the assessor of the corporation, and may enforce the payment of the same in any manner to be prescribed by ordinances not repugnant to the Constitution of the United States, and of this State, and such ordinances may provide for the advertisement, sale, and conveyance of any such real estate for taxes unpaid thereon to said corporation, and the time and mode in which the same may be redeemed from such sale in the manner prescribed by the constitution of this State." On the 9th of March, 1849, said appellants passed an ordinance relative to the revenues of the corporation, which was duly published; which provides as follows: Be it ordained, by the President and Trustees of the town of Jacksonville, that all property, real and personal, within said corporation which may be subject to taxation for state and county purposes by the laws of this State, shall be liable to taxation for the use of the corporation, and the lien of the corporation for such taxes shall attach from and after the date when the assessment list is received by the collector." The appellee was an inhabitant of said corporation in 1849. For that year there was assessed against him amongst other taxes, a tax of 40 cents to the one hundred dollars, on four thousand dollars money loaned, or at interest, amounting to sixteen dollars.

To restrain the collection of this tax the appellee filed his bill, and obtained a writ of injunction from Woodson, Judge. The appellants filed an answer, admitting the foregoing state of facts. The parties in the circuit court submitted to Woodson, Judge, the question, "whether the corporate powers of said town extend to the right to levy on the inhabitants of said town a tax for money loaned by them, in or out of said town." The court decided that, "the ordinance under which the assessment was made was not in accordance with authority granted by the charter, so far as it attempts to assess a tax on money loaned, and is to that extent void;" and perpetuated the injunction. From this deci-

sion the plaintiffs in error appealed and bring the case to this court; and assign for error, that the court below erred in deciding the aforesaid ordinance void, and that appellants had not a right to collect a tax on money loaned.

D. A. Smith for appellants.

Murray McConnel for himself.

Trumbull, J. The right of the town of Jacksonville to levy and collect a tax upon money loaned by the inhabitants of said town, is the only question involved in this case.

That a corporation, which is a mere creature of the law, can only exercise such powers as are conferred upon it by the act of incorporation, is a well settled doctrine. (*a*)

Let us then inquire what powers have been granted the town of Jacksonville, upon the subject of taxation.

The 9th section of an act, the better to provide for the incorporation of the town of Jacksonville, approved February 10, 1849, declares, that "the Board of Trustees shall have power and authority to assess and collect taxes uniform in respect to persons and property, for corporate purposes, upon all the real and personal estate within said town."

Here the power to assess and collect taxes is expressly given, but it is insisted that the power to assess and collect a tax upon all personal estate does not include the power to tax money loaned; in other words, that money loaned is not personal estate. We cannot assent to this proposition. The term all personal estate, in its ordinary sense, is understood to include loaned money, as well as every other species of personal property.

This view of the case is strengthened by the fact, that the general revenue law in force at the time the act in question was passed, expressly declares that the term "personal property"—a term of similar import to that of "personal estate"—shall be construed to include "all moneys on hand and moneys loaned whether within or without the State."

When the legislature passed the act authorizing the Board of Trustees of the town of Jacksonville to assess and collect a tax, upon all the personal estate within said town, it is but reasonable to suppose that the term "personal estate" was understood to

(*a*) Petersburg vs. Mappin, 14 Ill. R. 194.

have the same meaning as had previously been given to a similar term, used in the general law, upon the subject of taxation.

There is another reason why the term "personal estate," should be construed to include money loaned, and every other species of personal property.

The constitution of the state expressly declares, that the mode of levying a tax shall be by valuation, "so that every person and corporation shall pay a tax in proportion to the value of his or her property." Under this provision the legislature would have no power to exempt from taxation one species of personal property, while it collected a tax from another, within the same jurisdiction, and it is never to be presumed that the legislature intended to pass a law which should be contrary to the Constitution, either in its letter or spirit. (*a*)

To restrict the term "personal estate" within narrower limits than would embrace every species of personal property, would, to say the least, render the validity of the law doubtful, if it did not make it wholly void, as being repugnant to the constitution.

We cannot doubt that the Board of Trustees of the town of Jacksonville had authority, under their act of incorporation, to assess and collect a tax upon money in hand, or money loaned in or out of said town, by the inhabitants thereof.

The decree of the Circuit Court, enjoining the collection of the tax in question, is therefore reversed and the bill dismissed.

Judgment reversed.

NANCY J. TURNEY, Admrx of the estate of J. TURNEY, deceased, Pltf in Error, *v.* A. B. GATES, Deft in Error.

ERROR TO JO DAVIESS.

It is erroneous, in reviving a judgment against an administrator, to award an execution against the goods and chattels, lands and tenements of the intestate.

In such a case, where execution was not issued on the judgment against the intestate within a year and a day, the lien on the lands of the intestate was lost.

The proper order would be to revive the judgment against the administrator, to be paid in the due course of administration.

In the distribution of the assets of deceased persons, under our statute, judgment creditors without a lien, and simple contract creditors, stand upon the same footing.

(*a*) Hunsaker vs. Wright, 30 Ill. R. 149.

Turney *v.* Gates.

This was a proceeding by *Scire Facias*, in the Jo Daviess Circuit Court, to revive a judgment theretofore rendered in favor of the defendant in error, at the March term, 1842, of said Court, against John Turney, who afterwards deceased. The *Sic. Fa.* issued against the present plaintiff in error, as administratrix of John Turney. The cause was heard before Thomas C. Browne, Justice, at the October term, 1844, a default was taken, and a judgment was rendered against the plaintiff in error, reviving the former judgment, and ordering that execution issue "against the goods and chattels, lands and tenements, rights, credits, and effects of the said John Turney, in the hands of the said administratrix to be administered, with costs of suit," &c.

The administratrix brings the cause to this Court, assigning for error, the rendition of judgment on the *Sic. Fa.* against the lands and tenements of the intestate, and in awarding execution, &c. It does not appear that any execution had issued upon the judgment against the intestate within a year and a day.

The writ of error herein, was issued in November, 1847.

Van H. Higgins submitted this cause to the Court, *ex parte*, on the errors joined.

Treat, C. J. Gates recovered a judgment against Turney, in March, 1842. No execution was issued thereon within a year. Turney died in 1844; and in 1846, Gates sued out a *scire facias* to revive the judgment against his administratrix. An order was entered in that proceeding that the judgment stand revived against the administratrix, and that the plaintiff have execution against the goods and chattels, lands and tenements of the intestate. The order was erroneous. The plaintiff was not entitled to execution on the judgment. He lost his lien on the lands of the intestate, by failing to sue out an execution within the year. The proper order would have been, that the judgment be revived against the administratrix, to be paid by her in the due course of administration. (*a*) Welch *v.* Wallace, 3 Gilman, 490. In the distribution of the assets of deceased persons, under our statute, judgment creditors without a lien and simple contract creditors are put on the same footing. Paschall *v.* Hailman, 4 Gil., 285.

The judgment of the Circuit Court will be reversed, with costs, and the cause remanded for further proceeding.

Judgment reversed.

(*a*) Turney vs. Young, 22 Ill. R. 256.

WILLIAM W. GALLIMORE, Appellant, *v.* WILLIAM T. DAZEY, *et al.*, Appellees.

APPEAL FROM ADAMS.

When a petition shows a case clearly within the spirit and letter of the statute, a party is permitted to avail himself of the privilege of a re-hearing of a decision by a justice of the peace, at any time within six months, by the aid of a writ of *certiorari*, and the filing of the petition with an order allowing the writ endorsed thereon, and an appeal bond approved, will give the court jurisdiction, and the case is pending from that time in the circuit court, without the emanation of the writ. (*a*)

The trial is *de novo* as in cases of appeal, and no formal return is required to the writ, and if the writ is served and returned, and its mandate is not complied with, an attachment may be issued against the justice.

Where the papers and a transcript of the proceedings are filed, the issuing o *certiorari* is wholly unnecessary.

There is no occasion for a bill of exceptions to the decision of a court dismiss a suit, upon a motion based upon facts appearing in the record.

This was an action commenced by the appellees against the appellant in Adams county, before a justice of the peace. The judgment upon the motion to quash, was rendered by Minshall, Judge, at May term of the Adams Circuit Court, 1849. Gallimore prayed this appeal. The facts of the case are stated in the opinion of the Court.

WARREN & EDMUNDS, for Appellant.

WILLIAMS & LAWRENCE, for Appellees.

TREAT, C. J. Dazey and Shepherd brought an action against Gallimore, before a justice of the peace The constable made return, that he was s tisfied the defendant evaded service of the summons, and he "therefore served the same on the said Gallimore, by leaving a written copy at his place of residence, with old Mrs. Gallimore." On the 16th of August, 1847, the justice rendered a judgment by default against the defendant for $46. On the 10th of February, 1848, the defendant obtained an order for a *certiorari*, to remove the cause into the Circuit Court, and filed a bond as in the case of an appeal. He swore, in his petition for the *certiorari*, that he was absent from the state at the time of the commencement of the suit before the justice, and continued absent until more than twenty days had elapsed after the judgment was recovered, and that in the meantime, he had no knowledge or information of the pendency of

(*a*) Post 163.

the suit, of the rendition of the judgment, and he could not, therefore, have taken an appeal in the ordinary way; and that he was not indebted to the plaintiff on any account whatever. A supersedeas was issued, and served on the justice. No writ of *certiorari* was issued. A certified transcript of the proceedings before the justice was filed in the Circuit Court, on the 19th of May, 1848. In May, 1849, the surviving plaintiff appeared and entered a motion to dismiss the proceeding, which the Court sustained. That decision is now assigned for error.

The statute allows a party under certain circumstances, to remove a cause from a justice of the peace to the Circuit Court, by *certiorari*, within six months after the rendition of the judgment. He is required to set forth and show on oath, that the judgment was not the result of negligence on his part; that the same, in his opinion, is unjust and erroneous, specifying wherein the injustice and error consists; and that it was not in his power to take an appeal in the ordinary way, stating the particular circumstances that prevented him from so appealing. The officer allowing the *certiorari*, is required to endorse an order to that effect on the petition; and on the filing of the same in the Circuit Court, together with a bond conditioned as in the case of an appeal, a writ of *certiorari* is to be issued. The writ commands the justice to certify into the Circuit Court, a transcript of the proceeding had before him; and upon the return of the writ, the cause is to be proceeded with as in cases of appeal. R. S. Ch. 59, Sec. 72 to 74.

The Circuit Court erred in sustaining the motion to dismiss. The petition showed a case clearly within the letter and spirit of the statute. The defendant was absent from the state, when the action was commenced before the justice, and did not return, until the time allowed for an appeal had expired. During his absence, he had no actual notice of the pendency of the suit, or of the existence of the judgment, and he was not the debtor of the plaintiffs. If all this was true, and it must be so considered for the purposes of this case, he had a clear right to the remedy by *certiorari*. The judgment was not the result of negligence; it was wholly unjust; and it was out of his power to have it reviewed in the Circuit Court in the usual mode. He had a defence on the merits, and an opportunity to interpose it. The statute was intended to provide for just such cases. It seems to

be the design of the statute that every party, against whom a judgment has been rendered by a justice of the peace, may have the case re-heard in the Circuit Court. It accordingly allows an appeal in every case, except on a judgment confessed, provided the same is taken within twenty days from the date of the judgment. And where a party can show that injustice has been done him, not attributable to his own laches, and that he could not, by the exercise of extraordinary diligence, perfect and appeal within the twenty days, he is permitted to avail himself of the privilege of a re-hearing, at any time within six months.

It is insisted, however, that the issuing of a writ of *certiorari*, within the six months, is necessary to invest the circuit court with jurisdiction of the case. We think otherwise. It is the filing of the petition, with an order allowing a *certiorari* endorsed thereon, and an appeal bond approved by the clerk, which gives the court jurisdiction. The case is from that time pending in the circuit court. The statute permits a party to take an appeal, by entering into an appeal bond before the justice, and the latter is thereupon required to file the bond and the papers of the case, in the circuit court, within twenty days thereafter. Under this provision, it was decided, in the case of Little *v.* Smith, 4 Scam., 400, that the case was properly pending in the circuit court, from the time of the approval of the bond by the justice, although the papers were not sent up within the time required by law; that it was the giving of the bond by the party, and not the filing of the papers by the justice, which perfected the appeal, and conferred the jurisdiction. It was held, in the case of Owens *v.* McKethe, 5 Gilman, 79, that appeal to this court was perfected, by the filing of the appeal bond with the clerk of the circuit court. Those cases are not different in principle, from the one under consideration. The only office of the writ of certiorari is to bring up the papers of the case, and a transcript of the proceedings had before the justice, to be used on the trial in the circuit court. The trial is to be *de novo*, as in cases of appeals; and not upon the return of the inferior tribunal, as in common law cases of *certiorari*. (*a*) The only command of the writ to the justice, is to certify and transmit the papers and proceedings of the case. He is not required to make any formal return to the writ. His only duty is to send up the papers and proceedings. The writ is directed to the sheriff, and

(*a*) Pigeon vs. State, 36 Ill. R. 251.

is served and returned by him. If its mandate is not complied with, the sheriff's return of service is a sufficient foundation for an attachment against the justice. Where the papers and a transcript of the proceedings are filed, the issuing of a *certiorari* is wholly unnecessary. The object of the statute is then fully answered, and the law will not require the performance of an unnecessary act. It is like the case of a writ of error from this court, which is never sent out, where the plaintiff in error files a transcript of the record in the first instance; and like the case of the suggestion of a diminution of the record in a case before this court, where a *certiorari* is not sent down to the keeper of the record, if either party will supply the defect, by filing a complete record. All that the appellee can require is, that he shall not be delayed in the trial of the case, by the neglect of the appellant to have a *certiorari* issued. If, when he appears, the papers of the case are in court, no matter how they came there, he has no cause for complaint. In this case, the necessary papers were on file long before the plaintiff entered the motion to dismiss, or even appeared in the case.

There was no occasion for a bill of exceptions to the decision of the Court, dismissing the suit. The motion was based on facts appearing in the record.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Judgment reversed.

RESCARICK AYERS, Appellant, *v.* GEORGE M. RICHARDS, Appellee.

APPEAL FROM MORGAN.

Where the introductory part of a declaration is in the appropriate form for debt but all the counts are strictly and technically in assumpsit, it will be considered a declaration in assumpsit.

Where the items of an account are read to a party, and he admits the correctness of each item and of the whole account, but as to certain items, stated that he thought, the whole or a part of them, had been paid by his son, and that he thought the account was correct, and that he would see his creditor and settle with him, such admissions do not show a new promise within five years. (*a*)

(*a*) Horner vs. Starkey, 27 Ill. R. 14; Mullet vs. Shrumph, 27 Ill. R 110; Dcikerson vs. Sutton, 40 Ill. R. 405.

Ayers *v.* Richards.

In order to take a case out of the statute of limitations, there must be a promise to pay the debt; such promise may be implied from an express and unqualified admission that the debt is due and unpaid, nothing being said or done at the time to rebut the presumption of a promise to pay; but the admission of the debtor, that an account is correct, that he received the goods or money or that he executed the note, will not be sufficient for the purpose, unless it is also expressly admitted that the debt is still due and unpaid.

In an action of assumpsit, on an open account, the last item of which accrued more than five years before the commencement of the action, the statute of limitations is a good defence.

The declaration in this case commenced as in debt, and concluded to the damage of the plaintiff of one thousand dollars. The body of the declaration had but six counts, which were all in assumpsit. To this declaration defendant replied, that he did not owe the sum of $1,000.00, demanded as debt in the plaintiff's declaration, &c., and gave notice with his plea, that he would reply upon the statute of limitations of five years, as a bar to the plaintiff's demand.

By agreement, the cause was tried by the Court, Woodson, Judge, presiding, at September term, 1850, and a judgment was rendered for the plaintiff, for $429.90, whereupon the defendant below appealed to this court. Upon the finding of the issues for the plaintiff, defendant interposed a motion in arrest of judgment, which was overruled. The only testimony in the case shows, that the witness called upon appellant, and "showed him the account, and read over to him each item of account, and as he read, Ayers admitted to the correctness of every item, and of the whole account, but as to the items for the board of his son, he stated that he thought that item, or a portion of it, had been paid by his son. He further stated to witness, that the account was correct, and that he would see Richards, and settle with him. On his cross examination, the witness stated that Ayers never intimated to him that he had any offsets against account or that it had been paid, except that he had supposed his son had paid for the board or a part of it. On being asked whether Ayers promised to pay the account, witness stated that he made no other promise than that he would see Richards and settle it."

The appellant moved the Court for a new trial, upon the ground "that on the evidence in the case, the court ought to have given judgment in favor of the defendant, under the statute of limitations of five years," which was also overruled.

D. A. Smith, for Appellant.

M. McConnel, for Appellee.

Caton, J. The introductory part of this declaration is in the appropriate form for debt, but all the counts are strictly and technically in assumpsit. This, according to the cases of Cruikshank *v.* Brown, and McGinnety *v.* Laguereure, 5 Gilman, 75, and 161, is a declaration in assumpsit, and not in debt. The counts being all in assumpsit, there was no misjoinder, and the motion in arrest of judgment was properly overruled.

It can make no difference in the result here, whether we consider the testimony of McConnel as so referring to the account filed with the declaration, as to enable us to look into that as a part of the evidence or not. By doing so, we see that more than five years had elapsed from the date of the last item in the account, and the commencement of this action, so that the statute of limitations constituted a good defence. Nor did the testimony of the witness show a new promise within the five years. He says he "read over to him each item of the account, and as he read, Ayers admitted to the correctness of every item, and of the whole account; but as to the items of the board of his son he stated that he thought that that item, or a portion of it, had been paid by his son. He further stated he thought the account was correct, and that he would see Richards and settle with him." In order to take a case out of the statute of limitations, there must be a promise to pay the debt. Such promise may be implied, it is true, from an unqualified admission that the debt is due and unpaid, nothing being said or done at the time, rebutting the presumption of a promise to pay. It is not sufficient that the debtor admitted the account to be correct, or that he had received the goods or the money, or had executed the note sued on, but he must have gone further, and admitted that the debt was still due and had never been paid. The bare admission of the correctness of the account, or genuineness of the note sued on, is no more a satisfactory answer to the statute, than would be the testimony of a witness proving the same facts. The statute presupposes the debt to have been due, and that there is no evidence that it has ever been paid. It would be absurd to say, that a promise shall be implied, by the bare admission of the party of what the law itself supposes to be true

It has been even regretted by many learned Courts, that parol testimony has ever been allowed to do away with the express statute, and especially, that any implied promise has been allowed to have that effect, for it certainly offers great inducements to pervert and distort the statements of parties, in order to make out a new promise. There is certainly great discrepancy in the decision of different courts on this subject, and some courts have undoubtedly allowed a looser rule to prevail, than the one which we have adopted, but we think the weight of authority, and certainly the reason of the case, are in favor of the views which we have stated.

It is true here is an inference, and a very strong inference, that this account had not been paid. But there should be an express admission of that fact, in order to infer the new promise. But one inference is to be admitted. No more should be admitted, when dispensing with an express act of the legislature. An inference upon an inference would be too unsubstantial for such a result. By the rule which the current of decisions has compelled us to adopt, the statute may be substantially repealed in the particular case. Were the question a new one, we should hold that no suit could be maintained upon the old cause of action, but upon a new and express promise, for which the old cause of action might be a sufficient consideration, as in case of a debt which has been discharged by bankruptcy.(*a*)

This being an action of assumpsit, on an open account, and the last item of the account having accrued more than five years before the commencement of the action, the statute of limitations was a good defence, and a new trial should have been granted.

If it be objected that the account, not being copied into the bill of exceptions, but only referred to by the witness, so that we cannot know what the account was, then we say, that as the evidence fixes no amount, except by reference to the account sued on, when that is withdrawn from view there is no evidence whatever to justify the verdict. If we can look at the account filed with the declaration, and referred to by the witness, to ascertain the amount, then we cannot help seeing, that the last item bears date more than five years before the commencement of this suit.

Let the judgment be reversed and the cause remanded.

Judgment reversed.

TREAT, C. J., dissented.

(*a*) Keener vs. Creele, 19 Ill. R. 191

Sconce *et al. v.* Whitney.

HARRISON SCONCE *et al.*, Pltiffs in Error, *v.* JAMES W. WHITNEY, admr, &c., Deft in Error.

ERROR TO PIKE.

In chancery, the summons must be served by copy.
Where the complainant chooses to proceed against infants under the statute, without service of process, it is theduty of the court, toexact of the guardian a vigorous defence of their interests,and it is wrong to take a bill for confessed against them, under any circumstances.

The bill in this case was filed to procure the re-conveyance of certain lands. The respondent died after the bill was filed, and proceedings were had against his survivors, and a decree entered upon the prayer of the bill in favor of the complainant. The heirs of the respondent, some of whom were minors, were never served with process, nor were they represented in this case. The widow of the first respondent married Sconce, one of the plaintiffs in error. The process was served upon one of the respondents by copy, and upon others by reading. The decree was rendered by Minshall, Judge, at the March term, 1850, of the Pike Circuit Court. A guardian *ad litem* was appointed for the infants, who did not appear or answer for them.

C. L. HIGBEE and J. SIBLEY, for Pltffs in Error.

There was no service of process on Mary Sconce, the wife of plaintiff in error. Service on the husband is not a service on the wife, where her property is the subject matter of the suit. 2 John. Ch. R., 139 ; 9 Versey Ch. R., 485 ; 6 Madd. Ch. R., 172

There is no appearance of the guardain, *ad litem*, of the infants before the final decree. No default or decree, *pro confesso*, can be entered against them. 3 Harrison, 603 ; 3 J. J. Marshall, 544 ; 5 Call, 459 ; 4 Gilman, 370.

BROWNING & BUSHNELL, for Deft in Error.

CATON, J. There are objections to this decree which are insurmountable. Mrs. Sconce was never properly brought into Court. The most that can be said, is, that the process was served upon her by reading, when the statute required that she should be served by copy. The infants were never served with

process in any way, nor did their guardian file any answer in their behalf. The court should have compelled the guardian to answer; and it was wrong for the court to take the bill for confessed as to them, under any circumstances. It was the duty of the circuit court to see that the guardian performed his duty, for which service a provision is made for his compensation. Particularly where the complainant choses to proceed against infants under the 47th Sec. of the 21st Chap. R. S., without service of process, as appears to have been the case here, it was the duty of the Court, to exact of the guardian a vigorous defence of the infants' interest.[a] In this case, so far from that having been done, not even a formal answer by the guardian was required, but the bill was taken for confessed; precisely as if they were capable of protecting their own interest; and there was no duty resting upon the Court, or the guardian, to protect them. Were such a practice once sanctioned, there would be an end of all security to infants. If a complainant will take a decree under such circumstances, either through design or inadvertance, he must not expect to sustain it in this Court.

Let the decree of the Circuit Court be reversed, and the suit remanded.

Decree reversed.

THE PEOPLE for the use of RICHARD MARKHAM, *et al.*, Appellants, *v.* JOHN WHITE, *et al.*, Appellees.

APPEAL FROM SCOTT.

The legal questions arising in this case were fully settled in a former decision reported in 11 Illinois, 341. The question here presented, is purely one of fact, viz: whether the administrator of the estate of Rider accounted for all of the property that came to his hands as such administrator, and the decree of the circuit court finding he did not so account, and that his sureties, the defendants, here were liable for his fault, affirmed.

This case having been presented to the Court at a previous term, all the facts of the case necessary to its elucidation will be found in the eleventh volume of Illinois Reports, page 341.

(a) Sec. 47 relates to cases where minor is notified by publication. Decree without notice is void. McDaniel vs. Carroll, 19 Ill. R. 227; Chickering vs. Failes, 26 Ill. R. 519; Mc Darmaid vs. Russell, 14 Ill. R. 490; Rhodes vs. Rhodes, 14 Ill. R. 249.

D. A. SMITH, for Appellants.

WM. THOMAS and WM. BROWN, for Appellees.

TREAT, C. J. This case was before this court at the last term and the decision will be found reported in 11 Ills., 341. Upon the remanding of the cause to the Circuit Court, the complainants amended their bill by making D. A. Smith, administrator *de bonis non* of Lewis Rider, a party defendant, who appeared and answered. Some additional proof was taken by the parties. The cause was then submitted on this proof, and the evidence previously taken, and a decree entered, that the complainants recover of the defendants, White and Webb, the sum of $329.38, to be distributed by the administrator of Rider in the due course of administration. The complainants being dissatisfied with the decree, have prosecuted an appeal for its reversal.

The legal questions arising in the case were fully settled in the former decision. The only question now presented for our consideration, is purely one of fact. It was decided at the last term, that the defendants White and Webb, as sureties on the administration bond of Parker, were liable in this proceeding for all of the estate of Rider that came to the hands of the administrator, and was not accounted for by him. The only property of Rider consisted of the effects of the firm of Webb & Rider, of which firm Rider was an equal partner at his decease. The whole of the partnership effects, except a house and lot and the debts due the firm, were inventoried and sold by Parker, as the administrator of Rider. The controversy now is whether this property, in whole or part, was not subsequently surrendered up by the administrator to the surviving partner, to be applied in the adjustment of the partnership affairs. In reference to this question, it was said in the former opinion: "If, upon a further investigation of the case, it shall turn out that Parker disposed of the partnership property with the assent or acquiescence of Webb, then, as administrator, he became chargeable with the proceeds; and if he has not faithfully accounted for them, his sureties must make good the loss sustained by the creditors. But, if on the other hand, it shall appear that the property, or any part of it, was surrendered up in good faith by

the administrator to the surviving partner, on his claim of right to dispose of it in winding up the affairs of the partnership, then the sureties are not to be held responsible for what was thus returned to Webb."

The proof discloses substantially these facts. The property inventoried by the administrator was appraised at $1,022.66. It was sold by him at public auction, in October, 1838, on a credit of nine months, for the aggregate amount of $836.41. Webb, the surviving partner, bid off all of the property, but a part that sold for $199.18. James Linkins was the purchaser of one article for $3.12. The property stricken off to Webb consisted entirely of tools and materials used in the prosecution of the partnership. After the sale, Webb continued to carry on the same business, and in so doing, made use of this property. He also proceeded, to some extent, to settle the concerns of the partnership. The books and accounts were retained by him. Parker was well aware of the acts and purposes of Webb. The property purchased by Linkins was surrendered to Webb, with the assent of Parker. Parker died in April, 1839. Shortly before his death, an interview took place between him and Webb, in which the latter as surviving partner, demanded the proceeds of all the property not bid off by him and Linkins, to enable him to wind up the business of the partnership. Parker admitted the justice of the claim, and said that on his return from St. Louis, they would have a settlement, and he would then turn over the notes to Webb in a legal way. He died on the trip to St. Louis. It does not appear that Parker ever accounted for any of the proceeds of the sale. Nor is there any proof that he ever received notes or other securities from Webb, for the payment of the property purchased by him.

On this state of case, the Circuit Court held the sureties liable for all of the property sold by their principal—except the part bid off by Webb and Linkins—and interest from the time the purchase money became payable. We are entirely satisfied with the decree. The production of the sale bill was sufficient, *prima facie*, to charge the administrator with the gross amount of the sales, but the other circumstances of the case clearly overcome this presumption, as respects the property bid off by Webb and Linkins. It is obvious, that the administrator never received any money or securities on account of this property. The only

controversy between him and Webb seemed to be in relation to the property purchased by other persons; and, as to that, Parker promised to pass over the proceeds to Webb, but died without so doing. It is very evident, that Parker considered the claim of Webb to the property in question, as surviving partner, superior to his right, as administrator of the deceased partner; and that he, therefore, permitted Webb to retain it in that character, rather than as purchaser. If such was the case, the sureties, on the principles of the former decision, ought not to be held responsible for the value of the property thus surrendered.

The decree must be affirmed, with costs.

Decree affirmed.

TRUSTEES OF SCHOOLS, for Township No. Two, &c., Pltffs in Error, *v.* EZEKIEL WALTERS, *et al.*, Defts in Error.

ERROR TO BROWN

The statute which provides that security for costs shall be given where actions are brought upon official bonds, applies to cases where the action is prosecuted solely for the benefit of a particular person or party; and not to cases where the object is to enforce a public duty.

A motion to dismiss for want of security for costs, even in cases within the statute, comes too late after answering to the merits. It is a dilatory motion, and if not interposed in due time, it will be considered as waived. The objection cannot be raised after the time has passed for pleading in abatement.

The facts of this case are stated in the opinion of the Court. The motion to dismiss was sustained, and the judgment of dismissal entered, by Minshall, Judge, at the August term, 1850, of the Brown Circuit Court. The Trustees of Schools prosecute this writ of error, and assign for error the dismissal of the suit, because security for costs had not been given.

R. S. BLACKWELL and J. BAILEY, for Pltffs in Error.

1. This is not an action upon an "office bond" for "the use of any person" within the meaning of R. S. 126, § 1.

This law was intended to apply to the bonds of Sheriffs, (R. S.,514,)Coroners, (ib., 514,)Recorders, (ib., 431,) Clerks of the Supreme, (ib., 144,) Circuit, (ib., 147,) and County Courts,(ib., 131,) Justices, (ib., 314,) Constables,(ib., 315,) Notaries, (ib., 392,) and others of a like nature ; where an individual, aggrieved by the neglect or misconduct of a public officer, institutes a suit against such officer upon his official bond, in the name of the People, Governor, or County Commissioners, in whom the legal interest is vested, and who, though nominal parties to the record, have no beneficial interest in the subject matter of the suit. The object of this law was to prevent groundless and vexatious litigation upon official bonds, to indemnify the nominal plaintiff, and to secure to the defendant and the officers of the Court all of the costs, in case the plaintiff is unsuccessful.

But actions upon the official bonds of Public Printers (R. S., 442,) Public Binders, (ib., 425,) Collectors, (ib., 441,) Auditors and Treasurers, (ib.,77,) Attorney General and State's Attorneys,(ib., 75,) Warden of the Penitentiary, (ib., 583,) School Commissioners, (ib., 498,) School Trustees, (ib., 505,) School Treasurer, (ib., ——,) and County Treasurer, are neither within the words or spirit of this statute. Not within the words, for such actions cannot be regarded as instituted for the use of any person, but for the use of the State, People, or County. In this case the suit is brought for the use of the inhabitants of township 2, S. 3 W., in Brown County, a municipal corporation for educational purposes, and the judgment when recovered forms a part of the school fund of the township. The suit then is not for the use of a person, but for the use of a particular fund.

A law which in general terms speaks plaintiffs, defendants and persons, applies to natural persons only, and States, Counties, and Municipal Corporations are not affected by its provisions, unless expressly named. Schuyler *v.* Mercer, 4. Gil., 20 ; Blair *v.* Worley, 1 Scam., 178.

If the legislature had merely said, in " all" actions upon "office bonds," security for costs should be given and stopped, no doubt could arise ; but they have gone farther, and used these restrictive words, "office bonds for the use of any person," clearly intending to dispense with security in all actions upon office bonds, not brought for the use of some person.

It is a sound rule of construction, that every clause and word

of a statute, shall be presumed to have been intended to have some force and effect. 22 Pick., 573.

2. A motion to dismiss a suit for want of security for costs is a dilatory motion in the nature of a plea in abatement, and if not made in apt time, is waived by the party. Simonds *v.* Parker, 1 Metcalf, 511–12; Carpenter *v.* Aldrich, 3 ibid, 58; Clark *v.* Gibson, 2 Arkansas, 113–14; Robinson *v.* St. Clair, 1 Denio, 628; Duncan *v.* Stint, 7 Eng. Com. Law Rep., 234; Fenville *v.* Richey, 2 Richardson, 10; Robertson *v.* Co. Com., 5 Gil., 565.

3. The judgment for costs against the plaintiffs is erroneous. R. S. 512, § 87; Laws 1847, p. 148, § 117; Laws 1849, p. 179, § 89.

Browning & Bushnell, for Defts in Error.

Treat, C. J. This was an action of debt brought by the Trustees of Schools of township two south, in Brown county, against Walters and others, on a bond executed by Walters, as principal, and the other defendants, as sureties, made payable to the plaintiffs, and conditioned for the faithful discharge of the duties of the office of Treasurer of Schools for said township. The breach assigned was the failure of Walters, to pay over the school funds in his hands to his successor in office. At the first term, the defendants filed several special pleas on which issues were formed. At the second term, the court, on their motion, dismissed the suit because security for costs had not been given. The propriety of that decision is the only question in the case.

The statute provides that, "In all actions on office bonds for the use of any person, actions on the bonds of executors, administrators or gaurdians, *qui tam* actions, actions on any penal statute, and in all cases in law or equity, where the plaintiff, or person for whose use an action is to be commenced, shall, before he institutes such suit, file, or cause to be filed with the clerk of the Circuit or Supreme Court in which the action is to be commenced, an instrument in writing, of some responsible person, being a resident of this State, to be approved by the clerk, whereby such person shall acknowledge himself bound to pay, or cause to be paid, all costs which may accrue in such action, either to the opposite party, or to any of the officers of such Court." It fur-

ther provides, " If any such action shall be commenced without filing such instrument of writing, the Court, on motion, shall dismiss the same." R. S., ch. 26, Secs. 1 and 2.

It is very clear that this case is not within the operation of the statute. The action, although on an official bond, was not brought " for the use of any person." It was brought by the obligees, for the purpose of recovering moneys belonging to a municipal corporation, of which they were the agents and trustees. It was not a suit on an official bond, for the benefit of an individual, within the meaning of the statute. The first clause of the statute applies only to that class of actions on official bonds, which are brought at the instance and for the benefit of particular individuals or parties, to obtain redress for private injuries resulting from the negligence or misconduct of public officers—such, for example, as actions on the bonds of sheriffs, for false returns, and for not paying over moneys collected on execution. The object of this suit must be to enforce a private right, and not a public duty. The action has to be brought in the name of the obligee, in whom the legal interest in the bond is vested, but it is subject to the control, and is prosecuted solely for the benefit of a particular person or party. If he is permitted to avail himself of the privilege of sueing on the bond, he should be held responsible for costs if he is unsuccessful. Not being a party to the record, no judgment can be entered against him. Hence the necessity of this provision of the statute. In this class of cases, the party, for whose use an action is prosecuted, is required to give security for costs, before commencing the action. The object of the requisition is to discourage unnecessary litigation on official bonds, and secure defendants and officers of Courts in the payment of their costs, where the prosecution is unsuccessful. But in all other actions on official bonds, security for costs need not be given. It manifestly was not the design of the legislature, to require security for costs to be given in actions instituted on official bonds, to enforce the performance of public duties. The statute declares, that in all actions commenced for or on behalf of the people of the State, or the Governor, or for or on behalf of a County, or in the name of any person for the use of the people, or a County, in which the plaintiff shall be unsuccessful, the defendant shall recover no costs whatever. R. S., ch. 26, § 14. And it also provides that, "No justice of the

peace, constable, clerk of a Court, or sheriff, shall charge any costs in any suit where any agent of any school fund sueing for the recovery of the same, or of any interest due thereon, is plaintiff, and shall be, from any cause, unsuccessful in such suit." R. S., ch. 98, § 87. These provisions embrace every case in which actions can be brought on official bonds, for matters affecting the interests of the public, and they expressly exempt the plaintiffs in such actions from the payment of chsts, in the event they are unsuccessful. If they are not compelled to pay costs, the legislature certainly never intended to require them to give security for their payment.

But, if this case was within the sta tute first recited, the decision of the court was erroneous. The defen dants were too late with the motion to dismiss, after answering to the merits of the action. It is a dilatory motion, in the nature of a plea in abatement, and if not made in due tim e, must be considered as waived by the party. The want of a bond for costs does not affect the jurisdiction of the Court. It is required to be given for the benefit of the defendant, and he may insist upon or waive his right If he objects to the prosecution of the action, because no security for costs was given when it was commenced, he must interpose the objection before he attempts any defence on the merits. He cannot raise the objection, after the time has passed for pleading in abatement. A statute of Massachusetts declares that, "All original writs, in which the plaintiff is not an inhabitant of the State, shall, before the entry thereof, be endorsed." A non-resident commenced an action, without having the writ endorsed. At the second term, the defendant moved to dismiss the case for that reason. The Supreme Court held, that the motion was properly refused. They said: "But it is perfectly manifest, that it is a provision made for the benefit of the defendant, and therefore he may waive it; and upon very strong grounds of justice and expediency, it has been adjudged, that if he does not take advantage of it in season, he does waive it." Carpenter *v.* Aldrich, 3 Metcalf, 58. In Arkansas, under a statute similar to ours, it was decided that the failure of a non-resident plaintiff to file a bond for costs, was a matter in abatement only, and that the defendant, by pleading to the merits, waived it altogether. Clark *v.* Gibson, 2 Arkansas, 109. See also, the cases of Robertson *v.* Co. Com., 5 Gil., 559; Fonville *v.* Richey, 2 Richard-

son, 10 ; and Duncan *v.* Stint, 5 Barnewell and Anderson, 702.(*a*)

The judgment of the Circuit Court must be reversed, with costs, and the cause remanded for further proceedings.

Judgment reversed.

JOHN E. JACKSON, Pltff in Error, *v.* WILLIAM S. BAILEY, Deft in Error.

ERROR TO McDONOUGH.

A debtor paying money, has the right to direct how it shall be appropriated ; and if the creditor misapplies the payment, he cannot complain if he loses the benefit of it. The application of the payment cannot be changed without the consent of the debtor. (*b*)

Bailey sued Jackson before a justice of the peace, in two suits at the same time, one for the balance due upon a note amounting to $10. 85, and the other, to recover the amount of an account for $18. 00. Judgment was rendered, by default in both cases, as follows : for $10. 85 on the note, and for $8. 00 on the account. Jackson paid the amount of the judgment on the account, and took an appeal from the judgment upon the note to the Circuit Court.

On the hearing in the Circuit Court, it appeared that Jackson had paid Bailey ten dollars, which he directed should be endorsed upon the note ; instead of doing this, Bailey had credited that sum upon the account, which was originally for $18 00, but was reduced by the credit to $800, for which sum the judgment was rendered. The Circuit Court; Minshall, Judge, presiding, at the May term, 1850, to whom the cause was submitted, affirmed the judgment of the justice of the peace.

Jackson brings the case to this court, and seeks to reverse the judgment of the Circuit Court, and assigns for error, the not allowing to him credit upon the note for the ten dollars, which he directed should be so applied ; and the rendition of a judgment for eleven dollars, when only one dollar was due upon it ; and in not declaring that the judgment upon one suit, was a bar to a judgment in the other.

(*a*) Edwaios vs. Helm, 4 Scam. R. 146 ; Robertson vs. County Commissioners, 5 Gil. R. 564 ; Randolph vs. Emerick, 13 Ill R. 364 ; Yocum vs. Waynesville, 39 Ill. R. 223.
(*a*) McFarland vs. Lewis, 3 Scam. R. 347 ; Baily vs. Wynkoop, 5 Gil. 452.

Jackson *v.* Bailey.

WARREN and EDMUNDS, for Pltff in Error.

Both suits were of the same nature, and together amounted to less than $100. 00, and should have been consolidated, and the payment of one judgment satisfies both. A debtor may direct on what particular indebtedness money paid by him shall be credited. 2 Greenleaf's Ev., 529–30; Pattison *v.* Hall, 9 Cowen, 747; 4 Phillip's Ev., C. & Hill's Notes, p. 131, note F, 371–2.

R. S. BLACKWELL, for Deft in Error.

1. The doctrine relative to the appropriation of payments was borrowed from the Civil Law, and adopted first by the Equity Courts, thence transplanted to Courts of Law. The doctrine is purely equitable, and each case must be governed by its own peculiar circumstances.

The general rules are simple and of easy application. The debtor may appropriate it on what debt he pleases at the time of payment. If he neglect to do so, the creditor may, at any time, before litigation arises touching the appropriation. But if neither party exercises his right of appropriation until a controversy springs up, the law will apply it as justice and fair dealing may dictate, according to the intrinsic equity of the case. Bayley *v.* Wynkoop, 5 Gil., 449.

But a party may waive his legal rights. Bank of Columbia *v.* Okely, 4 Whea., 235, 4 U. S. Cond., 439.

Even after the debtor has exercised his right and directed the application of his payment, the appropriation may be changed by the mutual consent of the parties; and in such case, the indebtedness first discharged, is revived by implication of law without an express promise by the party. Rundlett *v.* Small, 25 Maine, 29

And this assent may be implied from the acts of the parties' 25 Maine, 31; 5 Gil, 449.

In this case the debtor directed the application, but his directions for some cause were disobeyed. The credit was placed on the account, instead of the note, and the creditor took his judgment for the balance of the account. This balance was paid by the debtor and the judgment satisfied. This is a waiver of his original rights.

By allowing the credit on the note, also injustice will be done, and another law suit will be the consequence.

TREAT, C. J. We think the court erred in not allowing the debtor credit, for the amount claimed to have been paid on the note. The amount in controversy was received by the creditor, with the written directions of the debtor to apply it on the note. It was therefore accepted as a payment on the note. It was *pro tanto*, a discharge of that particular indebtedness. It was the clear right of the debtor so to appropriate the money. He expressly exercised the right, and the creditor, in accepting the money, received it in part satisfaction of the note. The instant it was received, the note, to that extent, was paid, whether the credit was ever endorsed therein or not. The creditor was not at liberty to disregard the appropriation made by the debtor, and apply the payment on another debt. The application of the payment could not be changed, without the consent of the debtor. Perhaps the parties might, by mutual consent, have transferred the credit to another demand, and, in that way, have revived the indebtedness originally discharged. But there is no evidence in the case to show, that the debtor ever assented to the payment being applied on the account the creditor held against him. The payment of the judgment recovered on the account, on which the ten dollars may have been credited, was no waiver by the debtor of his original rights, and no ratification of the change in the credit by the creditor. If he had, before the judgment was rendered, voluntarily paid the account, with knowledge that the payment was credited thereon instead of on the note, there would be more propriety in holding that he had assented to a trensfer of the credit, and in not permitting him afterwards to insist on the benefit of the payment on the note. But this is a very different case. The payment of the judgment was compulsory. The debtor lost none of his defences to the note by paying the judgment. The creditor cannot complain, if he loses the benefit of the payment in question. It will be the result of his own wrongful misapplication of the appropriation.

The judgment of the circuit court will be reversed, with costs, and the cause remanded for further proceedings.

Judgment reversed.

IRA STOUT, Appellant, *v.* JOHN SLATTERY, Appellee.

APPEAL FROM ADAMS.

If a party shows himself entitled to the remedy to be obtained by *certiorari*, the filing of the papers from the justice, before the plaintiff appears in the Circuit Court, dispenses with the necessity of issuing the writ. (*a*)

If a notary public administer an oath, his signature to the jurat, without his seal of office, will be sufficient within the county of his residence; if to be used out of the county, his seal of office, or some other evidence of his official character, will be indispensable.

Our statute does not make it the duty of a notary to verify his acts by his seal, except in the acknowledgment of deeds.

The circuit court of Adams county, Minshall, Judge, presiding at May term, 1849, upon motion of the appellee, quashed the *certiorari* issued on behalf of the appellant. The facts of the case are fully stated in the opinion of the court.

WARREN & EDMUNDS, for Appellant.

WILLIAMS & LAWRENCE, for Appellee.

TREAT, C. J. Slattery sued out an attachment against Stout, from a justice of the peace. There was service on a garnishee, and a publication of notice to the defendant. On the 5th of February, 1849, a judgment was entered against the defendant, for $94.62, and, on the 12th of the same month, a judgment was entered against the garnishee in the same amount. On the 16th of March, 1849, the defendant obtained an order for a *certiorari* and filed the same, and an appeal bond, in the circuit court. He stated, in his petition for the *certiorari*, that by reason of absence from the State, he had no actual knowledge or notice of the pendency of the attachment, or of the rendition of the judgments therein, until the time allowed for an appeal had expired, and that he was not in any manner indebted to the plaintiff. The jurat to the petition was subscribed, "Calvin A. Warren, Notary Public for said county of Adams." No writ of *certiorari* was ever issued. A transcript of the proceedings before the justice was filed in the circuit court on the 5th of April, 1849. In May, 1849, the plaintiff entered a motion to dismiss the appeal, which was sustained by the court; and that decision is now assigned for error.

This record presents but a single question, which did not

(*a*) Ante 143.

arise, and was not decided, in the case of Gallimore *v.* Dazey, *ante*, p. 143. On the principles of that case, the defendant clearly showed himself entitled to the remedy by *certiorari*; and the filing of the papers from the justice, before the plaintiff appeared in the Circuit Court, dispensed with any necessity for issuing a writ of *certiorari*.

The notary public, before whom the petition was verified, did not affix his seal of office to the jurat, and it is insisted, that his omission to do so, presents an insuperable objection to the proceedings; in other words, that a notary can perform no official act, without evidencing it by his notarial seal. This position cannot be maintained. We are clearly of the opinion, that the failure of the notary to annex his official seal to the jurat, does not vitiate the proceedings based on the petition. Within the county of Adams, the addition of the seal was not necesssary. If the petition was to be used in another county, the seal of the notary, or some other evibence of his official character, would be indispensable. In a case like this, the seal does not give validity to the act of the notary. It is only evidence of his authority to administer the oath. It is the usual mode of authenticating the act, but not the exclusive one. This is not like the case of process, which the law provides shall issue under the seal of the court; nor the case of the performance of an act by an officer, which the law declares shall be done under his official seal. Our statute does not make it the duty of a notary to verify his acts by his notarial seal, except in the single instance of the acknowledgment of a deed. R. S., ch. 75; ch. 76, §3; ch. 24, §16. The rules of the common law may perhaps require some particular acts of a notary to be evidenced by his official seal, but the taking of affidavits is not one of them. The power to administer oaths is expressly conferred by statute, and is not one of the incidents of the office. The affixing of the notarial seal is not essential to validity of his acts, except in cases where it is required by some rule of the common law, or some provision of the statute. In all other cases, his official acts, at least within the State, are none the less valid, because they are not authenticated by his notarial seal. The only difference relates to the proof of his authority. If the act is not evidenced by the seal of the notary, his signature and official character must be established by some other legitimate evidence. Clerks

of courts are in the constant habit of taking affidavits, without attaching the seal of the court to their jurats, and the validity of their acts, and the propriety of the practice, has never been questioned. It would hardly be contended, that perjury could not be assigned on such an affidavit, if the contents were material, and the party knew them to be untrue. And there is no difference in principle between the two cases. There is no more occasion for the seal in the one case than in the other. The oath is legally administered in either case. It is only when it becomes necessary to prove the making of the oath, that the seal of the officer, or some competent evidence of his authority, must be produced. The case of the Fund Commissioners *v.* Glass, 17 Ohio, 542, is an authority very much in point. A statute of Ohio made it the duty of each notary to provide a notarial seal, with which to authenticate his official acts. By a subsequent statute, notaries were authorised to take the acknowledgment of deeds, and were required to make certificates of acknowledgment, and subscribe the same. It was held, that they need not affix their notarial seals to the certificates. The court said: "Under this law, the acknowledgment of this deed was taken, and to the certificate of his acknowledgment the officer taking it did subscribe his name. This was all which the law under which he was acting required him to do." It has been decided, that a Circuit Court will take notice who are justices of the peace, for the county in which it is held; and proof of the official character of these officers is never required, unless that particular matter is distinctly in controversy. Shattuck *v.* The People, 4 Scam., 477; Irving *v.* Brownell, 11 Ill., 402. The rule is one founded in reasons of public convenience, and may with equal propriety be extended to notaries.(*a*)

The judgment of the Circuit Court must be reversed, with costs, and the cause remanded for further proceedings.

Judgment reversed

(*a*) Dyer vs. Flint, 21 Ill. R. 82.

Boorman *v.* Freeman *et al.*

JAMES BOORMAN, Pltff in Error, *v.* WILLIAM D. FREEMAN, *et al.*, Defts in Error.

ERROR TO MORGAN.

If a defective appeal bond is filed in the Circuit Court, and the party applies for leave to file a new bond, he should be permitted to do so, within a reasonable time, to be named in the order granting leave. (*a*)

Boorman sued Freeman & Co. before a justice of the peace, upon account. Freeman & Co. filed an account in set off, and recovered a judgment against Boorman for $24 38. From this judgment Boorman appealed to the Morgan Circuit Court; the appeal bond was signed by an unauthorized agent in the name of Boorman. In the Circuit Court, Freeman & Co. moved to dismiss the appeal, because of the insufficiency of the bond; Boorman then filed a cross motion for leave to file an amended bond, and that the cause be continued. Whereupon, the Circuit Court, Woodson, Judge, presiding, at November term, 1849, sustained the motion to dismiss, and overruled the motion to amend and continue, and dismissed the appeal.

Boorman sued out a writ of error, and brings the cause to this Court; and assigns for error, the refusing the motion to continue the cause and for leave to amend the appeal bond.

D. A. SMITH, for Pltff in Error.

M. MCCONNEL, for Deft Error.

TREAT, C. J. This case does not differ in principle from that of Bragg *v.* Fessenden, 11 Ill., 544. There, an agent executed the appeal bond in the name of the appellant, without authority under seal for that purpose. Subsequently and after the expiration of the time allowed by law for taking the appeal, the appellant executed a power of attorney confirming the act of the agent. This Court held that the bond was sufficient, and reversed the judgment of the Circuit Court dimissing the appeal. Here the agent had no authority under seal to execute the appeal bond, on behalf of the appellant. But, when the appellee moved to dismiss the appeal, because of the defective execution of the bond, the appellant entered a cross motion for leave to file a new

(*a*) Trustees &c., vs. Starbard, 13 Ill. R. 49; Weist vs. People, 39 Ill. R. 598.

bond, which the Court refused. The two cases are identical in principle. In both, the agents had no competent authority to bind their principals. In one, the appellant was permitted to perfect his appeal, by the ratification of the defective bond; in the other, he offered to perfect his appeal, by the filing of a sufficient bond in place of the defective one. If a party can prevent the dismissal of an appeal, by confirming a bond executed without authority, he certainly should be allowed to accomplish the same result, by giving a new and valid bond. The statute provides: "If, upon the trial of any appeal, the bond required to be given shall be adjudged informal or otherwise insufficient, the party who shall have executed such bond, shall in no wise be perjudiced by reason of such informality or insufficiency; provided, he will, in a reasonable time, to be fixe d by the Court, execute and file a good and sufficient bond." R. S., ch, 59, § 65. According to the construction put upon this statute, in Bragg *v.* Fessenden, and the cases there cited, this case is clearly within its provisions; and the Circuit Court erred in not giving the appellant leave to file a new bond. The proper order would have been, that he should file the bond within a reasonable time—the day to be named in the order—and in default thereof, that the appeal should be dismissed.

The judgment of the Circuit Court will be reversed, with costs, and the cause remanded for further proceeding.

Judgment reversed.

ELISHA B. HITT, Appellant, *v.* JOSEPH W. ORMSBEE, *et al.*, Appellees.

APPEAL FROM SCOTT.

The admissions of several parties to a bill in chancery are not competent evidence against others, whose interests are adverse.

Where a party is indebted, and makes ample provision for the payment of those debts, and in the meantime makes a provision for his family, his indebtedness does not afford evidence of a fraudulent intent.

Nothing can be admitted, but everything must be proved against an infant.

Hitt filed his bill in the Scott Circuit Court, to perfect his title

(*a*) Hall vs. Davis, 44 Ill. R. 494.

to a lot of land, and to establish the right of Ormsbee to the lot, and to get possession of the land in his own right.

Hitt sets out that in October, 1847, he recovered a judgment at law, in the Scott Circuit Court, against Ormsbee, and sued out an execution, and levied upon and sold a house and lot in Exeter, in said county, and purchased the same as the property of Ormsbee. In fifteen months after the sale the sheriff made a deed to Hitt, conveying to him all the right of Ormsbee to said premises.

That the lot was purchased and paid for by Ormsbee in 1840, at which time he took possession, and built a house and made other improvements thereon using his own funds in all instances for that purpose. That on the 30th of April, 1842, Ormsbee was in possession of said property, using it and claiming it as his own, and was in possession at the filing of the bill, which was in May, 1859, and that his debt to Hitt was contracted on 30th April, 1852, although the note sued on was not given for several months afterwards. It appears that when the lot was purchased, a deed was taken conveying the same in these words, "grant, bargain, sell, convey, and confirm unto the said Frances Heath, her heir Mary S. Heath, now the wife of J. W. Ormsbee, and the heirs of the said Mary S. by the said Ormsbee, forever."

It appears that Frances Heath is the mother of Mary L. Heath, who is the wife of Ormsbee, and that she resides in Virginia, and never had possession of the land or the deed, or claimed any interest in the property.

It is in proof that when Ormsbee purchased and paid for the property, that he admitted he was in debt in this state, and to persons in other states.

It was proven by the defendant, Ormsbee, that at the time he purchased said property, and for some time afterwards, he was reputed in this state to be unembarrassed, and to be worth two or three thousand dollars, and that this property was believed to be his. But none of the witnesses had any personal knowledge of his circumstances. It is in proof that a large debt for which he was liable as a member of a firm, has since been paid by the members of that firm, and that Ormsbee is insolvent, and that many of his debts are still unpaid.

The bill alleges that the purchase was for the benefit of Orms-

bee, and that he procured the deed to be made as it was, to defraud his creditors.

Ormsbee and Frances Heath, by their answers, admit the truth of the charges in the bill, except the charge that the property was bought to defraud creditors. The answer states that Ormsbee bought the property for the benefit of his family, to save them from the extremity of bad fortune.

Upon the hearing of the cause, Woodson, Judge, at June term, 1850, refused the relief prayed for and dismissed the bill. Hitt appealed to this Court, and assigns said decision for error.

M. McConnel, for Appellant.

That as Ormsbee was in possession, and Mrs. Heath had no right to it, the property was subject to be sold to satisfy Ormsbee's debts. The intention of Ormsbee in connection with the deed makes no difference whatever. That from the recording of the deed and the admisssions of the answers, and the terms of the grant, it is clear that this is a conveyance in trust to the mother of Ormsbee's wife, &c., for his use, bought with his money, and that he would have the right to establish the title in him as the *cestui qui trust*, and if he could do so, his creditor having all his right, could do the same thing. Macubbin *v.* Cromwell, 7 Gill. & John., 157; Boyd *v.* McLane, 1 John., 582; Botsford *v.* Burr, 2 John., 409; Livingston *v.* Livingston, 2 John., 540.

Ormsbee paid the money; the deed having been taken in the name of his mother-in-law, creates a resulting trust in Ormsbee, which interest is subject to execution. Perry *v.* Head, 1 A. K. Marshall, 47; 4 J. J. Marshall, 592; Elliott *v.* Armstrong, 2 Blackf., 198; Jennison *v.* Graves, 2 Blackf., 440; Doyle *v.* Sleeper, 1 Dana, 536; Hamson *v.* Battle, 1 Dev. Equity Rep., 537; Kellogg *v.* Wood, 4 Paige, 578; Ontario Bank *v.* Root, 3 Paige, 478.

D. A. Smith, for Appellees.

The bill in this case assails the deed by Edwards for the benefit of Ormsbee's wife and her heirs by his body, as actually fraudulent against his creditors. I submit that as the debt was

not contracted until some time after the execution of the deed that the deed is a *bona fide* post nuptial settlement that cannot be called in question by Hitt as a subsequent creditor. 1 American Leading Cases, pp. 40 to 46, 55, 56 : 1 Stroy's Eq. Juris., sections 355 to 365 inclusive.

CATON, J. The admissions of Ormsbee, as testified to by, the witness, are not competent evidence against the other defendants. (*a*) In contemplation of law, at least, his interests were adverse to theirs. It does nor appaer that those admissions were made at a time when it was against his interest to make them, even if that would render them competent. The only indebtedness proved against Ormsbee, at the time he purchased the premises in question, except by such admissions, was his indebtebness as a member of the late firm of McConnel, Ormsbee, & Co. Although his legal liability for those debts still continued, those liabilities were provided for by the undertaking of the other members of the firm to pay them. In pursuance of that undertaking they have since been paid. No doubt has been suggested of the entire responsibility of the other members of the firm, to fulfil that undertaking, and the result shows, that that provision was amply sufficient. No doubt that he considered at the time, and such appears to have been the fact, that those debts were as amply provided for, as if they had been secured by a mortgage. (*b*) It, then, could not have been his contemplation, at the time he made this provision for his family, to defraud those creditors, any more than as if those debts had been secured by a mortgage ; and the rule seems to be well settled, that where debts are thus secured, they do not afford evidence of a fraudulent intent.

As to the infant defendant, the case is still more defectively made out. As to him, nothing can be admitted, but every thing must be proved. Beyond the admission of the answers, there is no evidence that the premises were purchased with the funds of Ormsbee. As to the infant, there is no evidence of the judgment against Ormsbee, or of the subsequent proceedings under which the complainant claims title. Except by the admissions contained in the answer of Ormsbee and Heath, there is not the shadow of a case made out. (*c*)

The decree of the circuit court dismissing the bill was proper, and it must be affirmed, with costs.

Judgment affirmed.

(*a*) Martin vs. Dryden, 1 Gil. R. 209 ; Rector vs. Rector, 3 Gil. R. 118 ; Cochran vs. McDonald, 15 Ill. R. 12 and note. Miller vs. Niemerick, 19 Ill. R. 172.
(*b*) Mortz vs. Koffman, 35 Ill. R. 553.
(*c*) Chaflin vs. Heirs, &c., 23 Ill. R. 38 ; Rhodes vs. Rhodes, 43 Ill. R. 549.

Hodson *et al.* *v.* McConnel.

WILLIAM HODSON *et al.*, Appellants, *v.* MURRAY MCCONNEL, Appellee.

APPEAL FROM MORGAN.

Where an appeal is allowed to several defendants, and there is a joinder in the errors assigned by all, it is too late for the appellee to urge the objection, that only a part of the defendants have appealed.

If a judgment is obtained in the name of one party, but for the use of another, the judgment debtor cannot be garnisheed, nor can the interest of the equitable owner of the judgment be defeated by such proceeding.

A defendant being notified that a judgment against him belongs to a person other than the plaintiff on the record, he is as much bound by the notice, as if the record stated the judgment to be for the use of such person.

In June, 1844, McConnel obtained judgment in the Morgan Circuit Court against Hodson, upon which execution was issued and returned no property found. In March, 1849, McConnel filed the requisite affidavit, and obtained an order for summons against R. & J. McDonald as garnishees. In March, 1849, a judgment was entered in the same court in the name of Hodson against the McDonalds. The proceeding of McConnel was for the purpose of obtaining a judgment against the McDonalds, as garnishees, for the amount of the judgment against them in favor of Hodson. In November, 1849, the McDonalds and Hodson filed their answers in the premises which are in substance, that several years before that time, the McDonalds became indebted to Hodson, and gave him a note, upon which the judgment in his favor was rendered. That before suit was brought against them on the note, it was sold, in payment of liability of said Hodson, and was delivered to an attorney and held by him for the use of the persons in whose favor the liability existed, of which the McDonalds had notice, and that they paid said judgment to said attorney, and that they supposed that satisfaction of the judgment had been regularly entered. That said judgment was satisfied by a new note given to a third party. That the McDonalds had been informed when they gave the second note, that McConnel had obtained an order for garnishee process against them, but did not know the process had been issued, until it was served.

Upon this answer, McConnel moved for a judgment against the garnishees, and at March term, 1850, Woodson, Judge, presiding, a judgment was rendered in favor of McConnel against the McDonalds, for the amount of the judgment against them

in favor of Hodson, and judgment given against Hodson for the costs arising out of the garnishee proceeding. The present appellants excepted, and bring the cause to this Court. The McDonalds did not join with Hodson in the appeal bond. The appellants assign for error, the rendition of the judgment against the McDonalds upon their answers, no issue having been made upon the facts stated to them,

William Thomas, for Appellants.

That by the 12th section of the attachment law, R. S., p. 307, it was the right of the appellees, to appear and answer on oath, &c., and upon filing the answer by the garnishees, they should have been discharged from further proceedings: unless the plaintiff alleged that the garnishee had not answered fully, in which case, the court should have directed an issue, to be tried by a jury, as provided by the 19th section of the attachment law.

The answers in this case show, that Hodson had parteed with his rights and interest in the judgment against the McDonalds, long before the garnishee proceeding was commenced, and there being no allegation of fraud, the judgment of the Circuit Court should have been for the defendants. Stockton *v.* Hall Hardin's Rep., 160; Keegin *v.* Dawson, 1 Gilman, 80.,

Upon the merits and facts of the case, the only question for the decision of the court, is with reference to the facts, was Hodson entitled to the money on the judgment against the McDonalds, at the time they were served with notice as garnishees? And with reference to the law, will the court compe the garnishees to pay money, which appears, does nót belong to the debtor? Dix et al. *v.* Cobb, 4 Mass., 510; Cushing's Trustee Process, 73, 74.

M. McConnel, *pro se.*

The McDonalds, who are the real parties in interest, have not joined in the appeal, and are not complaining of the judgment.

Hodson was not summoned in the case and is a mere volunteer, and is not authorized to defend in the court below, or to appeal to this court. It is apparent that his debt to appelle e has not been paid, and that is the only question he can make;

he cannot assign for error the judgment against the garnishees, the judgment against them in his favor being applied to pay his debt.

It appears affirmatively, that the judgment against the garnishees, was in favor of Hodson, and not of any other person, which fact being a matter of record, cannot in a proceeding at law be denied, by going behind the judgment, and showing that it was for the use of another.

TRUMBULL, J. This was a garnishee proceeding, instituted by McConnel, under R. S., ch. 57, § 38, against John and Richard McDonald, as debtors of William Hodson.

The circuit court gave judgment against the McDonalds for the sum due from them to Hodson, and against Hodson for costs.

It was objected, upon the argument, that Hodson alone had appealed, and that he could not be permitted to assign errors in the judgment against the McDonalds.

In point of fact, an appeal was allowed to all the defendants in the court below, and they have all united in the assignment of errors, to which there is a joinder in error.(*a*) After this, it is too late for the appellee to insist that only a part of the defendants below had appealed, and it is wholly immaterial, whether Hodson has a right to complain of the judgment against the McDonalds. They certainly have the right, and have availed themselves of it.

The record shows, that the note upon which the judgment in favor of Hodson against the McDonalds was obtained, did not belong to him, but to the heirs of one Swain, for some of whom he was guardian, and to all of whom he was indebted, and that it was delivered to the attorney who brought suit upon it, to collect for their benefit. Hodson had, therefore, no real interest in the judgment, although it was in his favor, as it had to be, the note never having been assigned. The fact that the record did not state that the judgment was for the use of the heirs of Swain, does not alter the case. The object of making such a statement upon the record, is, to notify the defendant and third persons who the real party in interest is, so that his rights may not be prejudiced by any transaction with the nominal plaintiff. If a defendant has notice that a judgment against him belongs to a person other than the plaintiff upon the record, he is as

(*a*) McCall vs. Lesher, 2 Gil. R. 46.

much bound by such notice as if the record stated the judgment to be for the use of such other person. (*a*)

In this case, the record shows that the McDonalds were informed of the transfer of the note, and that Hodson had no interest in it, before suit upon it was commenced.

The doctrine is well settled, that thecourts of law will notice and protect the interests of the equitable owners of choses in action, and particularly so, in the matter of a garnishee proceeding, which is of an equitable character.(*b*)

According to the answers of the garnishees and the admissions of the parties, contained in the record, it is manifest that Hodson was not entitled to the benefit of the judgment in his favor, consequently his creditor, McConnel, could have no claim upon it.

Judgment reversed.

JOHN A. CHESNUT, Appellant, *v.* EBENEZER MARSH, Appellee.

APPEAL FROM MACOUPIN.

A judgment under which lands are sold for the payment of taxes is good, if it contain the substance of the form required by statute.

A judgment rendered by a Court having full jurisdiction, is obligatory until reversed, though such judgment may be irregular and erroneous.

In a collateral proceeding, a judgment for the sale of lands for the payment of taxes, cannot be impeached because the same judgment is against the owners of the land; the latter part will be regarded as surplusage. (*c*)

This was an action of ejectment brought by Chesnut against Marsh in the Macoupin Circuit Court, at September term, 1848, to recover possession of the east half of the south-west quarter of section 21, in town 10, range 7, west of the third principal meridian.

The title of Chesnut was derived from a sale of the land for taxes. The only question decided by the Court, was as to the sufficiency of the judgment ordering the sale of the lands; and this judgment is sufficiently set out in the opinion of the Court.

The cause was heard before Woodson, Judge, and a jury, at October term, 1850.

(*a*) Triplett vs. Scott, *ante*, 138.
(*b*) Born vs. Staaden, 25 Ill. R. 322; Carr vs. Waugh, 28 Ill. R. 422.
(*a*) Pigeon vs. State, &c., 36 Ill. R. 251; Malford vs. Stalzbuch, 49 Ill. R. 309.

On the hearing of the cause in the circuit court, the Judge excluded the judgment for taxes, referred to in the opinion, ordering the sale of the lands in controversy, which was rendered in 1839, and the other proofs offered by the appellant. The exclusion of these proofs is assigned for error. Chesnut appealed.

R. S. Blackwell, for Appellant.

1. The circuit courts of this State, in the exercise of the judicial power conferred upon them by the revenue law of 1839, are not to be regarded *quo ad hoc*, as courts of special jurisdiction, within the meaning of the rule, requiring the records of such courts to show affirmatively that all of their proceedings are strictly in accordance with the statute giving the power. The circuit courts, before this additional jurisdiction was conferred upon them, were courts of record, possessing a general jurisdiction, having a public seal, established terms, organized process, a permanent location, judicial and executive officers, and their functions do not cease on the execution of a particular power. No change has been made in the organization or character of the courts by the revenue laws. But they exercise a general jurisdiction, under a public statute, and are to be regarded in all respects as Superior Courts without limitation, as to the subject matter or mode in which they are to exercise their authority. When therefore their jurisdiction appears, the same liberal intendments are to be made in support of a judgment under the revenue law, as in the judgments of the circuit courts, rendered in the due course of the common law. Doe ex dem., Obert *v.* Hammel, 3 Harrison N. J. R., 73 ; Kempe *v.* Kennedy, 2 U. S. Co nd. Rep., 253 ; Raymond *v.* Bell, 18 Conn., 87-9 ; .Gregnior *v.* Astor, 2 Howard U. S. R., 319.

But if the circuit courts, in the exercise of this power, act as courts of special and limited jurisdiction, as laid down in Thatcher *v.* Powell, 6 Whea., 119, still those courts, following this rule, have repeatedly decided, that if the record shows jurisdiction in the court, then, however erroneous their proceedings may be their judgments cannot be impeached in a collateral action, but are regarded as conclusive upon parties and privies, until reversed upon writ of error or appeal. Voorhees *v.* U. S. Bank, 10 Peters, 449 ; Thompson *v.* Tolmie, 2 Peters, 157 ; Weyer *v.*

Zane, 1 Ohio Cond. Rep., 589 ; Admas *v.* Jeffries, 12 Ohio, 272 ; Young *v.* Lorrain, 11 Ill., 636–9 . Wyman *v.* Campbell, 6 Porter, 236–243 ; Doe *v.* Wise, 5 Blackf., 402 ; M'Ilvoy *v.* Speed, 4 Bibb, 85 ; Fridge *v.* Slate, 3 Gil. and John., 103 ; Van Wormer *v.* Mayor of Albany, 15 Wend., 262 ; Paine *v.* Moreland, 15 Ohio, 444–5.

The Court in this case had jurisdiction.

This Court will presume that the collector did his duty in making his report. Taylor *v.* People, 7 Ill ., 349, (2 Gil.)

And the record recites the notice required by law. This recital is *prima facie* evidence that notice was given. Rust *v.* Frothingham, 1 Ill., 258, (Breese ;) Bamber *v.* Winslow, 12 Wend., 102.

The judgment is not regular, and could have been reversed upon writ of error. But the substantial requirements of the statute are recitied in the judgment, and appear to have been complied with, and the judgment cannot be impeached collaterally. Siggert *v.* Harber, 5 Ill , 371 ; Rig *v.* Cook, 9 Ill., 348–9 ; Atkins *v.* Hammin, 7 Ill., 450 ; Laws 1838-9, p. 14, § 30.

Billings Parsons, for Appellee.

1. It is a well settled principle, that in an action of ejectment to recover possession of land, purchased at a sheriff's sale for taxes, the plaintiff, before he can introduce the sheriff's deed in evidence, must first exhibit a valid judgment against the land. Atkins *v.* Himman, 2 Gil., 437.

2. Judgments are the sentence of the law, pronounced by the Court upon the matters contained in the record. 3 Blackstone's Com., 295.

A judgment, though pronounced by the Judge, is not his determination, but the determination and sentenee of the law. Tested by this rule, the judgment attempted to be rendered in this case, is void. Laws 1839, § 26, 29, anl 30.

Where a summary remedy is given by statute, a person seeking to avail himself of it, must be confined strictly to its provisions, and shall take nothing by intendment. Logwood *v.* Planters' Bank, 1 Minor, 25 ; Bates *v.* Planters' and Merchants' Bank, 8 Porter , 100 ; Roberts *v.* State Bank, 9 Porter, 317 ; 7 Blackf., 37 ; 7 Hill, 25 ; 1Greene, 306. 4 Halsted, 20.

3. As to what are voidable, and what void judgments. Buckmaster *v.* Carlin, 3 Scam., 106 ; Ellicott et al., *v.* Piersol, 1 Peters, 340 ; Thompson *v.* Tolmie, *ibid*, 162 ; Swiggart *v.* Harber, 4 Scam., 371 ; Woodruff *v.* Taylor, 20 Vt., 76 ; Bradsteeet *v.* Neptune Ins. Co., 3 Sumner, 607 ; Sanford *v.* Dick, 17 Conn., 216 ;Anderson *v.* Miller, 4 Black., 419 ; Miller *v.* Bartoloo,4 Eng., (Ark.,) 321.

Caton, J. In this case we are only called upon to decide upon the effect of the judgment, under which the premises in question were sold, for the non-payment of taxes. That the court had jurisdiction, there is no doubt. It is not disputed that the exigencies are shown to have existed, which called upon the court to act, to adjudicate, and to proceed to render a judgment. The rule of law is well settled, that when a judgment is rendered by a court thus possessing jurisdiction, although the judgment may be irregular and erroneous, it is obligatory until reversed. Young *v.* Lorraine, 14 Ill., 624. This principle is applicable to the case before us, for although the statute authorizes a judgment for taxes, in effect to be defeated by the proof of certain facts in a collateral action ; as no attempt is made to prove any of those fates, that provision of the statute has no application, as we will hereafter attempt to show.

The only question then would seem to be, is this such a judgment as the Court had authority to render ? The statute prescribes a form for these judgments, which form is directed to be adopted as near as the nature of the case will permit. This form contains certain recitals, after which follows the judgment of the Court, which is in favor of the State and against the several tracts of land contained in the previous recitals, for the taxes, interest and costs due severally thereon, concluding with an order, that they be sold to pay the same. The recitals in this order set forth in detail the matters, the substance of which is only required to be recited in the statutory form. After the recitals, follows a judgment against the several owners of the different tracts in favor of the State of Illinois, for the amount of taxes, interest and costs due upon each tract ; and it is further considered and adjudged, that each of said lots of land, or so much thereof as will be sufficient to satisfy and pay the judgment, be sold ; and this judgment is to be entered at a several

judgment against the owners of each lot of land, described in the report and list, and the land itself, for the taxes, interest and costs due upon the same.

All of that part of this order, which professes to render a judgment against the owners of the land, is void, for in this proceeding the Court has no authority to render a personal judgment. The whole proceeding is against the land itself. But the order does not stop with the judgment against the owners. A judgment is also rendered against the land itself. The order, in fact, contains two judgments, for the same demand and for the same amount—the one against the owners, and the other against the lands. The first was without authority; the other was what the Court was authorized and required to do. We do not think that the judgment, which was rendered against the land by authority of law was made void, because in the same order is contained a judgment against the owners, which was rendered in the exercise of an usurped authority. This latter was as void and harmless as if it had never been written. In this collateral proceeding, at least, that part of the order may be treated as surplusage. It being utterly harmless, as against the party, he ought not to claim a benefit from it, by insisting, that it vitiated that which was done by the Court within the pale of its authority, and which was otherwise obligatory.

Some question was made upon the argument, whether any judgment was in fact rendered against the land, because the technical words of a judgment are not used in its condemnation, and because the verb is placed in the infinitive instead of the indicative mood. This, however, we think, is but a cavil about terms.

After a judgment is rendered against the owners of the land, the order declares that "this judgment is to be entered against the land itself, for the taxes, interests and costs due upon the same." The intention and understanding of the Court in using these words—admitting that the form of expression is that of the Court instead of the clerk—cannot be doubted. The idea intended to be expressed, and which is unavoidably understood, is, that by that order of the Court a judgment was rendered against the land. We cannot avoid this understanding, any more than as if the most technical language had been employed in rendering the judgment against the land. Bad grammar does

not vitiate. But by supplying a word which may be fairly understood, even this objection to understanding this order as final, is obviated. Read the expression: "This judgment is to be *considered* as entered, as a several judgment against," &c.; and all idea of a subsequent order, to make the judgment final and complete, at once disappears. We do not understand, and are not willing to hold, that a judgment is void, because the technical language of approved forms, is not used in expressing it. A judgment, like all other writings, is designed to convey ideas, and consists in the ideas conveyed, and when those ideas are so expressed as to be clearly understood, we are not at liberty to say there is no judgment, because the same ideas were not expressed in more technical or grammatical language.

Rejecting, then, as surplusage, that part of this order which pretends to render a personal judgment against the owners of the land, and we have left all of the substance of the judgment, which the statute requires to be entered up in such a case, although the precise form given in the statute is not used. And now we will inquire whether that precise form was indispensable.

After giving the form, the statute declares: "The form, as herein before set forth, shall be pursued as near as the nature of the case will permit." It is not pretended that the Circuit Court supposed, that this departure from the form given, was rendered necessary, by anything peculiar in the nature of the case.

It is a well settled rule of the common law, that neither irregularity nor informality will render a judgment void. Egarton *v.* Hart, 8 Verm., 208. Our legislature has afforded a most conclusive reason for determining, that want of form shall not vitiate judgments, rendered in favor of the State for taxes due her, any more than in an ordinary case between individuals. The 12th section of the statute of jeofails, which is as follows: "This chapter shall extend to all suits in any Court of record, for the recovery of any debt due the State, or any duty or revenue thereto belonging, and also to all writs of mandamus and informations of the nature of *quo warranto* and proceedings thereon." This judgment was rendered in a suit for the recovery of revenue due the State, and is necessarily included in the express provisions of this statute. And there is a fitness and propriety, too, in providing, that the interests of the State, in suits affecting her pecuniarily, should not suffer, for the want or lack of form, any

more than the rights of parties, in suits between individuals. To suppose otherwise, would be opposed to all the well known instincts of legislative bodies.

Should we hold that a departure from the prescribed form renders the judgment in this proceeding a nullity, we should have to carry the same principle into other proceedings, the forms of which are prescribed by the legislature. It would be difficult to contemplate the extent of the mischief which would result from such a rule. The statutes abound in forms, which are prescribed as peremptorily as in the form of this judgment, a departure from which, has never been held to vitiate the proceeding. We will only advert to the statute concerning justices of the peace and constables. That statute creates an inferior jurisdiction, in whose favor no presumptions are indulged, and where a strict conformity to the law conferring the jurisdiction is required. In that statute, the form of the summons, and of the warrent to hold to bail, and of the subpœna for witness, is given and required to be used in precisely the same language, by which the court is directed to enter the judgment, in the form given in the statute under consideration. It has never been contended, and probably never will be, that a departure from those forms, if the substance is expressed in those writs, would render the proceeding before the justice utterly void and him a trespasser. In the same statute, and in still more positive language, is the form of the venire for the jurors given. The 45th section says: "The following shall be the form of the writ for summoning jurors, viz:" Although there is no latitude given for a particle of variation from the form, yet we do not think a juror would be at liberty to disobey the mandates of the writ, substantially the same as that given in the statute, but varient in form. In these laws the legislature never intended to prescribe an iron, unyielding rule, any deviation from which would break the law. We think it cannot be maintained, that the form of the judgment given here is of the essence of the law. The substance of the statute is that the order of the court shall show that certain preliminary steps have been taken, and that a judgment shall be rendered in favor of the State against the land for the amount of the taxes, interest and costs due the State, and that the land be ordered to be sold to pay the same. When the judgment, as in this case, contains these essential elements, we cannot say that

it is a nullity, however improper and unadvised it may be to depart from the prescribed form.

But, on this subject, we are not without authority directly in point, in our own Court. In Atkins *v.* Hinman, 2 Gil., 437, the judgment omitted the following important words, which are contained in the statutory form, to wit: "That the taxes thereon remained due and unpaid on the day of the date of the said collector's return." The report of the collector, which showed the non-payment of the taxes being copied into the judgment was held sufficient evidence of that fact, without the recital required by the form. Another omission was, that the day on which the collector had made his return was not inserted, and that was held not to be fatal, inasmuch as that fact could be ascertained by reference to the files of the Court. Some matters were also inserted in that judgment, not required by the form, but the objection on that amount was not sustained. On the subject of the departure from the given form, the Court said: "The omissions and variations in the judgment are merely in matters of form, and evidently clerical mistakes, which ought not to vitiate the judgment, especially when it is apparent from the face of the proceeding, that the court had jurisdiction of the subject matter, and proceed to make the proper adjudication." It is not to be denied, that so far as the essentials of the judgment required by the statute are concerned, there were more omissions in that judgment, than in the one before us, and the case establishes beyond controversy, that it is not indispensable to pursue the form given in the statute.

The case of Hinman *v.* Pope, previously decided in 1 Gilman, 131, in nowise conflicts with the view we have taken. One of the questions decided in that case was, as to the validity of the precept or process issued to the collector, and upon which the sales were made. By the statute, the clerk was required to make out and deliver to the collector a certified copy of the collector's report, together with the order of the Court thereon, which should constitute the process on which all lands should be sold for taxes. In that case, no such paper, either in form or substance, had been furnished by the clerk. On the contrary, he issued an order on his own responsibility, commanding the collector to make the sale, without any intimation that it was issued in obedience to an order of the court, or that the court

had ever entered any judgment against the land, or that even the subject matter had ever been before the Court in any way. Upon its face the paper was void. It was neither a good common law execution, nor such a process as the statute required. The Court said : " The paper offered in evidence was not such process, either in form or substance, as is required to be issued by the 31st section, and was consequently void. It does not recite that any judgment has ever been rendered by the Court. It is a mere mandate of the clerk, to sell certain lands for taxes, to be found in a collector's list, appended to the paper. An execution to be valid must show on its face, that such a judgment has been rendered by a competent Court as will justify its emanation." Here we see the defect was of a substantial and not of a formal character. That case was not put upon the ground, that the process was issued in a special proceeding, which required greater strictness than in the exercise of a common law jurisdiction, but the process was held to be void, because it would have been void in a common law proceeding.

As the question is now presented, the validity or effect of this judgment is in nowise impaired, for the reason that it is not clothed with the same conclusive attributes, which attach to an ordinary judgment. The statute, it is true, allows it to be attacked collaterally, or rather allows the title acquired under the sale to be defeated, by proving any one of four specified things, to wit: " Either that the said land was not subject to taxation at the date of the sale ; that the taxes had been paid ; that the land had never been listed or assessed for t axation; or, that the same had been redeemed. By proving either of the three first, an attack is made upon the judgment itself,and by the last, the tax title is defeated by something subsequent to the judgment. In this case, no question arises under these provisions of the statute. No attempt has been made to impair the effect of the judgment, in any mode authorized by law. Except it be attacked in the mode authorized, it is as conclusive as if no provision had been made authorizing it to be questioned collaterally. There is no difference between *prima facie* and conclusive evidence, where there is no rebutting or countervailing testimony adduced. There can be no pretence here, that the judgment, as against the lands, does not prove what it purports to establish, but the complaint is that there is no such judgment

We, however, think otherwise. We are of opinion, that this order of the Court shows all the facts, which the statute requires should be shown by the judgment, and that it does contain a judgment, in favor of the State, against the lands for the proper amount, to satisfy which the lands are ordered to be sold That the order also contains a separate personal judgment against the owners of the lands, may be admitted; but as the right now claimed does not at all depend upon that part of the order, we entertain no doubt that it may, in this action, be rejected as sur plusage, and that it does not render void that part of the order which is otherwise valid. What effect it would have, were the question raised directly by writ of error or appeal, we express no opinion.

Let the judgment be reversed and the cause remanded.

Judgment reversed.

TRUMBULL, J., dissenting. I cannot assent to the foregoing decision.

The judgment offered in evidence is, according to my understanding, simply a judgment in *personam* against the owners of the lands, and not a judgment against the lands themselves, which alone the Court had jurisdiction to render. It reads as follows: "It is considered and adjudged by the Court, that the State of Illinois do severally recover of the several owners of the lands, described in the report and list aforesaid, the taxes due upon each of said lots of land, being the same set down in figures opposite to each lot of land, together with the interests and costs due thereon, and the costs of this proceeding, and it is further considered and adjudged, that each of said lots of land, described in the list aforesaid, or so much thereof as will be sufficient, be sold, to satisfy and pay this judgment and the costs of sale, and this judgment is to be entered as a several judgment against the owner of each lot of land, described in the report and list and the land itself, for the taxes, interest and costs due upon the same."

The judgment against the owners of the lands is confessedly void, for the reason that the Court had no jurisdiction over their persons, and we look in vain into this order for any other judgment than the one against the owners. It is true, that the order contains a direction for the entry of a several judgment against

the land itself, but where is the judgment? Surely not in this order, unless the direction to enter a judgment and the entry of it mean one and the same thing—a proposition to which I cannot assent.

But if it were admitted, that the direction to enter judgment against the land itself for the taxes, interest and costs due upon the same—which is all that is left of the order after striking out that part which refers to the personal judgment—was equivalent to the entry of such a judgment, I still think the judgment would be void. It would not conform even substantially to the form of the judgment required by statue and would be uncertain both as to what land it was against, and for what amount of taxes, as it would contain no reference to the reported list from which those facts could be ascertained; and if it did, the judgment would not be for the amount of tax there reported, but for the amount due, whether reported or not. Such a judgment would be void for uncertainty.

The legislature, in conferring jurisdiction upon the courts, to enter judgment against delinquent lands, has prescribed the form of such judgments, and required the courts to pursue it, as near as the nature of the case will admit. This requirement of the law, was wholly disregarded in the entry of the judgment under consideration. It is admitted, that the form of the judgment, without anything in the nature of the case to require it, is wholly varient from the one prescribed by statute. In my opinion, the court was as much bound to comply substantially with the requirement of the law, prescribing the form of the judgment, as in any other particular. I think the circuit court decided rightly, in excluding the judgment from the consideration of the jury.

Smith *et al. v.* Dunlap.

DAVID A. SMITH, *et al.*, Assignees, &c., Pltiffs, *v.* JAMES DUNLAP, Deft.

AGREED CASE FROM SANGAMON

There is a wide difference between a note for the payment of a certain sum, which may be discharged by the maker, on the day it matures, by an equal amount of state indebtedness, and a note for the payment of a certain amount in state indebtedness. In the former case, if the maker negleets to pay the note at maturity in the manner specified, he is liable to pay in specie the whole amount of the note. In the latter case, he is only liable for the value of the state indebtedness at the time of the maturity of the note.

Where a promisor undertakes to pay a certain number of dollars in specific articles, he must deliver the articles on the day named, or he will be bound to pay the sum stated, in money. But if he agrees to pay in bank notes or other evidences of indebtedness, purporting to be and which can be counted as dollars, he must pay the number of dollars named of the securities described, in default of which, he is responsible only for their real value.

The measure of damages, in the case of a breach of contract, for the sale of a chattel, is the cash value of the article at the time it should have been delivered.

This suit was presented for the consideration of this court, upon an agreed case, stating that on the 20th day of February, 1843, Dunlap made his note for payment to the Bank of Illinois, for the sum of $131,480 52, in State of Illinois indebtedness, which matured and became due on the 20th day of April, 1843, and is unpaid. On the 10th of April, 1845, the officers of said Bank, pursuant to an act of the legislature, entitled "An act supplemental to an act to reduce the public debt of one million of dollars, and to put the Bank of Illinois into liquidation," in force, February 28, 1845, under their corporate seal and the signature of their President (the said defendant) and Cashier, assigned said note as a stock note to John J. Hardin and Samuel Dunlap, since deceased, as assignees of said Bank, and that the said plaintiffs are successors in office of said deceased, and entitled to a judgment or decree, (if this court has chancery jurisdiction of this case,) as assignees as aforesaid, for anything legally due and recoverable in the premises. At the maturity of said note, the marketable value of Illinois state indebtedness was twenty cents to a dollar, including interest in arrear on the same, and the value of notes of said Bank was about thirty seven cents to the dollar, and the value of certificates of said bank was about eighteen cents to the dollar. Since the maturity of said note, the highest and present marketable value of Illinois state indebtedness, has been, and is, canal bonds issued before date of said note, including interest in arrear, as about

thirty cents to the dollar, and Internal Improvement bonds issued since said note became due, including interest in arrear, is about forty-two cents to the dollar, the present value of notes and certificates of said Bank is about forty to forty-three cents to the dollar.

The question submitted to the Court was: what were the said plaintiffs entitled to have a judgment or decree for, if the Court has chancery jurisdiction in the case, this Court to render such final judgment or decree in the premises, as should seem meet.

The cause was heard upon a like agreed case, before Davis, Judge, at December term, 1850, of the Sangamon Circuit Court, who rendered judgment for the plaintiffs for the sum of $38,361.93.

WILLIAMS & LAWRENCE, who appear for the creditors of the Bank of Illinois, made the following points:

Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the Court will not render a judgment upon such an imperfect general verdict, but will remand the cause to the Court below, with directions to award a *venire facias de novo*. Barnes et al. *v.* Williams, 6 Pet. Cond. R., 369; Bellows *v.* President of Hallowell and Augusta Bank, 2 Mason, 31.

The agreement in this case stands in the place of a special verdict, and if the facts are so imperfectly stated that the Court cannot render judgment according to the substantial merits of the case, then the parties should be required to make a more perfect statement, or the case should be dismissed without prejudice to either party.

If this is a stock note, and the term stock note has any meaning, then it stands in the place of $131,480.52, which the charter of the bank required to be paid into the bank in gold and silver coin, as the basis of its promises to pay, and the only security which the creditors of the bank had, for the payment of its, debts. Gale's Stat. p. 99, §2 and 3, p. 102, §8, p. 103, §8, p. 107 §1, p. 108, §6; Acts of 1842, p. 21, and Acts of 1845, p. 247, §9.

LINCOLN & HERNDON, for Pltff.

Smith *et al v.* Dunlap.

The measure of damages for not paying stock according to orntract, is the value at the time it should have been returned, co at the time of the trial, at the option of the payee. 19 Conn., 212 ; 2 Greenleaf's Ev., §261 ; 2 Comstock, 443 ; 2 East, 211 ; 11 Eng. Com. Law, 436.

Where a note is payable in State Bank paper, it should be paid in State Bank paper at its real value, and not at its nominal value. 4 Ohio Cond., 222.

Our statute, allowing debtors to pay the bank in State Bank paper, either before or after the commencement of the suit, has no reference to stockholders. They are not entitled to its benefits. Statutes 1842–3, page 21 ; 5 Sm. & Marshall, 428.

Browning & Bushnell, on same side.

We insist, that this was not a note for the delivery of state indebtedness, nor for the payment of state indebtedness at its nominal value, but that it was a note for the payment of money ; that the sum mentioned in the note was the value reeeived, and which was to be re-paid ; that Dunlap had, by the contract, the privilege of paying that amount in state bonds, at their actual marketable value, at the time the note fell due, but in default thereof, he became liable to pay in money, the face of the note and interest.

The note imports value ; Dunlap, therefore, retains in his hands the money of the plaintiff. The Illinois state indebtedness has been paid for in advance, and the rule of damages above adverted to, always applies in cases of notes payable for a specific sum in goods or other personal property.

In an ordinary contract for the sale and delivery of goods, the measure of damages depends upon whether the goods have been paid for in adance or not. Where no money has been paid, the measure of damages is the value of the article at the time and plaıce of delivery. 1 Greenleaf's Ev., §261 ; Gainsford *v.* Carroll, 2 B. & C., 624 ; (9 E. C. L,. 204 ;) Boorman v. Nash, 9 B. & C ., 145 ; (17 E. C. L ; 344 ;) Shaw *v.* Nudd, 8 Pick., 9 Swift *v.* Barnes, 16 Pick., 194, 196 ; Shepherd v. Hampton, 4 Cond. R., 233 ; Doglass *v.* McAlister, 3 Cranch, 298 ; Dey *v* Dox, 9 Wend., 129 ; Davis v. Shields, 24 Wend. 322.

But where the goods have been paid for in advanc the plain-

tiff may recover the highest price of the goods at any time between the time fixed for the delivery and time of the trial. West *v.* Wentworth, 3 Cow., 82 ; Clark *v.* Pinney, 7 Cow., 681 ; Chitty on Contract, 352, note 2 ; Baker *v.* Wheeler, 8 Wend., 505 ; Shepherd *v.* Hampton, 4 Cond. R., 233 ; Williamson *v.* Dillon, 1 Har. & Gill., 444, 463–4 ; Commercial Bank *v.* Korlwright, 22 Wend., 348, 366–7. And the same principle is always applied to the cases of contracts for the delivery of stocks. Shepherd *v.* Johnson, 2 East., 211 ; McArthur *v.* Seaforth, 2 Taunt., 257 ; Harrison *v.* Harrison, 11 E. C. L., 436 ; Downs *v.* Bash, 2 E. C. L., 407 ; Commercial Bank *v.* Korlwright, 22 Wend., 348, 366–7 ; West *v.* Pritchard, 19 Conn., 212 ; Wilson *v.* Little, 2 Comstock, 443.

Massachusetts seems to be an exception to the general rule ; there, there seems to be no distinction taken, between pre-payment and non-payment. But the courts there admit that this is not in accordance with the general rule, but have adopted it for convenience and uniformity. Sargent *v.* Franklin, 8 Pick., 90.

But this is not an ordinary contract for the delivery of goods. It is a note for money payable in goods of a particular description. The payor may pay in goods at his option when the note becomes due ; if he fails to do so, it becomes an absolute note for money ; and the sum mentioned in it, and the interest, is the measure of damages. The sum specified in the note is considered the value of the consideration. Brooks v. Hubbard, 3 Conn., 58; Smith *v.* Smith, 2 John., 235 ; Gleason v. Pinney, 5 Wend., 393–4 & 5 ; Gleason v. Pinney, 5 Cow., 152, 411 ; Harrison v. Wells, 12 Verm., 505, 509 ; Cowner v. Graham, 1 Ohio, 150, 160. There is a great difference in the construction of the contract, between a contract for the payment of dollars in property, and a contract for the delivery of property. 5 Wend., 401–2. The stipulation to pay in property is for the benefit of the payor ; if he does not avail himself of it, he must pay in money. Chipman on Cont., 34–5, 32.

This express point has been decided, in the case of a note payable in so much money in certain bank notes, must be paid in the amount specified in the note in money. Edwards v. Morris, 1 and 4 Ohio, 222.

Bank bills pass under a bequest of money ; stocks, or other securities for money, do not. Mann v. Mann, 1 John. Ch., 231,

236 ; Dowson *v.* Garkoin, 2 Keen, 14 ; 2 Williams Ex., 861–2 ; Holham *v.* Sutton, 15 Ves., 327. Nor does a legacy of "stock" fall within the head of "pecuniary legacies." Douglass v. Congreve, 1 Keen, 410, 424. Stocks are always treated as property subject to the same rules and incidents of other choses in action or personal property—they are "goods, wares and merchandise," they pass, and pass only by devise, assignment and like other personal property or choses in action. Trisdale v. Harris, 20 Pick., 9, 12, 13, 14 ; Gray *v.* Portland, 3 Mass., 389 ; Sargent *v.* Franklin, 8 Pick., 90, 95 ; Jumel *v.* Marble Head Social Ins. Co., 10 Mass., 476, 482. They could not be, nor are they taxed as "money," but as "public stocks." R. S., 1845, p. 436, §3.

Bank bills, on the contrary pass by delivery as money, without assignment or formality. They are not to be compared with stocks. They are totally dissimilar in constitution, object and use. Stocks may assume the form of personal property or of securities for money ; in whichever form, they are wholly unlike bank bills or bills of credit, which are money in common parlance, in contracts, and in legal contemplation. The two are not to be compared in legal reasoning, and every analogy drawn from the comparison of things so dissimilar is false, and the conclusion equally so. Wherever it became necessary, the courts have always carefully distinguished between them. Miller v. Race, 1 Burr, 452, (top p., 173 ;) Craig v. State of Missouri, 4 Pet., 410, 431–2 ; Angell & Ames on Corp., 500–1 and note.

And in all the reasoning of the courts on the question of damages on the breach of stock contracts, the courts have always treated such contracts as subject to the same considerations, as other contracts relating to the sale, payment, or delivery of other articles of personal property. Sedgwick on Damages, 276 ; Sargeant *v.* Franklin, 8 Pick., 90, 100 ; Gray v. Portland Bank, 3 Mass., 364, 390 ; See English Stock Cases before cited.

Treating this, then, as a note for money payable in other commodities, it should have been paid in those commodities when due. Dunlap not having availed himself of this privilege, the note has now become absolute for the note and interest.

On the other hand, treating the note as a contract for the delivery of stock, a failure to comply with the contract on the part of Dunlap, authorizes the plaintiff to rescind the contract and to recover back the original consideration of the note.

The note is *prima facie* evidence of a consideration equal to the sum expressed in it. It is an acknowledgment of a debt due to that amount, and this *prima facie* indebtedness can be recovered back in an action for money had and received, or in an action on the contract itself. Smith *v.* Smith, 2 John., 240; Brooks *v.* Hubbard, 3 Conn., 62; Pinny *v.* Gleason, 5 Wend., 400, 403; Bush *v.* Canfield, 2 Conn., 485; Clark *v.* Pinney, 7 Cow., 681; Stephens *v.* Syford, 7 N. H., 360, 364; Sedgwick on Dam., 273, 276.

The law requires the assignment to trustees of the property and effects of the bank. Stock notes were to be collected only on certain contingencies. In performing their duties under the law, it was proper and even necessary for the officers making the assignment, to designate the stock notes for the information of the assignees. A mistake in this respect might doubtless be shown, but in the absence of proof, the act of Dunlap, in assigning this as a stock note will be taken as true. Laws of 1845, sections 3 and 9, p. 246.

S. T. Logan, for Deft.

Treat, C. J. First. What is the proper construction of this contract? Is it a note for the payment of $131,480 52, which the maker may discharge on the day it matures, by an equal amount of the obligations of the State of Illinois? Or, is it a contract, by which he only assumes to pay that number of dollars of state indebtedness? If the former, it is the privilege of the debtor to make payment on the day named, in the indebtedness of the state, but, if he fails thus to discharge the obligation, he is bound to pay the sum specified in specie; if the latter, he is, in any event, only liable for the actual value of the indebtedness agreed to be paid. There is a wide difference between the two classes of contracts. Where the promisor undertakes to pay a certain number of dollars in specific articles, such as grain, cattle, or other commodities, he must deliver the property on the day named in the contract, or he becomes absolutely bound to pay the sum stated in money. The sum expressed in the obligation indicates the true amount of the debt; and the other provision is inserted for the benefit of the debtor, and relates exclusively to the mode of payment. If he does not avail him-

self of the privilege of discharging the debt in property, the obligation becomes a naked promise to pay the amount in money. But where the promisor agrees to pay a certain sum in bank notes, or other evidences of indebtedness, which purport on their face to represent dollars, and can be counted as such, the sum is expressed to indicate the number of dollars of the notes or evidence to be paid, and not the amount of the debt or consideration. The obligation is in fact but a promise to deliver so many dollars, numerically, of the securities described. If the debtor fails to deliver them according to the terms of the contract, he is responsible only for their real, not their nominal value. Their cash value is the true amount of the debt to be discharged. And beyond the damages directly resulting from the breach of the contract, the creditor is not entitled to recover.

The contract in question falls directly within the latter definition. It is an undertaking to pay a given number of dollars of the indebtedness of the State of Illinois. This indebtedness consists of obligations issued by the State, for the payment of specified sums of money to its creditors. The amount in dollars is expressed on the face of the instruments, and can be at once ascertained by inspection. The debt secured to be paid by this note, was no doubt the market value of the amount of State indebtedness specified, as understood and ascertained by the parties. If they intended that the indebtedness should be received at any other rate than its nominal value, they certainly would have so provided in the contract.

This construction of the contract is sustained by the adjudged cases, some of which will be noticed. In Clay *v.* Huston's admrs, 1 Bibb, 416, the expression in a note "thirty pounds in militia certificates," was construed to mean that number of pounds in certificates as specified on their face, and not an amount of certificates equal in value to thirty pounds in specie. In Anderson *v.* Ewing, 3 Littell, 245, a note for the payment of "eight hundred dollars, on or before the first day of September, 1820, in such bank notes as are received in deposit at that time in the Hopkinsville Branch Bank," was held to be a contract to pay eight hundred paper dollars of the description mentioned. The Court said: "It is true, an instrument drawn, stipulating the payment of a certain number of dollars in cattle, wheat, or other commodities, is construed to mean so much of these arti-

cles as will amount to that sum in specie. But the reason of this is evident. The commodities themselves cannot be counted by dollars, as that name is never applied to them. But this is not the case with bank notes. They engage to pay so many dollars, and are numerically calculated by the numbers they express; so that the expression 'eight hundred dollars in bank paper' is universally understood to mean that much money, when the numbers expressed on the face of the notes are added together, and not as including so many more, superadded, as will make them equal to eight hundred dollars in specie." In Phillips *v.* Riley, 3 Connecticut, 266, a note for "Eighty-eight dollars in current bank notes, such as pass in Norfolk between man and man, was decided to be a contract to pay bank notes of the kind described, to the nominal amount of eighty-eight dollars. In Robinson *v.* Noble's admrs, 8 Peters, 181, in an action on an agreement to pay freight at the rate of one dollar and fifty cents per barrel, "in the paper of the Miami Exporting Company, or its equivalent," the Court held, that the specie value of the paper, when the payment should have been made, was the proper measure of damages. In Hixon v. Hixon, 7 Humphry, 33, a note for "One hundred dollars, in Georgia, or Alabama, or Tennessee bank notes, or notes on any good men," was decided to be an obligation for the payment of that many dollars for the notes specified. In Gordon v. Parker, 2 Smedes & Marhsall, 485, a note for "five thousand dollars, payable in Brandon money," was determined to be a contract to pay that number of dollars of the kind of money described. In Dillard v. Evans, 4 Pike, 175, the Court held a note payable in the "common currency of Arkansas," to be a contract to pay so many dollars of the bank paper then current in the state.

Nor is the view we are inclined to take of this contract, in conflict with the cases of Pinney v. Gleason, 5 Wendell, 393, and Brooks v. Hubbard, 3 Connecticut, 58. The former was an action on a note for the payment of "seventy-nine dollars and fifty cents, on the first day of August, 1822, in salt, at fourteen shillings per barrel;" and the latter was an action on a note for "two hundred and fifty dollars, in brown shirting, at the price of thirty cents per yard, for every yard in length, and to average three-fourths of a yard in width." It was determined in each of these cases, that the measure of damages was the sum

mentioned in the note, and not the value of the articles designated for payment. The sum was stated to express the amount of the indebtedness; and the remaining provision was inserted to give the debtor the option to pay in specific articles, at a stipulated price. The price of the articles was fixed to obviate the necessity of resorting to parol evidence to ascertain the value, and that the debtor might know how much he would be bound to deliver, and the creditor how much he would be entitled to demand, in the event the articles should be tendered. If the note in question contained a provision, that the state indebtedness should be received at a particular rate to the dollar, the cases might be alike in principle; but as it does not, those decisions form no just criterion for the determination of this case.

Second. What is the true measure of damages for the breach of this contract? It is well settled, in the case of a contract for the sale or delivery of a personal chattle, that the proper criterion by which to measure damages for the breach of the contract, is the cash value of the article, at the time it should have been delivered. If the consideration has not been paid, the purchaser is only entitled to recover the difference between the contract price, and the market value of the article when the delivery ought to have been made. Leigh *v.* Patterson, 8 Taunton, 540; Gainsford *v.* Carroll, 2 Barnewell & Cressell, 624; Shepherd *v.* Hampton, 3 Wheaton, 200; Shaw *v.* Nudd, 8 Pickering, 9; Stevens *v.* Lyford, 7 New Hampshire, 360. To this general rule, the British Courts have made a single exception. In actions on contract to replace stocks, the measure of damages is held to be the market value of the stocks, at the time they should have been returned, or on the day of trial, at the option of the plaintiff. Shepherd v. Johnson, 2 East, 211; McAuthur *v.* Seaforth, 2 Taunton, 257; Downs v. Buck, 1 Starkie, 318; Harrison *v.* Harrison, 1 Carrington & Payne, 412. This exception has been recognized in New York, and the principle extended to contracts for the delivery of property, where the price has been paid in advance. In such cases, the vendee is permitted to recover the highest market price, between the period of delivery and the day of trial West *v.* Wentworth, 3 Cowen, 82; Clark v. Pinney, 7, *ibid*, 681; Commercial Bank v. Kortwright, 22 Wend., 348; Willson v. Little, 2 Comstock, 443.

But independent of these cases, and occasional *dicta* to be

found in a few reported cases, the general rule seems to remain unimpaired by judicial decisions. In the cases of Clay v. Huston's admrs, Anderson v. Ewing, Hixon v. Hixon, and Gordon v. Parker, before cited, in all of which the consideration of the notes had been advanced, the measure of damages was held to be the cash value of the paper, at the time it was payable. In Smith v. Berry, 18 Maine, 122, which was an action on a note for one hundred and thirty casks of lime, paid for in advance, the court decided that the payee could not recover beyond the market value of the lime, when it should have been delivered, and interest. In Sargeant v. The Franklin Ins. Co., 8 Pickering, 90, which was an action for refusing to transfer shares of stock, the measure of damages was declared to be the market value of the shares, at the time they should have been transferred. In Smethurst v. Woolston, 5 Watts & Sargeant, 106, which was an action on a contract for the delivery of specific articles, paid for in advance, the value of the articles at the time of the breach was held to be the proper measure of damages. Chancellor Kent, in referring to this subject, holds this language: "I do not regard the distinction alluded to as well founded or supported. It is disregarded or rejected by some of the best authorities cited. The true rule of damages is the value of the article at the time of the breach, or when it ought to have been delivered. That is the plain, stable, and just rule within the contract of the parties. Damages for the breaches of contracts are only those which are incidental to, and directly caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties, and not speculative profits, or accidental or consequential losses, or the loss of a fancied good bargain." 2 Kent's Com., 6th Ed., 480, notes. Mr. Sedgwick, in his Treatise on the Measure of Damages, at page 277, after a thorough examination of the authorities, seems to arrive at the same conclusion.

The weight of authority manifestly supports the general rule before laid down, and is against any discrimination in favor of cases in which the price has been paid in advance. It has been applied by this court to contracts for the conveyance of real estate, where the vendee has advanced the purchase money. On the breach of such contracts, the value of the land at the time it should have been conveyed, is the measure of damages. Buck-

master *v.* Grundy, 1 Scammon, 310; McKee *v.* Brandon, 2 *ibid*, 339. We have no hesitation in holding the rule applicable to contracts for the sale or delivery of personal property, without regard to the circumstance, whether the price has been paid or not. If unpaid, the purchaser recovers the difference between the price he agreed to pay, and what the commodity was worth, when it should have been delivered; if paid, he is entitled to recover the market value of the article, when the delivery ought to have been made, and interest in the way of compensation for the delay. This is as full an indemnity as can well be accorded, consistent with the policy of the law. Legal rules ought to be general in their application, so far as to embrace all cases depending on the same principles. There is no more reason for exempting cases like the present from the operation of the general rule, than there is for holding in the case of the breach of a contract to pay money, that the creditor may recover damages beyond the amount agreed to be paid and interest. He may be, and in point of fact generally is, as seriously injured by the neglect of his debtor to pay a money demand on the day it falls due, as he is by his failure to perform promptly a promise to pay a debt in specific articles. And yet, it would not for an instant be contended, in the case of the obligation to pay money, that the sum specified does not form the only criterion for estimating the damages. It is as much within the understanding of the parties, that the value of the specific articles is to be the measure of damages, for the breach of the contract to pay money. We hold, therefore, that the true measure of damages for the non-fulfilment of this contract, is the market value in specie of state indebtedness, on the day it should have been paid, and interest thereon to the day of trial. (*a*) This was the decision of the Circuit Court, and its judgment must be affirmed.

Judgment affirmed.

(*a*) Phelps vs. McGee, 18 Ill. R. 158; Sleuter vs. Wallbaum, 45 Ill. R. 44; Larabee vs. Badger, 45 Ill. R. 442.

Eames *v.* Blackhart.

THADDEUS EAMES, Admr, &c., Pltff in Error, *v.* DAVID BLACKHART, Deft in Error.

ERROR TO HENDERSON.

When a person, just before his death, delivers his money to another to over by him to his family, and the person who so receives the money is afterwards sued by the administrator of the deceased, on the ground that he had not accounted for all the money so received : Held, That it was erroneous in the court to instruct the jury in this case, "that it was not incumbent on the defendant to account for what the deceased did with his money." That it was for the jury, and not the court, to determine, whether the facts and circumstances in evidence satisfied them that the deceased, at the time of his death; had more money in his possession than had been accounted for by the defendant ; and whether or not there was sufficient *prima facie* evidence in the case against the defendant, to call upon him to explain how it was that he received no more money from the deceased.

Held, also, that, as a general rule, it was true that one man was not bound to show what another had done with his money, yet that such a state of circumstances might exist, as to make it incumbent on a person who would discharge himself from liability, to show what another has done with his money. Held, also, that it was not the province of the court to draw inference, from the evidence, or determine what it does or does not prove.

This was an action of assumpsit, brought by the plaintiff in error against he defendant in error, in the Henderson Circuit Court, in February, 1850, and was tried at the last April term of said court, before Minshall, Judge, and a jury.

The declaration contained only the common money counts of money loaned, money had and received, and also a count for interest on money over-due and forborne, and for work and labor. To all of which the defendants plead the general issue.

Evidence was given on both sides which is of a character not easily abridged, so as to exibit a fair view of the case. After the evidence was closed, the court, at the instance of the defendant, instruted the jury as follows, to wit: "The Court will instruct the jury that it is not incumbent on the defendant, to account with what Joseph Eames did with his money, and unless they believe from evidence, that the said defendant received more money from Joseph Eames than he delivered to the plaintiff, they will find for the defendant." To the giving which instruction the plaintiff excepted. The jury then retired and brought in a verdict for the defendant. The plaintiff moved for a new trial, and assigned several reasons. The Court overruled the motion for a new trial, and rendered judgment for costs against the plaintiff, and awarded execution to be paid in the course of administration ; to all of which the plaintiff excepted.

He now insists that the foregoing instruction, under the facts of the case, was erroneous; that the verdict was contrary to evidence, and that on both of these grounds a new trial ought to have been granted.

Browning & Bushnell and R. S. Blackwell, for Pltff in Error.

An instruction which assumes the existence of a fact, is erroneous. Reed *v.* Hurd, 7 Wend., 408; Fitzgerald *v.* Alexander, 19 Wend., 402; Lightburn *v.* Cooper, 1 Dana, 273; Dallam *v.* Handlay, 2 A. K. Marshall, 424; Adams *v.* Tiernan, 5 Dana, 395. So an instruction which withdraws from the consideration of the jury any proof tending to establish the principal fact. Sullivan *v.* Enders, 3 Dana, 67; Planters' Bank *v.* Bank Alexandria, 10 Gill. & John., 357; Tiffany *v.* Savage, 2 Gill., 129; Speed *v.* Hewen, 4 Mo. Rep., 356. So an instruction calculated to divert the attention of the jury from the facts upon which their verdict ought to rest. Reed *v.* Greathouse, 7 Mon., 560; 11 Wend., 83; 9 Conn., 107; 12 Pick., 177; 5 Day, 479; 5 Mass., 365. Province of the jury and Court ably discussed in the following cases. Anderson *v.* State, 2 Kelly, 379; Steel *v.* Glass, 1 Kelly, 486–9.

Williams & Lawrence, for Deft in Error.

The credibility of witnesses is a matter peculiarly within the province of juries, and a Court will not set aside a verdict as against evidence, except in those cases where the verdict "strikes the mind, at first blush, as manifestly and palpably contrary to the evidence." Dawson *v.* Robbins, 5 Gil., 72; Kincaid *v.* Turner, 2 Gil., 620; Evans *v.* Fisher, 5 Gil., 572.

Trumbull, J. Joseph Eames, a resident of Oquawka, on his return home from St. Louis, died suddenly of the cholera on board a steamboat upon the Mississippi river. Just before his death, he delivered up to the defendant his money, and requested him to keep and deliver it to his family. The deceased and the defendant had gone down to St. Louis together a few days previous, were both residents of Oquawka, and, so far as the evi-

dence shows, were the only persons from that place upon the boat at the time of Eames' death.

After his return, the defendant paid over to the plaintiff, who is administrator of the said Joseph Eames, deceased, two hundred and fifteen dollars in gold, and twelve dollars in paper money. This suit was brought upon the ground that defendant did not pay over all the money he received from the deceased.

A variety of facts was proven upon the trial, mostly of a circumstantial character, tending to show that the deceased had more money with him, and that the defendant received a larger sum than he had accounted for.

The defendant requested the court to instruct the jury as follows: "That it is not incumbent on the defendant to account for what Joseph Eames did with his money, and unless they believe from the evidence that the said defendant received more money from Joseph Eames than he delivered to the plaintiff, they will find for the defendant." This instruction the court gave, and the giving of it is now assigned for error.

That one man is not bound to show what another has done with his money, is true, as a general proposition, and yet such a state of circumstaces may exist as to make it incumbent on a person, who would discharge himself from liability, to show what another has done with his money.

The first part of the foregoing instruction, as applied to the facts and circumstances of this particular case, was, we think, erroneous, for the reason, that it assumed that the evidence offered was not sufficient to justify the inference of such a *prima facie* case against the defendant, as to call upon him to explain how it was that he received no more money from Eames. We do not say that such a case was made out, and the circuit court had no right to say there was not, but should have left the jury to determine from all the circumstances in evidence, whether more money had been traced to the possession of Eames just before his decease, than the defendant had accounted for, and if there had been, whether enough was not shown in connection with the other evidence to make it incumbent upon the defendant to show what became of the balance of the money that Eames had.

The substance of the instruction was that the plaintiff's evidence was insufficient to warrant the inference, that Eames, about

the time of his decease, had more money than defendant had paid over, so as to throw upon him the burden of accounting for such excess. Had the defendant been able to show that Eames shortly before his death, lost, paid out, or in any manner used any considerable sum of money, such circumstance would have been greatly in his favor. That he was bound to introduce such evidence we do not mean to intimate. He was clearly not liable for more money than he received from Eames, but in determining how much he did receive, it was for the jury to say whether the evidence satisfied them that Eames had in his possession, about the time of his decease, a larger sum of money than defendant had accounted for, and which must have gone into his possession, unless he could show that Eames otherwise disposed of it.

The instruction was calculated to mislead the jury, by withdrawing from their consideration part of the evidence in the case.

It is not the province of the court to draw inferences from the evidence, or determine what it does or does not, prove, and if it do so in a manner calculated to mislead the jury, its judgment will be set aside and a new trail granted.

Judgment reversed and cause remanded.

Judgment reversed.

REUBEN ROWLEY, Pltf in Error, *v.* GEORGE W. BERRIAN, Deft in Error.

ERROR TO ADAMS.

The characters "N. P." clearly indicate the office of Notary Public.

In attachment cases, the affidavit, if sworn to within the state, may be made before any officer authorized by the laws of this state to administer oaths and the Courts will take notice who are authorized to administer oaths within the county in which suit is brought. If the oath is taken in another county, the authority of the person administering it, must be established by evidence competent for the purpose. In other states the same officers who are authorized to take acknowledgments of deeds to be recorded in this state, may take affidavits to be used in cases of attachment, and their acts in either case are to be authenticated in the same manner.

The plaintiff in attachment, where the defendant is not before the Court, is not entitled to a judgment for a greater sum than that claimed in the affidavit, together with costs and interest.

Aliter if the defendant is before the court.

Rowley *v.* Berrian.

This was an action of debt brought in attachment, by the defendant in error against the plaintiff in error. The affidavit for the attachment was in the words and figures following, to wit:

"STATE OF ILLINOIS, } *Sct.*
Adams County, }

"George W. Berrian, being first duly sworn, deposes and says that Reuben Rowley is indebted to him in a sum exceeding twenty dollars, on a promissory note, of which the following is a copy:

$212.57-100. NEW YORK, April 4th, 1840.

Sixty days after date I promise to pay George W. Berrian, Two Hundred and Twelve 57-100 dollars, for value received.

R. ROWLEY, 96 Nassau st.

"That there is now due from the said Rowley, to him the said Berrian, on said note, $212.57-100 principal, with interest thereon at seven per cent. from June 6th, 1840, ($113 25,) and cost of protest, (75 cts.,) besides damages on protest. Said affiant further deposes and says that said Rowley is a non-resident of the state of Illinois, and further deponent saith not.

G. W. BERRIAN.

"Subscribed and sworn to before me, this 17th day of January, 1848.

W. H. BENNISON, N. P.,
For the city of Quincy, in Adams county, Illinois.'

A bond was filed in the penal sum of $650. Writ was issued for the sum of $326.57 besides damages on protest, and returned levied upon real estate. Publication was made, and a copy of the advertisement filed, which sets forth that a writ of attachment has been issued for the sum of $326.57. Judgment was rendered before Purple, Judge, and a jury, at May term, 1848, by default for $212.57 debt, and $152.18 damages, making the amount of the judgment $364.75. Execution was issued, and land sold in full satisfaction. The defendant in the court below brings the cause to this court.

WILLIAMS & LAWRENCE, for Pltff in Error.

BROWNING & BUSHNELL, for Deft in Error.

TREAT, C. J. This was a foreign attachment sued out by

Berrian against Rowley, on the 17th of January, 1848. The affidavit, on which the attachment was founded, after reciting a promissory note, made by the defendant to the plaintiff, bearing date at New York, on the 4th of April, 1840, for $212.57, payable in sixty days, proceeded as follows: That there is now due from said Rowley to him the said Berrian on said note, $212.57, principle, with interest thereon at the rate of seven per cent. from June 6th, 1840, $113.23, and costs of protest, 75 cts, besides damages on protest." The jurat was subscribed, "W. H. Bennison, N. P., for the city of Quincy, in Adams county, Illinois." The writ of attachment was levied on real estate. There was a publication of notice of the pendency of the proceeding, in which the amount claimed to be recovered was stated to be $326.57—the aggreate of the sums specified in the affidavit. The plaintiff in his declaration claimed to recover in addition, fourteen per cent. on the amount of the note, as damages allowed by the law of New York on account of the protest for non-payment. The defendant was not served with process, nor was his appearance entered. On the 30th of May, 1848, a judgment was entered in favor of the plaintiff, for $364 75, and costs, with an award of execution against the property attached. The defendant now assigns error on the record.

It is contended, that the affidavit was not made before an officer competent to administer oaths. The characters N. P. are an abbreviation of the term notary public. They are in common use, and well understood. They as clearly indicate the office of notary public, as do the characters J. P. that of justice of the peace; and this court has repeatedly decided that such is the meaning of the latter initials. Shattuck *v.* The People, 4 Scammon, 477; Livingston *v.* Kettelle, 1 Gilman, 116. It sufficiently appears from the record, that the affidavit was made before a notary public of the county in which the action was commenced. Proof of his official character was not required. A circuit court will take notice who are notaries for the county in which it is held. Stout *v.* Slattery, *ante*, 162. But it is objected, that a notary cannot take an affidavit, which is to become the foundation of an attachment, unless he authenticates the same under his seal of office; and the 32d section of the 9th chapter of the Revised Statutes is referred to as sustaining this position. That section declares, that "The affidavit required in the first section

of this chapter may be sworn to before any officer authorised by the laws of this state to administer oaths, or by any officer of any state, territory or district of the United States; the fact that the person administering such oath is duly authorized, to be proved in the same manner as in the acknowledgment and authentication of deeds." We understand this provision as embracing two classes of cases. First. The affidavit may be made before any officer authorized by the laws of this state to administer oaths, and when so made, the official character of the individual administering the oath may be proved as in other cases. If made in the county in which the suit is brought, proof of the official character of the person administering the oath is not ordinarily required. The courts will take no notice who are authorised to administer oaths within the county. If the oath is taken in another county, the authority of the person administering it must be established by evidence competent for the purpose. Second. The affidavit may be made out of the state, before any officer authorized by the statute to take the acknowledgment of deeds to land lying in this state; and when thus made, the same proof of the official character of the person administering the oath must be made, as in the case of the acknowledgment of a deed. The same officers in other states, who are authorised to take the acknowledgment of deeds to be recorded in this state, may take affidavits to be used in cases of attachment; and their acts in either case are to be authenticated in the same manner. The statute allows deeds to be proved or acknowledged before any judge of the courts of the United States; any commissioner to take the acknowledgment of deeds, and any judge of the supreme, superior, or circuit courts of any of the states or territories of the United States; and no other proof, than a statement to that effect in the certificates of these officers, is required of their official character. Such a certificate affords *prima facie* proof of the anthority of the person making it. Deeds may also be acknowledged before a clerk of a court of record, mayor of a city, and notary public of another state, but these officers are required to certify the acknowledgments under their seals of office. Deeds may also be acknowledged before a justice of the peace of another state, but the proper clerk must certify his official character. Acts of 1847, p. 37.

It is insisted, that the judgment is erroneous, because it is for

(*a*) Steamboat Clarion vs. Marion, 18 Ill. R. 501; Tunnison vs. Field, 21 Ill. R. 108; Hichens vs. Lyon, 35 Ill. R. 151; Hobson vs. E. R. E. &c., Co. 42 Ill. B. 306.

a greater amount than the sum claimed in the affidavit, and set forth in the notice of publication. We are inclined to regard this objection as well taken. The proceeding by attachment is in derogation of the common law, and in the nature of a proceeding in rem ; and where, as in this case, there is neither personal service on the defendant, nor appearance by him, and the regularity of the proceedings arises directly and not collaterally, a substantial compliance with the requirements of the statute ought to appear on the face of the record. The law requires the plaintiff to file an affidavit, setting forth particularly the nature and amount of the indebtedness ; and the advertisement to the defendant must apprise him of the amount claimed by the plaintiff. The writ of attachment commands the sheriff to attach so much of the estate of the defendant, as will be sufficient "to satisfy the claim sworn to, with interest and cost to suit." The judgment can only be satisfied out of the property levied on. It is not, for any other purpose, even *prima facie* evidence of indebtedness. It is evidently the design of the statute, that the plaintiff shall be restricted to the particular demand set out in his affidavit. The court may upon satisfactory proof enter a judgment for the plaintiff, for the amount claimed in the affidavit and accruing interest, and subject the estate attached to the satisfaction thereof, and the costs of the proceeding. Beyond this, the court has no authority to adjudicate upon the rights of the parties.(*a*) It only has jurisdiction of the person of the defendant for the purpose of subjecting the property attached to the payment of the particular cause of action specified in the affidavit. This precise question arose in the case of Henrie v. Sweazy, 5 Blackford, 273. There the plaintiff in his affidavit for the attachment claimed a certain amount to be due him, and he recovered a judgment by default for a larger sum. In holding the judgment to be erroneous, the court remarked : "The plaintiff in attachment is not entitled to a judgment for a greater sum, than he demands by his affidavit, together with interest, if the debt be such as to draw interest." The cases in Maine and Massachusetts, referred to as establishing a different doctrine, have no applications to this proceeding. Those decisions were made in actions *in personam*. Where a defendant in attachment is before the court, either by service oft he process, or by the entry of an appearance, the suit then becomes a proceeding *in per-*

sonam ; and, if the defendant does not take advantage of the variance between the writ and declaration by motion or plea in abatement, the plaintiff may declare on other causes of action than those specified in the affidavit, and the judgment will have the like force and effect of a judgment in an ordinary action. But this is not such a case. The defendent was not before the Court, and the judgment includes a demand not stated in the affidavit. Although growing out of the note sued on, it is for the purposes of this case another and distinct demand. It was mentioned generally in the affidavit, but no specific sum was claimed to be due in respect of it, and the advertisement did not notify the defendant that such a claim would be insisted on. The reference to this demand in the affidavit not being specific must be disregarded. It is as if no allusion had been made to it. Allowing the plaintiff interest on the amount sworn to be due up to the rendition of the judgment, and there is a considerable excess, which was no doubt caused by including the damages claimed in the declaration on account of the protest of the note. For this error the judgment must be reversed, with costs, and the cause remanded.

Judgment reversed.

THOMAS HOLLOWBUSH, *et al.*, Pltffs in Error, *v.* MURRAY MCCONNEL *et al.*, Defts in Error.

ERROR TO MORGAN.

The only mode by which the final decision of a case in the Supreme Court can be reversed or set aside, at a subsequent term, is by petition for a rehearing.

This cause has been before this Court on several different occasions, and will be found reported in 4 Gilman, p. 511, and in 11 Illinois, p. 61, from which all the facts in the case can be ascertained. The present writ of error was issued to the Morgan Circuit Court, and by agreement errors were assigned by both parties. The decree in the Circuit Court was at September term, 1850, Woodson, Judge, presiding.

(*a*) Palmer vs. Logan, 3 Scam. R. 60 ; Ridgway vs. Smith, 17 Ill. R. 33 ; Plats vs. Turrill, 18 Ill. R. 275.

Hollowbush *et al. v.* McConnel *et al.*

D. A. Smith and A. Williams, for Pltffs in Error.

M. McConnel, *pro se.*

Trumbull, J. This case was before the Court a year ago, and all the legal questions involved in it were then settled. 11 Ill., 61.

The case was remanded, for the purpose of ascertaining the value of the rents and profits of the premises in question, and also the improvement erected thereon ; if it could be shown to be for the benefit of the estate, and to have been made in good faith. After an amendment of the pleadings in the Circuit Court, so as to present the question of the improvement, the case was referred to a master to state an account. The appellee filed exceptions to portions of the master's report, which were overruled and the report approved. Whereupon a final decree was entered, from which an appeal has been taken by the defendants below, and in this Court, by consent, both parties have assigned errors.

The appellants complain, that the Circuit Court erred in decreeing, that the appellee had the right to redeem the mortgaged premises, and in allowing him anything for the rents and profits of the Naples ferry.

Both these questions were substantially settled when the case was here before. The first one was the very point then decided and the Court has now no power, if it had the inclination, to reverse that decision. There is no mode provided by law, except it be upon a rehearing, whereby the final decision of a case in this Court can be reversed or set aside at a subsequent term.

There must be an end of litigation somewhere, and there would be none if parties were at liberty, after a case had received the final determination of the Court of last resort, to litigate the same matter anew, and bring it again and again before the Court for its decision. Washington Bridge *v.* Stewart, 3 Howard,413 Booth *v.* Commonwealth, 7 Mefe., 86.(*a*)

Waiving, however, for the moment, the former decision establishing McConnel's right to redeem, which cannot now be legally questioned, we will, for the sake of the counsel who has argued against this right with such evident sincerity, briefly re-state the grounds of that decision.

(*a*) Semple vs. Anderson, 4 Gil. R. 562.

The case has been treated as if it were a bill to redeem, after foreclosure and sale of the mortgaged premises by the mortgagee. Such is not the fact. The sale made was set aside, and the decree reversed under which it was made. Before the time for making the sale under the last decree arrived, this bill was filed. The right of the mortgagor, or his grantee, to pay off the mortgage and redeem the premises, before the day arrives when by the decree the sale is to be made, cannot surely be questioned. The real question is, whether in redeeming, McConnel, under the peculiar circumstances of this case, has the right to claim, as a credit upon the mortgage, the value of the rents and profits of the mortgaged premises while in possession of the appellants. If he has that right, it is upon the ground alone, that he could not avail himself of it as a defence against the bill to foreclose.

What are the facts? In 1844, a decree is entered, that the mortgaged premises be sold. The sale takes place, and they are purchased by the assignee of the mortgagee; claiming under whom the appellants, in 1845, take possession of the mortgaged premises, including the Naples ferry, and continue to receive the rents and profits thereof till 1848, when the decree entered in 1844, is reversed, and the sale under it set aside by a decision of this court. Manchester v. McKee, 4 Gil., 511. The circuit court to which the cause was remanded, without opening the case so as to afford McConnel, the grantee of the mortgagor and a defendant in that suit, an opportunity to present any defence that had arisen after 1844, when the case was set for hearing, entered another decree directing a sale of the mortgaged premises, in default of the payment of the sum due in ninety days, consequently it was out of McConnel's power to show in that case, that the present appellants, who are the assignees of the mortgagee, had been in possession of the mortgaged premises (receiving the rents and profits) from 1845 to 1848, and that thereby the mortgage had, in fact, been paid. No such defence existed in 1844, when the case was set for hearing, and the decree then entered was never afterwards opened, so as to allow McConnel to interpose it. Why then should he not be allowed, at any time before the decree of 1848 was carried into effect, to show that circumstances had occurred, after the case was set for hearing, that amounted to a discharge of the sum for which the

decree was rendered? Admitting the allegations of his bill to be true—and McConnel certainly had rights—how, under the peculiar circumstances of this case, was he to avail himself of them, except by filing a new bill—not as has been alleged for the purpose of undermining or setting aside a former decree, but for the purpose of bringing before the court facts that arose after the former case was heard, and showing that the amount due by the decree then entered, had been partly or wholly paid? From the necessity of the case he must have had the right to file such a bill.

The appellants next object, that they are improperly charged with the rents and profits of the Naples ferry, because, as they say, it constitutes no part of the mortgaged premises.

After both parties have all along, during this protracted controversy, treated the Naples ferry as appertaining to the mortgaged premises—the complainant alleging in his bill, that the defendants, claiming as purchasers under the mortgage, had taken possession of the land and ferry, and the defendants, in their answer, admitting the possession, and speaking of the ferry as appertaining to the mortgaged premises—after this court had acted upon this understanding of the parties in its former disposition of the case, it is now too late for the appellants to insist, for the first time, that the ferry constitutes no part of the premises which the appellee is seeking to redeem,

No such objection was urged when the case was here before, nor was it then pretended that McConnel was not entitled to an account of the rents and profits of the ferry, in case he was permitted to redeem. In fact the very foundation of his case as it now stands, the appellants having been shown to be solvent, depends upon their receipt of the rents and profits of the ferry, which was the only income derived from the premises. The amount of waste, shown to have been committed by the appellants, is so small, being but twenty dollars, that it would not of itself justify the maintainance of a suit of this character, in reference to property so valuable.

This court, then, in deciding that McConnal had the right to redeem, necessarily passed upon the question of his right to claim the rents and profits derived from the ferry by the appellants, while in possession of the same, and we are not now at liberty to re-investigate that question.

The appellee, in his assignment of errors, asks to have the decree modified in various respects. He complains, that appellants are not charged with the rent of the ferry from 1843 instead of from 1845 ; that too small a sum, according to the evidence, was charged against them for the profits of the ferry, while they had possession ; and, that they ought not to have been allowed at all for the warehouse.

According to the former decision of this Court, the appellants were only chargeable with the rents and profits of the ferry from June, 1845, and that was manifestly the proper time from which they should have been charged, because that was the time when they took possession, under their purchase, from the assignee of the mortgage, and it is only because they got possession of the ferry by virtue of their claim of title, derived from the mortgagee, that they are to be charged with the rent of the ferry at all in this suit.

It is difficult or rather impossible, to determine from the evidence in the record, what the precise value of the ferry per annum has been since 1845. The testimony upon that point is contradictory, and some of it not very pertinent.

Upon the whole, we are not prepared to say, that the master erred in his report upon that subject.

The warehouse is shown by the evidence, to have been a judicious improvement, put upon the premises by the appellants in good faith, when they supposed that they were the owners of the land, and according to the previous decision of this Court they were properly allowed for its erection.

The decree of the Circuit Court is affirmed.

Decree affirmed.

NATHANIEL BUCKMASTER, Appellant, *v.* SIMEON RYDER, Appellee.

APPEAL FROM MADISON.

Upon a bill to quiet title, if a decree is rendered which is binding upon a party, his assignee, who has notice of the decree, is bound by it, if the Court had authority to adjudicate. Such a decree though erroneous, cannot be questioned collaterally.

Buckmaster *v.* Ryder.

A decree is conclusive on the parties while it remains in force, its errors can only be inquired into and corrected by a direct proceeding for that purpose.

A party assigning a judgment, is not estopped from ascertaining title to land against a purchaser under the judgment, where the lien of such judgment is divested by decree, especially if there was no express or implied convenant that the judgment was a subsisting lien.

This is a suit in chancery, wherein the said Simeon Ryder is complainant, who filed his bill against Buckmaster and others, to foreclose a mortgage assigned to him by the State Bank of Illinois; in which bill he alleges, that one Sigerson & Harrison, in August, 1840, being indebted to the Bank $4,196 00, made four notes to secure that sum, payable in two, three, four and five years from date, and gave the mortgage sued on, to the Bank to secure these notes; that Sigerson & Harrison embraced in said mortgage, a lot in Middletown, and a lot in block 1, in Alton, of which property they pretended to be seized and possessed; that in 1847, the State Bank assigned to Ryder said mortgage, and the three promissory notes first mentioned in the mortgage, excepting the lot in Middletown, from the effect of said assignment which had been released by the Bank, that the said Buckmaster claims to have some title in the mortgaged premises, through a sale made to him on a judgment in favor of Ryder & Frost, against one John A. Halderman and Job Lawrence, obtained against them the 17th of January, 1838, in the Municipal Court of the City of Alton, and assigned by them to the said Buckmaster. The bill however, charges the fact to be, that in a Chancery suit by Sigerson & Harrison against Ryder & Frost, and others, to confirm the title of Sigerson & Harrison to the lot in block 1, in which suit, the judgment under which Buckmaster bought the property, came in question, it being charged in said bill upon which said suit was brought that Ryder & Frost were judgment creditors of John A. Halderman upon a judgment, obtained by them in January, 1838, in the Municipal Court of the city of Alton against the said Halderman & Lawrence, for $279 08, besides costs; and it being averred in said bill, that Sigerson & Harrison were entitled to hold said lot in block 1, as the legal and equitable owners thereof and the prayer of said bill being, that the title to said lot in block 1, should be confirmed and established in Sigerson & Harrison, it was decreed at September term of the Madison Circuit Court, 1841, that they were entitled to hold the same, free of all liens and encumbrances, any of the defend-

ants, and that the defendant should be barred of all claim upon the same, as will appear from a copy of the decree, &c., That the judgment was assigned to Buckmaster after the lien thereof was barred; that Buckmaster is preventing the tenants from paying Ryder rent, on the pretence that his claim, under the judgment, is better than the mortgage claim; and that he, Ryder, is enti tled to a priority of lien over said judgment, by force of his assigned mortgage, praying that he may have his money, due on the notes, in a strict foreclosure, and that the Master in Chancery may make a deed to complainant, &c.

On the pleadings, and on the proofs which were in the cause, a decree was entered at the March term, 1850, of the Madison Circuit Court, Underwood, Judge, presiding, which decrees, that defendants pay to S. Ryder $3.839 34, within ninety days from the date of the decree, with interest; that in default to pay, the defendants be barred, &c.; and, that all interest which Buckmaster has in the premises, by virtue of his sale on the execution, issued upon the judgment, assigned to him and Greathouse, by Ryder & Frost, and all certificates of purchase, and deed or deeds made to Buckmaster, by virtue of said sale, be cancelled and set aside, and for nothing esteemed, and that Buckmaster, and all persons claiming under him, be perpetually enjoined from proceeding under said judgment, to enforce any sale or lien against the said mortgaged premises; and, that the property, in case of non-payment of the money found due, shall be sold, &c., and deed made by the commissioner to the purchaser, &c.; and, that the cross bill of the said Buckmaster be dismissed at his cost, &c. From which decree Buckmaster appeals, &c.

Wm. Martin, for Appellant.

The assignee of a mortgage takes the title which the mortgagee has in the mortgage; and is affected by all equities in favor of third persons. 2 Paige C. R., 206,

Sigerson & Harrison mortgaged property to the State Bank, which they bought on a junior judgment against Halderman. Therefore, the mortgage to the Bank passed to them no better title to the property mortgaged, than Sigerson & Harrison had at the date of the mortgage in August, 1840. 4 Porter, 321-29.

When the Bank mortgage was made, Ryder & Frost's judg-

ment was the oldest lien on the mortgaged property. This lien was matter of record. Hence, all persons dealing with the property, affected by the lien, were bound to take notice thereof, and especially the State Bank, who took the mortgage. The Bank, also, had notice of Buckmaster's claim.

When the State Bank took the mortgage, they obtained all the title for which they bargained; and they took all the title which Sigerson & Harrison had to the property. In the absence of fraud, then, or misrepresentation, neither Sigerson & Harrison, nor the State Bank, can apply to Chancery, to deprive third persons of older and paramount legal liens which by law have been fixed upon the mortgaged property.

The decree set up in this case to defeat Buckmaster's title, was rendered thirteen months after the property was mortgaged to the State Bank, and on a bill filed eight months after the date of said mortgage. The Bank under whom Ryder claims, was not a party to said bill, or to the decree; the Bank neither authorized the filing of the bill, nor do they claim any thing under the decree; hence the Bank is neither a party to the decree nor are they privy to the decree, the Bank not claiming title through Sigerson & Harrison, after the rendition of this decree.

To affect Buckmaster, the bill must have been filed by the State Bank, or by some one for their benefit, wherein, such facts must appear as will show a superior equity in the State Bank over the legal lien of the oldest judgment. To overrule Ryder & Frost's judgment, the Bank must show that she contracted with Sigerson & Harrison for a better title than she obtained by the mortgage; and that Ryder & Frost, or those claiming under them, induced the Bank to make such contract.

This decree in favor of Sigerson & Harrison, cannot be set up by Ryder, to defeat Buckmaster, because Ryder does not claim through them, but as assignee of the State Bank.

Ryder, having taken the consideration from Buckmaster & Greathouse, for the assigned judgment, under which he, Buckmaster, purchased, will commit a fraud on Buckmaster by defeating his sale on the oldest judgment. This a Court of Equity will not permit.

The sale by Buckmaster, overreaches the mortgaged title of the State Bank, and the Bank failing to redeem from Buckmas-

ter's sale within twelve months from its date, lost all their title to the land under their mortgage. To have given the Bank the legal title, they should have paid off the oldest judgment and tacked the sum paid to their mortgage. See 2 Cowen, 125 ; 11 Ills. 445.

This bill, setting up a decree to bar Buckmaster, must show by averment that the lien of the Ryder & Frost judgment was put in issue in the case of Sigerson & Harrison against Halderman. This not appearing, the decree should not have an influence with the court, in deciding the rights of these parties. See Mitford's Chancery Pleading, p. 237–8 ; Story's Equity Pleading, §791 ; 2 Madd. Ch., 313–4.

To conclude parties by a decree, it must be in a suit directly between them or their privies, and upon the subject matter directly involved in the controversy. The controversy here is to foreclose a mortgage by an assignee, wherein he does not so connect himself or the mortgage, &c., with the decree, as to authorize the court to consider it.

To make a decree conclusive, it must appear that chancery had jurisdiction. This is done by averment. If there be no such averment the decree is a nullity. See Story's Eq. Pl., §10; §12 ; also, §257, §290 ; Andrews *v.* Fenton, 1 Arkansas, 186 ; Baraitt *v.* Oliver, 7 Gill & Johnson, 193, 208 ; 4 Scam., 333 ; 4 Gilman, 354.

Where judicial proceedings are brought collaterally in question, the authority of the court whose proceedings are plead to conclude a party, may be inquired into ; they may also be inqured into when relied upon by a party claiming the benefit of such proceedings. See 1 Peters U. S. R., 329, 340, 341.

A decree cannot be used in a suit in favor of new parties, unless the same decree could have been used against the new parties had it been adverse. See 2 Peters' Digest, 539, §51 ; Pain's Cir. Court Rep., 196 ; 2 Stark. on Ev., 196, title Mutuality

Davis & Edwards, for Appellee.

Treat, C. J. In January, 1838, Simeon Ryder and Charles L. Frost recovered a judgment against John A. Halderman and Job Lawrence, in the municipal court of the city of Alton, for $279 08. In February, 1838, Krum, as executor of Emerson,

obtained a judgment against Halderman, in the Madison Circuit Court, for $533 48. In March, 1838, Halderman conveyed to John Sigerson, Wallace Sigerson and Enos H. Harrison, by deed of mortgage, a part of block one, and lot four in block twenty-four in the city of Alton, to secure the payment of certain promissory notes previously made by Halderman and Lawrence. In April, 1838, Fleming and others obtained a judgment against Halderman and Lawrence, in the Mnnicipal Court of the city of Alton, for $1,236 10; and, at the same time and before the same court Enos Litchfield obtained a judgment against Halderman and Lawrence, for $469 39. In July, 1838, Ryder and Frost recovered another judgment against Halderman and Lawrence, before the same court for $247 62. In October, 1838, Sigersons and Harrison recovered a judgment in the same court against Halderman, for $4,624 98; and under an execution issued thereon, they became the purchasers of the mortgaged premises for $1,900 and received a sheriff's deed therefor, in October, 1840. In August, 1840, Sigersons and Harrison conveyed to the State Bank of Illinois, by deed of mortgage with covenants of warranty, that part of block one embraced in the mortgage from Halderman, and purchased at the Sheriff's sale, to secure the payment of $4,196, within five years.

In April, 1841, Sigersons and Harrison filed a bill in Chancery, in the Madison Circuit Court, against Halderman Ryder, Frost and the other judgment creditors of Halderman and Lawrence, in which, after setting forth at large all the foregoing proceedings, but the mortgage to the State Bank of Illinois, they proceeded to state as follows: "Your orators under this state of facts, are informed and believe, that difficulties may arise in regard to the title of your orators to the said two pieces, parcels and lots of ground, so by your orators purchased at Sheriff's sale aforesaid, which, can only be remedied in a court of equity. Your orators, therefore, believing that they are entitled to the possession and ownership of soid lots or parcels of ground free and discharged of all liens, claims, or incumbrances, which the said John A. Halderman, or either of the said judgment creditors, may claim or pretend to set up, pray of your Honor, that the said John A. Halderman, Simeon Ryder, Charles L. Frost, Thomas Fleming, Charles McIntire, Jasper Corning, Sanderson Robert, Enos Litchfield, and John M. Krum, executor of Wil-

liam S. Emerson, deceased, may be required to make full, true and perfect answers to all and singular the charges above set forth, fully and particularly, according to the best of their knowledge, information and belief, as if the same were herein again repeated, and they interrogated thereto ; and that the defendants above named, and all persons claiming and to claim the said described lots or parcels of ground in said mortgage mentioned and set forth, may be barred of and from all claims of, in and to the said premises, and every part and parcel thereof, with the appurtenances ; and that your orator's title to the same may be confirmed." Process was served on the defendants, and, at the September term, 1841, the bill was taken for confessed, and a decree entered, that the defendants be forever barred of all claim to the premises in controversy, and that the complainants' title thereto be fully confirmed and established.

In September, 1842, Ryder and Frost assigned the judgment first recovered against Halderman and Lawrence to Buckmaster and Greathouse ; and, in November, 1844, under an execution issued thereon, Buckmaster became the purchaser of that part of block one, included in the mortgage to Sigerson and Harrison for $550, and afterwards obtained a Sheriff's deed therefor. In May, 1847, the State Bank of Illinois assigned and transferred to Simeon Ryder the notes and mortgage executed to it by Sigerson and Harrison. Ryder had actual notice of the sale to Buckmaster, when he received the assignment of the mortgage; and Buckmaster was well aware of the decree rendered in favor of Sigerson and Harrison, when he received the assignment of the judgment.

In January, 1848, Ryder, as the assignee of the Bank, filed this bill in chancery against Buckmaster and others, to foreclose the mortgage executed by Sigerson and Harrison. The foregoing state of facts appeared from the pleadings and proofs in the case. On the hearing, the Court made a decree, providing for the foreclosure of the mortgage, and directing, in case of default in the payment of the amount found to be due on the mortgage that Buckmaster be enjoined from asserting any claim to the mortgaged premises, by virtue of the purchase under the assigned judgment. To reverse that decree, Buckmaster has prosecuted an appeal to this Court.

The correctness of the decision made by the Court below, must

depend upon the effect to be given to the decree rendered in 1841, in the case of Sigerson and Harrison against Halderman and others. If that decree was binding on Ryder and Frost, who were then the owners of the judgment, it must be held to have the same effect against Buckmaster, who subsequently received an assignment of the judgment, with express notice of the decree. Under such circumstances, he could succeed to no greater rights than Ryder and Frost had as judgment creditors. If the decree operated to discharge the lien of the judgment on the premises now in controversy, the lien could not be revived by a transfer of the judgment to a party fully aware of the previous proceedings. The sole purpose of that suit was to quiet and confirm the title of Sigerson and Harrison to the premises in question. It was peculiarly a matter of equitable cognizance.(*a*) All of the parties interested in the property, except the State Bank of Illinois, were made defendants. The object of the proceeding was clearly set forth in the bill. The complainants claimed to hold the premises, free from all liens of the other judgment creditors af Halderman. The validity of their liens as against the complainants, was directly drawn in question by the allegations of the bill. The defendants were fully apprized of the grounds on which the complainants relied, and were distinctly called on, to meet and controvert their exclusive claim to the property. They were regularly brought before the Court, and an opportunity afforded them to set up and insist upon their rights. The Court thus acquired full jurisdiction of the subject matter of the suit, and of the persons of the parties; and it proceeded to enter decree affirming the title of the complainants to the premises. The decree was undoubtedly erroneous as to Ryder and Frost, and, in a direct proceeding for the purpose, might have been reversed. But, it by no means follows, that it can be declared invalid in this collaterial proceeding. The only inquiry now is, had the Court pronouncing the decree authority to adjudicate upon the rights of the parties in respect of the property; not whether its decision was in accordance with the principles of equity. If the Court had such authority, and proceeded to exercise it, the decree, however inequitable or erroneous, must be held binding when drawn in question collaterally. This is an inflexible rule of the law, which has been repeatedly recognized by this Court. Buckmaster v. Carlin, 3 Scammon, 104;

(*a*) Martin vs. Dryden, 1 Gil. R. 188.

Swiggart v. Harber, 4 *idid*, 364; Rigg v. Cook, 4 Gilman, 336; Young v. Lorain, 11 Illinois, 624. (*a*)

There can be no doubt of the validity of the decree. It is conclusive on the parties, while it remains in force. Its errors can only be inquired into and corrected, in a direct proceeding instituted for the purpose. The complainants were entitled to the full benefit of the decree. The confirmation of their title inured to the benefit of the State Bank of Illinois, to which they had previously mortgaged the property with covenants of title. The proceeding was not adverse to the Bank, but in furtherance of its interests. Although the Bank was a proper party, yet the fact that it was not made one, did not defeat the jurisdiction of the Court, nor prevent the decree from inuring to its benefit. From the rendition of the decree, the Bank held the premises discharged of the liens of the judgment creditors. It transferred all of its interests to the complainants in the present suit. He thereby succeeded to all of the rights derived by Sigersons and Harrison by the purchaser at the sheriff's sale, and by the decree establishing their title under that purchase. Buckmaster acquired no title by his purchase under the judgment, because the lien of the judgment, as respects this property, was previously divested by the decree. There is no force in the position, that Ryder is estopped by the assignment of the judgment from asserting title against a purchaser under it. He did not either expressly or by implication, covenant that the judgment was a subsisting lien on this particular property. He simply transferred whatever interest he then had as a judgment creditor. The decree already exempted this property from the operation of the judgment, but, in all other respects, it left the judgment in full force against Halderman and Lawrence.

The decree of the circuit court is affirmed, with costs.

Decree affirmed.

(*a*) Jones vs. Smith, 13 Ill. R. 306.

Ray *v.* Virgin.

AARON RAY, Pltff in Error, *v.* KINSEY VIRGIN, Deft in Error.

ERROR TO MASON.

In an action on a note given for goods bought at an administrator's sale, the purchaser may show, in defence to the note, that the administrator, knowing the contrary, fraudulently represented the goods to be sound.

The defendant, Kinsey Virgin, was administrator of an estate. At the sale of the personal property of said estate by said Virgin, the plaintiff in error bought two horses, and gave the note sued on. The suit was brought before a justice of the peace, and a judgment rendered against Ray for the amount of the note, and he took an appeal to the Circuit Court.

Upon the trial in that Court, the defendant below, proved that the sale of said horses was made by Ray in person, at a public auction. That he represented, that said horses were sound and free from all diseases, except the horse distemper; when in truth, said horses had the glanders and were of no value whatever, and this was known to the administrator when he made those representations, and therefore, that the note was given without any consideration, and was procured by the frand of said Virgin.

All this testimony was rejected by the Judge of the Circuit Court, upon the ground, that the false and fraudulent statements of the administrator, whereby he obtained this note for the use of the estate, were not admissible to prove that the note was without consideration; and the only remedy the maker of the note has in such a case is, to pay the note to the estate, and sue the administrator in his own right, and make him personally liable for the consequences of his fraud. This jury in the circuit court then gave a verdict for the amount of the note, and a judgment was rendered thereon. To reverse this judgment, this case is brought here, and the error assigned is the refusal of the circuit court to permit said evidence to go the jury.

M. MCCONNEL, for Pltff in Error, submitted this cause to the court *ex parte*.

CATON, J. The only question in this case is, whether a party who has given a note for goods purchased at an administrator's sale, may show in his defence to the note, that the admin-

strator fraudulently represented the goods to be sound, when he knew them to be unsound. This precise question was decided in the case of Rice *v.* Richardson, 3 Alabama, 438, where such a defence was held to be admissible. Of the correctness of that decision I entertain no doubt. It is sustained by every principle of reason, of justice, and of public policy. It would never do to allow administrators, and other fiduciary officers, to exert their ingenuity in perpetrating frauds, and by that means obtain the notes of individuals, and then allow them to say that they had committed the fraud, not for their own benefit but for that of the estate. Such an end cannot sanctify such means. There is no merit in the estate to authorize the enforcement of a demand thus obtained, more than their would be, had the fraud been committed by, and the note given to the intestate. It is not making the estate responsible for the fraud of the administrator, for it loses nothing as a penalty for that fraud, which originally belonged to it, but it is preventing the collection of a claim to which the estate has no just right. The contract is executory, and being founded in fraud, cannot be enforced. Had the contract been excuted, it might be impracticable to allow the money received, to be recovered back, and the injured party would have to seek redress against the administrator personally. But the rule must be different where the contract is executory.

To put an extreme case, yet one precisely within the rule contended for by the adminintrator. Let an administrator take a quantity of saw-dust found on the estate of his intestate, and put it up in chests, marked as a genuine article of tea imported from China, throw it into the market and sell it at auction for tea, as a part of the assets in his hands, for ten thousand dollars, and take notes for the amount, could the administrator be allowed to collect those notes? In that case it would be but poor consolation to the victims, while making them pay their notes, to satisfy the debts of others against an insolvent estate, to tell them that they may sue an irresponsible administrator, and make him answer personally for the fraud. Had this note been given to the intestate, under the same circumstance, no one would deny the admissibility of the defence, yet there would be just as much merit in the claim then as now. The law cannot sanction a fraud by enforcing a contraet impregnated with it.

If the administrator makes representations which he knows to be untrue, for the purpose of deceiving the purchaser, who is thereby deceived, without that degree of negligence on his part, which will throw the responsibility of the deception upon himself, we hold that he may show that fraud in defense to the note(*a*) This does not dispense with the application of the rule, *cav eat emptor*, to such sales. I know of no case where that rule has ever been so applied as to excuse a fraud. The utmost vigilance may often be unable to guard against the practices of the fraudulent. As has been repeatedly decided by this court, in the absence of fraud, the purchaser at such sale must not only look out for the title, but for the quality of the article which he putchases. Nor can the administrator bind the estate by a warranty of either. If he assumes to do so, he would be personally responsible upon such warranty. This is carrying the doctrine of risk to the purchaser and immunity to the estate far enough. To go farther, and sanction the practice of a fraud, would tend to drive all prudent men from such sales, which would prove a serious detriment to estates. The evidence should have been admitted. The judgment is reversed and the cause remanded.

Judgment reversed.

IRA STOUT, Pltff in Error, *v.* EDSON WHITNEY, Deft in Error.

ERROR TO ADAMS.

On demurrer to a declaration reciting a written contract and the circumstances under which it was made, the writing must be construed in the light presented by the declaration. The defendant cannot demur, and then suggest that other circumstances may exist, which if true, would show that the parties intended to express a different meaning.

In the construction to be given to written instruments, the intention of the parties must govern; and each part of the instrument must be viewed in the light of the other parts, in order to arrive at that intention.

If demurrers are filed to each of several counts in a declaration, assigning different breaches of a contract, if there is one good assignment in a count, the demurrer must be overruled.

This was an action of covenant brought on an agreement between the parties, which will be found in the following count, which was the fourth of the declaration. Demurrers were filed to each of the counts to which there was a joinder, and the Cir-

(*a*) Mason vs. Wait, 4 Scam. R. 135; England vs. Clark, 4 Scam. R. 489; Welch vs. Hoyt, 24 Ill. R. 118; Linton vs. Porter, 31 Ill. R. 120.

cuit Court of Adams County, Minshall, Judge, presiding, sustained the demurrers, whereupon the plaintiff in the Court below sued out this writ of error. The judgment in the circuit court was rendered at October term, 1850.

And also for that, Whereas before the making of the articles of agreement hereinafter mentioned, to wit: on the 20th day of March, A. D. 1848, the said plaintiff of the one part, and the said defendant of the other part, made their certain other articles of agreement, under their respective hands and seals of that date, in substance as follows, to wit: Articles of agreement made and entered into this 20th day of March, 1848, between Ira Stout of the one part, and Edson Whitney of the other part, both of Hancock county, Ill., witnesseth, that the said Stout and Whitney have agreed and entered into the following arrangements in regard to carrying on their mercantile business in the town of Lima, Adams county, Ill., to wit: The said Stout agrees to furnish a quantity of goods and groceries, &c., &c., to the said Whitney, in the town of Lima, all to his own expense, account, and usage, and pay the rent of the store room rented of Ketcham, also furnish said Whitney from time to time such goods as most suitable for sale, said Whitney on his part has to give his personal services to the establishment, manage, sell, and take good care of said goods, all to his own expense and discretion and on the sale of said goods, the profits arising therefrom is to be equally divided between the parties. The said Whitney agrees to return to the said Stout all the goods which are not sold at the expiration or close of their contract. It is agreed by the parties, that if any dissatisfaction should arise between the parties, either may withdraw on reasonable and proper terms, to be decided by three disinterested persons. It is agreed, that whatever articles the said Whitney may use for his own family, are to be charged at cost. The said Whitney agrees to take good care of said goods in every possible manner, but is not responsible for any unavoidable accidents to said goods. Neither of the parties are to make use of the other's name without their written consent. The terms of this agreement shall cease, and be at an end, at the expiration of one year from this date; which said articles of agreement were in full force, from the time of the making thereof, until the time of the making the said articles of agreement hereinafter mentioned, and are the same articles of agree-

ment mentioned in said articles of agreement hereinafter mentioned. And also for that, whereas, the said plaintiff at the time of the making the said articles of agreement, hereinafter set out, and for a long space of time thereafter, to wit: For the space of three months thereafter, was engaged in the mercantile business, and had a store near Stimpson's Mill, in the county of Hancock, in said State. And also for that, whereas the said plaintiff, after the making of the said articles of agreement hereinbefore set out, and under, and in pursuance thereof, and before the making of the said articles of agreement hereinafter mentioned, furnished, and delivered to the said defendant, a certain lot of goods of the said plaintiff, out of his, the said plaintiff's said store, to be disposed of, and accounted for, by the said defendant according to the effect, true intent, and meaning of the said articles of agreement hereinbefore set out, and also furnished, and rendered to the said defendant, a bill of the same; which said lot of goods was the first lot of goods furnished, and delivered by the said plaintiff, to the said defendant, under and in pursuance of the said articles of agreement herein before set out, and are the same goods mentioned, in the said articles of agreement hereinafter mentioned, as having been furnished by the said Stout, out of the former store near Stimpson's Mill. And also for that, whereas, the said plaintiff after making of the said articles of agreement hereinbefore set out, and under, and in pursuance thereof, and also after the said lot of goods above mentioned, were furnished and delivered to the said defendant, as hereinbefore stated, and before the making of the said articles of agreement hereinafter mentioned, purchased at his own proper cost and charges, divers and sundry goods in the city of St. Louis, for the said Lima store, which said goods last mentioned were, before the making of the said articles of agreement hereinafter mentioned, furnished and delivered to the said defendant, for the said Lima store, and are the same goods mentioned in the said articles of agreement hereinafter mentioned, as having been purchased in St. Louis, for the said Lima store, before the making of the said articles of agreement hereinafter mentioned, to be there disposed of and accounted for, by said defendant, according to the effect, true intent, and meaning of the said articles of agreement hereinbefore set out. And also for that, whereas, at the time of the making of the said articles of agreement hereinafter men-

tioned, divers and sundry of the said goods had been sold by the said defendant, on credit, for which the said defendant, at the time of the making of the said articles of agreement herein after mentioned, held diverse and sundry book accounts, notes, and claims on and against the purchasers thereof, which said notes, book accounts, and claims, are the same book accounts, notes, and dues, mentioned in said articles of agreement, hereinafter mentioned, as having been contracted on account of said goods, or store in Lima. And also for that, whereas, at the time of the making of the said articles of agreement herein after mentioned, divers and sundry of the goods, herein before mentioned as having been furnished and delivered by the said plaintiff to the said defendant, remained unsold, and were then in the said store at Lima, which said goods so remaining unsold as above stated, and the same goods mentioned in the said articles of agreement hereinafter mentioned, as goods then, to wit: at the time of the making of the said articles of agreement hereinafter mentioned, on hand, and the said plaintiff and the said defendant being so situated as hereinbefore stated, and shown with respect to each other, and with respect to the aforesaid matters and things heretofore, to wit; on the 18th day of December. A. D. 1848, to wit: at the said county of Adams, made and concluded their certain other articles of agreement of that date, sealed with their seals respectively, and now to the Court here shown, in the words and figures following, to wit: whereas, that an article of agreement is now existing between Ira Stout of St. Louis, of Missouri, and of Edson Whitney, of Adams county, Illinois, concerning the sale of goods in Lima, Illinois, wherein said Stout has furnished said Whitney, various kinds of goods, and said Stout, being desirous of selling to said Whitney all the goods now on hand, including all book accounts, notes, and all dues due the concern, of every nature, contracted on account of said goods or store in Lima, have this day bargained and sold, and by these presents sell to said Whitney on the following terms, to wit: the said Whitney is to have the first lot of goods, furnished by said Stout, out of his former store near Stimpson's Mill, at cost, after making reasonable deductions on articles overcharged in bill rendered, and on all goods laid in and purchased in St. Louis for the said Lima store, the said Whitney agrees to pay the said Stout the original cost and five

per cent. on each dollar so purchased; the said Stout agrees to take in payment of said goods all kinds of merchantable produce delivered at Quincy or Warsaw at the maket prices of said places, where such produce may be delivered as aforesaid, such as corn, wheat, oats, barley, dried hides, beeswax, bacon, lard, furs and peltries. The said Stout agrees to furnish a good corn-sheller and sacks to put grain in, and pay all charges of storage, and whenever any such articles are delivered and stored, the said Stout agrees to run all risks, accidents or fall in prices; the prices is to be regulated according to the date delivered, the said Whitney agrees to deliver to the place or places aforesaid, all such articles of produce aforesaid as he can conveniently on or before the first day of June next; and on a final settlement of all just dues and demands now existing between the said Stout and the said Whitney, the said Stout agrees to give the said Whitney twelve months from the first of March next, with six per cent. interest on the latter payment; the said Whitney agrees to pay four promissory notes signed by said Whitney as security for said Stout, amounting to three hundred and thirty four dollars and ninety-nine cents, given on account of judgment rendered in the Circuit Court of Hancock county, by arbitration, which sum is considered as part payment in consideration of said goods, said judgment was rendered in favor of Chester Stimpson, and against said Ira Stout

In testimony whereof, the said Ira Stout and Edson Whitney have hereunto set their hands and seal this 18th day of December, A. D. 1848.

Attest, DANIEL KETCHUM. IRA STOUT. [Seal.]
EDSOM WHITNEY. [Seal.]

And the said plaintiff avers, that the cost of the aforesaid first lot of goods furnished by the said plaintiff to the said defendant, out of his, the said plaintiff's said former store near Stimpson's Mill, amounted to a large sum of money, to wit: the sum of three thousand dollars, after making reasonable deductions on articles overcharged in bill rendered; and the said plaintiff further avers, that the said goods, laid in and purchased in St. Louis for the said Lima store, originally cost in St. Louis, a large sum of money, to wit: the sum of seven thousand dollars; and that five per cent. on each dollar of the said cost of the same amounted to a large sum of money, to wit: the sum of three

hundred and fifty dollars ; and so the said plaintiff says that the price covenanted to be paid by the said defendant to the said plaintiff, in and by the said last mentioned articles of agreemenh for the goods, book accounts, notes and dues thereby sold by the said plaintiff to the said defendant, amounted to a large sum of money, to wit : the sum of ten thousand three hun dred and fifty dollars, to wit : at the county of Adams aforesaid.

And the said plaintiff further avers, that the said prices of the said goods, book accounts, notes and dues, last abo v e mentioned, amounted to a large sum of money, to wit : the sum of ten thousand dollars, after deducting therefrom the amount of the said four promissory notes in the last mentioned articles of agreement mentioned to wit : at the said county of Adams.

And the said plaintiff avers, that he hath ever been ready and willing to perform and fulfil, and that he hath well and truly performed and fulfilled all and singular the covenants and agreements in the said articles of agreement last here in before mentioned, contained on his part and behalf to be done and performed according to the effect, true intent and meaning thereof.

Yet the said plaintiff in fact says, that the said defendant hath not paid the residue of the said price of the said goods, book accounts, notes and dues sold by the said plaintiff to the said defendant, by the said last mentioned articles of agreement, which remains after deducting from the said price, the amount of the said four promissory notes ; and that he hath not delivered to the said plaintiff, either at said Quincy or Warsaw, any merchantable produce in payment thereof, although the time for the payment of the same hath long since elasped.

And for assigning a further breach in this behalf, the said plaintiff further avers, that the said price of the said goods, book accounts, notes and dues, sold by the said plaintiff to the said defendant, by the said last mentioned articles of agreement, after deducting therefrom the amount of the said four promissory notes, in the said last mentioned articles of agreement mentioned, and all just debts and demands in favor of the said defendant, and against the said plaintiff, existing at the time of the making of the said last mentioned articles of agreement, amounted to a large sum of money, to wit : the sum of ten thousand dollars. Yet the said plaintiff in fact says, that the said defendant hath not paid the residue of the said price of the said goods, book

accounts, notes and dues, sold by the said plaintiff to the said defendant, by the said last mentioned articles of agreement, which remains after deducting therefrom the amount of the said four promissory notes, in the said last mentioned articles of agreement mentioned, and all just dues and demands in favor of the said defendant and against the said plaintiff, existing at the time of making the said last mentioned articles of agreement, and the said defendant hath not, since the making of the said last mentioned articles of agreement, hitherto delivered to the said plaintiff, either at said Quincy or Warsaw, or elsewhere, any merchantable produce in payment of the said residue, although the said residue long since became due and payable, to wit: at the said county of Adams.

And the said plaintiff, for assigning a further breach in this behalf, further says, that the said defendant, before the making of the said articles of agreement in the introductory part of this count mentioned, to wit: at the said county of Adams, was justly indebted to the said plaintiff in the sum of five hundred dollars, for other goods before that time bargained and sold by the plaintiff, to the defendant at his request, and for other goods before that time sold and delivered by the plaintiff, to the defendant at his request, and for money, by the said plaintiff before that time, lent and advanced to, and paid, laid out, and expended for the said defendant at his like request; and for money before that time had and received, by the said defendant, to and for the use of the said plaintiff, and the said plaintiff further avers that the said indebtedness continued and was a just demand from the said defendant to the said plaintiff, existing at the time of the making of the said articles of agreement last here in before set out, to wit: at the said county of Adams. And the said plaintiff further avers, that the said indebtedness last above mentioned, together with the said price of said goods, book accounts, notes and dues, sold by the said plaintiff to the said defendant, by the last mentioned articles of agreement, after deducting from the said price the amount of the said four promissory notes in the said last mentioned articles of agreement mentioned, amounted to a large sum of money, to wit: the sum of ten thousand dollars, after deducting therefrom all just dues and demands in favor of the said defendant and against the said plaintiff, existing at the time of the making of the said last

mentioned articles of agreement, to wit: at the said county of Adams.

Yet the said plaintiff in fact says, that the said defendant hath not paid the said residue of the said indebtedness above named, and the said price of the said goods, book accounts, notes and dues, sold by the said plaintiff to the said defendant, by the said last mentioned articles of agreement, which remains after deducting therefrom the amount of the said four promissory notes, in the said last mentioned articles of agreement mentioned, and all just dues and demands in favor of the said defendant and against the said plaintiff, existing at the time of the making of the said last mentioned articles of agreement, and that the said defendant hath not delivered to the said plaintiff, either at said Quincy or Warsaw, or elsewhere, any merchantable produce in payment thereof, although the time for the payment of the same hath long since elapsed, to wit: at the said county of Adams.

And for a further breach in this behalf, the said plaintiff further avers, that before the making of the said articles of agreement, in the introductory part of this count mentioned, to wit: on the first day of March, 1848, to wit: at the said county of Adams, the said defendant was justly indebted to the said plaintiff in the sum of five hundred dollars for other goods, before that time, bargained and sold by the said plaintiff to the said defendant at his request; and for other goods before that time sold and delivered by the said plaintiff to the said defendant, at his request; and for money by the said plaintiff, before that time, lent and advanced to, and paid, laid out, and expended for the said defendant, and at his like request; and for money before that time had and received to and for the use of the said plaintiff; and the said plaintiff further avers that the said indebtedness last above named, existed and was a just demand in favor of the said plaintiff and against the said defendant, at the time of the making of the said articles of agreement last heretofore set out, after deducting all just dues and demands in favor of the said defendant and against the said plaintiff, existing at the time of the making of the said last mentioned articles of agreement. Yet the said plaintiff in fact says, that the said defendant hath not paid the said indebtedness last above named, as by the said last mentioned articles of agreement he covenanted to do, although the time for the payment of the same hath long

since elapsed, to wit: at the said county of Adams. And so the said plaintiff saith that the said defendant hath not kept with him the covenants so made between them as aforesaid, in the said several counts of this declaration, but hath broken the same, and to keep the same with the said plaintiff the said defendant hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff of ten thousand dollars.

And therefore he sues, &c.

A. Wheat, with whom was Warren and Edmunds, made the following points for the pltff in Error.

To constitute a partnership as between the parties themselves, it is necessary that there should be a community of property, or joint interest in the capital stock of the business, and a personal responsibility of each party, for the partnership engagements. 3 Kent's Com., 24; Waugh v. Carroll *et al.*, 2 H. Blackstone, 246.

The agreement between the parties, of the 20th of March, 1848, did not create a partnership. Hosketh v. Blanchard *et al.*, exrs of Blanchard, 4 East, 143; Rice v. Austin, 17 Mass., 197; Bailey v. Clark, 6 Pick., 372; Heran v. Hall, 1 B. Monroe, 159; Loomis v. Marshall *et al.*, 12 Conn., 69.

But if it did, this action would nevertheless lie. Glover v. Tuck *et al.*, 24 Wend., 158; Lyon v. Malone, 4 Porter, 497; Gibson v. Moore, 6 N. H., 550; Duncan v. Lyon, 3 John. Ch., 362; Rockwell v. Wilder, 4 Met., 562; Rogers *et al.*, Ex., &c., v. Rogers, 1 Hall, 393; Frink *et al.*, v. Ryan, 3 Scam., 322.

The covenant by plaintiff in the agreement of the 18th of December, 1848, to furnish sacks and a corn sheller, was not a condition precedent. Bennett v. Executors of Pixley, 7 John., 249; Tompkins v. Elliott, 5 Wend., 496; McKee v. Ruth *et al.*, 5 Gil., 315; 1 Ch. Pl., 320, 323. Nor was the covenant to settle. Frink *et al.*, v. Ryan, 3 Scam., 322; Baits v. Peters, 9 Wheaton, 556. As to averments and assignment of breaches, see Potter v. Bacon, 2 Wend., 583; 1 Ch. Pl., 332, 370, 375, 664; Com. Dig. Pleader C., 45–6.

Browning & Bushnell and Williams & Lawrence, for Deft in Error.

CATON, J. With the view we are disposed to take of this case, it is a matter of no moment whether the parties were partners prior to the execution of the agreement of the 18th of December, 1848, or not. Whatever else may be said of that agreement we think it clear that the partnership, admitting that one had existed, was by that agreement dissolved, and the interest of Stout in the assets of the concern, were transferred to Whitney. That agreement is far from being skillfully drawn, and objections may be raised to any construction which may be given it. This is another of the thousand instances, which are constantly occurring, where the parties, during a negotiation, probably arrive at a perfect understanding, and then when they come to reduce their agreement to writing, only express some of the leading features of their understanding, and those only in an imperfect and inconsistent manner, not reflecting that others ignorant of the detail of the mattersabout which they are negotiating would have difficulty in perceiving what, to their own minds, was perfectly apparent. In such cases something must necessarily be intended, but above all it is indispensibly necessary, in order to arrive at their meaning, that we should place ourselves as far as possible in the position of the parties, when they made the contract, by possessing ourselves of the circumstances which they had in their view during the negotiation. When, as in this case, the construction is to be given to the instrument, as it appears in the declaration, we must look alone to those circumstances as there recited or averred, for assistance in arriving at the meaning of the instrument. If those circumstances are improperly or imperfectly stated in the declaration, the other party cannot demur, and then suggest, that other circumstances may exist, which if true, would show that the parties had something else in view, and meant to express a different meaning from that which would be understood, in view of the facts stated in the declaration. It is for the defendant to show the existence of those circumstances in contemplation of which, the parties made the contract, and which might serve to show what they meant. Here the question being raised by a demurrer, the contract must now be construed in the light presented in this declaration.

According to the declaration, the circumstances in view of, and about which, this contract was made, are, that in the March previous, the parties had,—if you please,—entered into partner-

ship, by the terms of which, the plaintiff was to furnish a store and a stock of goods, and the defendant was to sell the goods, and that the profits should be equally divided between them. In pursuance of that agreement the plaintiff furnished goods, some from his store near Stimpson's Mills, and others purchased and forwarded from St. Louis. A portion of these goods had been sold by the defendant, for which various notes, book accounts and demands were due the concern, and a remnant of the goods still remained unsold. Previous to the time when the contract was made, the defendant had become security with the plaintiff on certain notes which were yet unpaid. In view of these circumstances, the contract was made. And now, what was the character of that contract, and what its object? Beyond all doubt, it was a contract of bargain and sale; and if we can ascertain what was intended to be sold, what the measure of compensation, and how payment was to be made, we shall then have arrived at the intention of the parties.

This contract, in its recital, after alluding to the existence of the original agreement, states that Stout had furnished to Whitney various kinds of goods, and that Stout was "desirous of selling to Whitney all the goods now on hand including all book accounts, notes, and all dues due the concern, of every nature and character, on account of said goods or store in Lima; have this day bargained and sold, and do by these presents sell to said Whitney on the following terms, to wit; &c." Now what was sold, the granting part of the contract does not state, and yet we cannot doubt that Stout intended to sell what is attempted to be described in the previous recital. In that recital it is manifest that the parties did not understand the value and meaning of some of the words used, and but for the explanation which they have given, we should never have thought that the parties understood, that the word goods included choses in action. This very sentence shows how unsafe it would be to adhere to the literal meaning of the words of the contract, in order to ascertain the intentions of the parties, when it is manifest they did not understand the true value of the words they used. We must as far as possible, make the parties their own interpreters, and allow one part of the contract to explain another part, as far as possible. Here, by the subsequent words, we see the parties have attempted to explain what they meant by the use of the

word goods, and yet I think it subsequently appears, that they were equally ignorant of the meaning of the words used in explanation. It was doubtless the intention of the parties to express in this recital the subject matter of the sale, but they have failed in doing so. I am of opinion that they intended to embrace in this sale, not only all of Stout's present interest in all of the assets of the concern, but also all interest which he ever had in the goods or there proceeds. That they intended to place themselves and their relative rights and liabilities, in precisely the same condition that they then would have been in, had no partnership or mutual interest ever existed. That they intended to occupy the same position which they would have occupied, had Whitney originally purchased the goods of Stout. That they intended by the new contract to supercede the partnership arrangement—to set aside all that had been done under it, and to create new rights and liabilities, precisely of the character which would then have existed, had a contract of sale been made of the goods at the time they were delivered, with the amount to be paid for them, and mode of payment, precisely as is stipulated in this contract. This I think is manifest from what immediately succeeds the part above quoted, which is as follows: "The said Whitney is to have the first lot of goods furnished by said Stout out of his former store near Stimpson's Mill, at cost, after making reasonable deduction on articles overcharged in bill rendered; and on all goods laid in and purchased in St. Louis for said Lima store. And said Whitney agrees to pay said Stout the original cost, and five per cent. on each dollar so purchased." Now this, while it serves to fix the measure of compensation, to be paid for the purchase, also serves to show, more satisfactorily than any other part of the contract, the nature of the transaction, and the character and extent of the sale. They say Whitney is to have the first lot of goods furnished from Stout's store, on certain terms, and the goods purchased in St. Louis on certain other terms. It is true that he could not presently have those goods for he had already had those goods, many of them had been disposed of, but still the mode of expression is not very inaccurate, and certainly not very uncommon, for the purpose of changing the terms of a transaction, which had originally been settled upon differently, or for the purpose of fixing the terms of a transaction, which had not pre-

viously been defined. Thus if one party furnishes goods to another, either with or without specified terms, when they subsequently come to negotiate and settle, nothing is more common than for the party to say, you shall have the first lot of goods on such terms, or for so much less than I agreed to take, and the second lot, for which no price was fixed, you shall have for so much. In the first instance, if the proposition were agreed to, it would supercede the original contract and create new rights and liabilities, growing out of the original transaction, precisely as was done in this case, and those rights and liabilities would be determined precisely as if no original contract had ever been made, and would depend entirely upon the new agreement. Such must have been the intention of the parties here. The whole agreement must be taken together, in order to arrive at the intention of the parties. The expression of one part must be taken in connection with those of another.

Then follows a provision in relation to the mode of payment, which, as no question is raised upon it, need not be particularly examined. A difficulty was however suggested, growing out of a subsequent clause providing for a postponement of a part of the payment. It is this: "and on a final settlement of all just dues and demands now existing between the said Stout and the said Whitney, the said Stout agrees to give the said Whitney twelve months from the first day of March next, with six per cent. interest on the latter payment." It is true, as was urged, that this contemplates a future settlement, but it does not follow that that was to be a settlement of the partnership transactions, as they had originally existed. It does not follow because the parties did not account together and strike a balance, that they did not dissolve the partnership in such a way as to supercede the necessity of taking an account of the profits and losses of the concern. The manifest object of the agreement was to avoid the necessity of such an accounting and to establish a new basis upon which their transactions were to be settled. Upon the basis thus established, a court of law is perfectly competent to determine the rights of the parties; as much so as if there had never been a community of interests in the business. The expression: "All just dues and demands" is broad enough to include individual dealings if any such had previously existed, as well as the rights created by the contract, and growing out of

their mutual dealings. It is unnecessary to inquire what was meant by "The latter payment," because the twelve months had expired before this action was commenced.

Following the clause last quoted, is the provision that Whitney should pay the three notes, on which he was security for Stout, and then, it is provided as follows: "Which sum is considered as part payment in consideration of said goods." This provision is in harmony with the view already expressed, that it was the intention of the parties to make Whitney occupy the position of an original purchaser of the goods.

It is to no purpose to suggest, that Whitney may have remitted to Stout, a part of the proceeds of the goods sold, and then object that no provision is made for such a state of case. No such fact is shown to exist. If it did, and that would in any wise vary the construction of the instruments, it is for the party claiming a benefit from it to show it. But if such remittances were shown, we do not think it would change our construction of the contract. If we are correct in this view that it is the intention of the parties to make Whitney occupy the position of an original purchaser of the goods, and that the rights and liabilities of the parties are to be determined upon that basis, then of course Whitney would have to be credited with such remittances as so much purchase money paid.

Although the construction which we give to the contract may perhaps differ somewhat, from that given in the first, second and fourth counts of the declaration, yet the difference is not of such a character as to effect the validity of the declaration. Objections were made in some of the assignments of breaches, but as the demurrers are to each count entire, if there is one good assignment in the count, the demurrer must be overruled. It may be proper to refer to one of the assignments, to which particular objection was made. In that assignment it is stated, that the defendant was, previous to the formation of the partnership, indebted to the plaintiff for goods sold, money lent, &c., which he had refused to pay, as by the covenant, he had agreed to do. This we think is a misapprehension of the covenant. The only clause of the contract, upon which any reliance can be placed to support this assignment, is the one last quoted. That clause however, does not obligate the defendant to pay those old debts, but it postpones the right of the plaintiff, to demand the paymen

of those demands till March, 1850. It was inserted for the benefit of the defendant and not of the plaintiff.

The third count was abandoned on the argument, and it is unnecessary to examine it. To the other three counts the demurrer was improperly overruled.

The Judgment is reversed and the cause remanded, with leave in the defendant to plead to the merits.

Judgment reversed.

NICHOLAS A. GARLAND, Pltff in Error, *v.* ISAAC S. BRITTON, Deft in Error.

ERROR TO SANGAMON,

All process issuing from the Circuit Court, must be sealed with the judicial seal thereof, if there is any. If there is no seal, the clerk must affix his private seal, and certify that no public seal has been provided.

The service of an unsealed writ is without vitality, and unless the defendant appears, a decree or judgment is unauthorized. (*a*)

This was a bill filed to foreclose a mortgage. The process served, was not attested by any seal. At the return term, the bill was taken for confessed, and a decree was entered by Treat, Justice, at November term, 1847. The plaintiff in error now seeks to reverse the judgment of the Circuit Court, and assigns for error, the want of a seal to the summons.

STUART and EDWARDS for Pltff in Error.

S. T. LOGAN for Deft in Error.

TREAT, C. J. This was a suit in chancery to foreclose a mortgage. The summons issued and served on the defendant was not under the seal of the Court. The bill was taken for confessed, and a decree of foreclosure entered. The defendant sued out a writ of error. The statute declares that "all process issuing from the said Circuit Courts, shall be sealed with the judical seal which shall be provided for that purpose; but in case there shall not be a judicial seal, the clerk shall affix his private seal until a public one shall be provided." R. S. ch. 29, §40. This statute is imperative in its requirements. If a Court has a

(*a*) Besimer vs. People, 15 Ill. R. 440.

judicial seal, it must be affixed to all of its process; if it has not, the clerk must use his private seal, but he ought in such case to certify that no public seal has been provided, for the presumption is that every court has a seal. The writ in this case did not purport to be under the seal of the court, nor the private seal of the clerk. It was, therefore, without vitality, and the service of the same was without effect. (*a*) The defendant not being before the court, by the service of process, or by appearing in the case, the decree was unauthorised, and must be reversed. See Hannum *v.* Thompson, 1 Scammon, 238; and Anglin *v.* Nott, ibid, 395.

Decree reversed.

HENRY MCHENRY, Pltff in Error, *v.* THOMAS WATKINS, Deft in Error.

ERROR TO CASS.

It is error, to overrule a motion to quash an execution issued, after the judgment on which it is based is satisfied.

This was a proceeding by motion in the Cass Circuit Court, to set aside an execution issued upon a judgment in favor of Watkins, against McHenry and another, upon the ground that the judgment upon which the execution had been issued was satisfied. The record shows that a notice of the proposed motion to quash had been given, and an order to stay proceedings upon the execution, under the provision of section 46, of chapter 83, of the Revised Statutes, was granted by the Circuit Judge.

The motion came on for hearing at November term, 1850, before Minshall, Judge, who denied the same

LINCOLN & HERNDON, for Pltff in Error.

WM. THOMAS, for Deft in Error.

TREAT, C. J. On the 20th of May, 1845, Watkins recovered a judgment against McHenry and Perkapile, for $462.64.

(*a*) Bonnett vs. Neely, 43 Ill. R. 288.

McHenry *v.* Watkins.

On the 18th of May, 1845, by virtue of an execution issued on this judgment, the sheriff sold to Watkins several tracts of land as the property of McHenry, for the aggregate amount of $350. On the first of March, 1847, Perkapile paid Watkins, on account of the judgment, $270.25. At the October term, 1848, Watkins entered a motion to set aside the sale of two of the tracts of land, which were bid off for the sum of $75 each, on the ground that McHenry had no title thereto; which motion the Court sustained in these words: "It is ordered that the sale of said lands be set aside and held for naught, and that plaintiff have execution upon his judgment for the amount for which said lands were sold." On the 26th of February, 1849, an execution issued on the judgment, on which the clerk endorsed as credit.. $200 made by the sale of land, and $270. 25 paid by Perkapiles The sheriff returned this execution satisfied in full. On the 9th of July, 1849, another execution issued, on which the clerk directed the sheriff to collect the sum of $150, and interest from the 18th of May, 1846. At the October term, 1849, McHenry entered a motion to quash this execution. During the same term, the sheriff, by leave of the court, so amended his return on the execution of the 26th of February, 1849, as to show the receipt of $68.57, which sum he and McHenry at the time supposed to be the true amount due on the judgment. At the succeeding term; the court overruled the motion made by McHenry to quash the execution; and that decision is assigned for error.

The court erred in refusing to quash the execution. The judgment was fully satisfied by the payment made on the previous execution. The clerk seems to have construed the order of the court setting aside the sale of the two tracts of land, as a specific direction that the plaintiff should have execution for $150. The order was not intended to have that effect. Allowing the sale of the two tracts to stand, the judgment was already overpaid; vacating the sale as to them, the amount actually due on the judgment was collected on the execution of the 26th of February, 1849. The order amounted to but this; that the sale of the two lots of land should be set aside, and the plaintiff should have execution for whatever balance might be due on the judgment, after crediting it with $200, made by the sale of McHenry's land, to which there was no objection, and the further sum of $270. 25, paid by the other judgment debtor. This

balance having been paid, the issuing of the execution in question was irregular and unauthorized.

The judgment of the Circuit Court must be reversed, with costs; and the cause will be remanded, with directions to that Court to quash the execution.

Judgment reversed.

AHIJAH WHITECRAFT, *et al.*, Pltffs in Error, *v.* HORATIO M. VANDERVER, Deft in Error.

ERROR TO CHRISTIAN.

In an action of debt, brought under the 1st Sect. of the 104 ch. of the R. S. for cutting, felling, &c., trees, it is necessary to allege in the declaration that the trees were felled without having first obtained permission so to do from the owner of the land, and the want of such an averment is fatal even after verdict. In order to make a party liable under this statute, all the facts upon which the statute creates the penalty must be alleged. It is not, however, necessary to allege in the declaration that the acts complained of were done contrary to the form of the statute, provided that it clearly appears from the declaration that the action is founded on the statute.

In order to subject a party to the penalties of this statute, he must have committed the acts knowingly and wilfully.

The declaration should also set out and distinguish the different classes to which the trees felled belong, there being different penalties annexed to the felling of different trees.

This was an action of debt brought in the Christian Circuit Court, to recover a penalty under the statute for cutting trees. The declaration contains but one count, which is as follows, that they (the defendants) render unto the plaintiff the sum of eleven hundred and sixty-six dollars, which they owe to and unjustly detain from him;—For that whereas heretofore, to wit: on, &c., and from thenceforward continually, until the bringing of this suit, at, &c., the said plaintiff was the owner of certain land (describing it) and that the said defendants, on, &c., and on divers other days and times, before the bringing of the suit, did fell sixty-eight elm trees, sixty-eight elm saplings, &c., &c., which said trees and saplings theretofore and up to the times of felling the same, as aforesaid, were standing and growing upon the land aforesaid, belonging to the plaintiff, as aforesaid. By reason whereof, and by force of the statute in such case made and pro-

vided, an action hath accrued to the said plaintiff, to demand and have of and from the said defendants a large sum of money, to wit: the sum of eleven hundred and sixty–six dollars, above demanded, yet, &c., to the damage of the plaintiff of two hundred dollars. To this declaration there was a demurrer and joinder, and a plea of *nil debit* and issue joined thereon. The declaration was ameded, and the cause was submitted to a jury, and a verdict was found for plaintiff for $476, Davis, Judge, presiding. The cause was tried at a special term in August, 1850.

Motion for a new trial and arrest of judgment were made and overruled.

W. J. Ferguson, for Pltff in Error.

The judgment should have been arrested.

The declaration does not allege either that the trees were cut *vi et armis*, or that they were cut without permission of the owner.

That it was without permission of the owner is a material and essential averment, and its omission is fatal to the declaration. It is a general rule of pleading that, in declaring upon a penal statute, the offence must be brought within the statute description, and the rule is well settled. The want of the owner's consent, forms a constituent part of the offence created by the statute. The declaration is fatally defective without the averment, and the omission is not cured by verdict. Little *v.* Thompson, 2 Greenl., 230 ; Williams *v.* Hingham, 4 Pick., 344, 347 ; Spencer *v.* Overton, 1 Days, 183.

In action upon statute for a penalty, the plaintiff must aver a case which brings the defendant within the act. He must negative the exceptions in the enacting clause, though he throw the burden of proof on the other side, and the omission is not cured by verdict. Spiers *v.* Parker, 1 T. R. 141, Per Mansfield, C. J. ; Bigelow *v.* Johnson, 13 Johns., 429 ; Morvel *v.* Fuller, 7 Johns., 403, Saper *v.* Harvard College, 1 Pick., 178 ; Drowne *v.* Stempson, 2 Mass., 444 ; Williams *v.* Hingham, &c., 4 Pick. 345 ; Wright *v.* Bennett, 3 Scam., 259 ; Whitesides *et ux*, *v.* Divers, 4 Scam., 336 ; Edwards *v.* Hill, 11 Ill., 24 ; Daggett *v.* Connecticut, 4 Conn., 60 ; Booth *v.* State, 4 Conn., 67 ; Leonard *v.* Bosworth, 4 Conn., 424 ; Eustis *v.* Kidder, 39 Maine, 98.

The declaration does not aver that the offence was committed against the form of the statute.

In penal actions upon statutes, the declaration must conclude "against the form of the statute," or contain that allegation in some part of it, and the omission of this averment is not cured by verdict.

"Whereby, and by force of the statute in such case made and provided an action hath accrued, &c.," is not sufficient. Fife *v.* Bonsfield, 51 Com. Law R., 100 ; Lee *v.* Clark, 2 East 333 ; Sears *v.* U. States, 1 Gal., 257 ; Smith *v.* U. States, 1 Gal., 261 ; Nichols *v.* Squire, 5 Pick, 169 ; Peabody *v.* Hayt, 20 Mass. 39 ; Wells *v.* Iggulden, 3 Barn. & Cresw., 186 ; the People *v.* Barstow, 6 Cowen., 291 ; Haskell *v.* Moody, 9 Pick., 162.

Lincoln & Herndon, for Defts in Error.

1. The Statute of this State to prevent trespassing upon and cutting timber is not a purely penal Statute, but a kind of remedial one—at least not penal. 13 Pick., 100 ; 6 Iredell, 352 ; 10 Missouri, 781 ; 1 Blackstone Com., 87 note.

2. It is not necessary to prove that the defendants wilfully and maliciously trespassed upon the land and cut the timber. It was a defence once to a certain extent, but that extent was repealed in 1833. Revised Laws, 604, sec. 6, and the repealing clause following sec. 1 ; 6 Blackford, 258 ; 5 Mass., 341.

3. It was a joint act ; they were tenants in common of the land which they owned, and all were seen cutting upon the land. The acts of one, where a pre-concert has been proved, is the act of all ; Greenleaf's Evidence, Secs. 108—171 ; 10 Wendell, 654 ; 5 Mass., 266.

4. The plaintiffs urge, without cause, that there should have been a new trial, and that judgment should have been arrested. 12 Gill & Johnson, 484 ; 6 Iredell, 352 ; 13 Pickering, 100 ; 17 Wendell, 87 ; 1 Cowen, 584.

Trumbull, J. All the facts stated in the declaration may be true, and yet the defendants below have committed no act that would subject them to this action. It is not alleged that they felled the trees without having first obtained permisssion so to do from the owner of the land, nor even that then did the acts complained of with force and arms, or unlawfully.

The declarartion, after setting forth the felling of the trees on the land of the plaintiff, alleges, that "by force of the statute in such case made and provided, an action hath accrued, &c."There is no statute giving an action of debt in such a case as that stated. The words of the law, R. S. ch 104, sec. 1, are : " Any person who shall cut, fell, box, bore, or destroy, or carry away any black walnut, black, white, yellow, or red oak, white wood, poplar, wild cherry, blue ash, yellow or black locust, chesnut coffee or sugar tree, or sapling, standing or growing upon land belonging to any other person or persons, without having first obtained permission so to do, from the owner or owners of such lands, shall forfeit and pay for such tree or sapling so cut, felled, boxed bored or destroyed, the sum of eight dollars." The subsequent part of the same section prescribes a penalty of three dollars for cutting, &c., trees of any other description than those before enumerated.

The want of permission from the owner is a necessary ingredient to constitute the offence, and he who would make a party liable under the statute, must allege all the facts upon which the statute creates the penalty. The rule is well settled, that when an action is given by statute which contains an exception in the same clause which gives the right of action, the plaintiff must negative such exception in his declaration, but if there be a subsequent exemption, that is a matter of defence, and the other party must show it to protect himself against the penalty. 1 Ch. Pl. 223 ; Teel *v.* Fonda, 4 John., 304.(*a*)

Here the qualification of the right of action, is contained in the very same section and clause of the statute which gives the right, and should, therefore, have been negatived in the declaration ; nor is the defect aided by verdict. It is not like the case of a title defectively set forth ; but there is an omission to allege a fact material to the title or right to recover which is in no way connected with, and cannot be implied from any fact that is alleged. In such a case it is error to refuse a motion in arrest of judgment. Little *v.* Thompson, 2 Greenleaf R., 228 ; Williams *v.* Hingham, 4 Pick., 341.

The declaration is also objected to, because it does not allege that the acts complained of, were done contrary to the form of the statute. This particular allegation we deem unne-

(*a*) Tuller vs. Voght, 13 Ill. R. 286 and notes.

cessary, provided it clearly appears from the declaration that the action is founded on a statute; Cook *v.* Scott, 1 Gil., 333.

The declaration before us is very general, and although the penalty for cutting part of the trees therein mentioned, is eight dollars, and for cutting others, three dollars per tree, yet in the declaration, a gross sum is claimed for felling the whole, without distinguishing to which class any of the trees belong. No advantage can probably be taken of this generality in a motion in arrest of judgment after verdict; but it would certainly be more in accordance with the rules of pleading, for the declaration to shows distinctly, that under and by virtue of the statute the defendants had forfeited and become liable to pay eight dollars per tree, for each and every tree felled of certain kinds—naming them—and three dollars for others.

The question of intention or knowledge on the part of the defendants that they were trespassing upon the land of the plaintiff, as necessary to render them liable to this action, was raised in the court below, has been argued here and will probably arise again upon another trial. It becomes therefore necessary to settle it now. Notwithstanding the statute, a party may still sue in trespass for an injury to his timber in the same manner as if the statute had never been enacted.

The object of the statute is to furnish an additional remedy to the owner of the land, and also to punish the wrong doer.

To subject a party to such punishment, he must have committed the wrong knowingly and wilfully, or under such circumstances as show him guilty of criminal negligence. It could never have been the intention of the Legislature to impose a penalty upon a person, who, supposing in good faith that he was cutting upon his own land after having taken reasonable pains to ascertain its boundaries, should, inadvertently and by mistake, cut trees upon the land of another. Cushing *v.* Dill., 2 Scam., 461; Batchelder *v.* Kelly, 10 N. H. 436. For an injury committed under such circumstances, the party is left to his common law remedy by action of trespass.

The judgment of the Circuit Court is reversed, and the cause remanded, with leave to the plaintiff below to amend his declaration.

Judgment reversed.

(*a*) Watkins vs. Gale, 13 Ill. R. 152.
(*b*) Good declaration, 23 Ill. R. 398.

JAMES BLOOMER, Appellant, *v.* MATHIAS B. DENMAN, Appellee.

APPEAL FROM ADAMS.

If the court can see, that the jury in the court below were warranted by the evidence, in inferring a state of case that would sustain the action, it is bound to uphold the judgment, even though their should seem to be a slight preponderance of evidence to the contrary, and the successful party is entitled to all the inferences legitimately arising from such finding.

The principal is liable for the acts of his duly authorized agent in the business entrusted to him, and is not permitted to deny the truth of the representations of such agent, about the subject matter of such agency, on the faith of which another has acted.

If an agent rescind a sale by him made, the principal becomes liable to refund any money which has been paid upon it.

To authorize a recovery in an action for money had and received, a privity of contract must exist between the parties. (*a*)

This was an action of assumpsit, brought by Denman against Bloomer, in the Adams Circuit Court. The cause was tried at October term, 1850, before Minshall, Judge, and a jury, and resulted in a verdict and judgment for the plaintiff, of $391.39, with costs. The facts necessary to a full understanding of this controversy, will be found in the opinion of the Court; and by reference to the 11th Ills., 177, where the same case is reported.

The instructions referred to as asked by the plaintiff, are as follows:

1st Instruction. If the jury believe from the evidence, that Johnson was the agent of Bloomer to receive the purchase money on said raft, and that after having sold the raft to Denman, and received a part of the purchase money, the contract of sale was rescinded, and the raft again taken into the possession of Johnson, and re-sold by him, and that Bloomer received the benefit of the purchase money paid by Denman, and also of that paid to Johnson on the subsequent sale of the raft, then Bloomer is liable to Denman for the amount paid by Denman, and the jury must find a verdict for the plaintiff.

2nd Instruction. If the jury believe from the evidence, that Bloomer, with a knowledge of all that had occurred between Johnson and Denman concerning said raft, received from Johnson the money that had been paid him, Johnson, on said raft, then Bloomer, by receiving said money from Johnson, ratified the arrangement made between Denman and Johnson in regard to whatever moneys had been received by Johnson on said raft; and if Johnson, as the agent of Bloomer, in regard to said pur-

(*a*) Trumbull vs. Campbell, 3 Gil. R. 502.

the raft was sold to Denman, still they will find for the defendant $345 advanced by Denman, then the jury must find for the plaintiff and assess his damage.

3d Instruction. If the jury believe, from the evidence, that Johnson was the duly authorized agent of Bloomer, that as such agent he had the control of said raft, that he represented to Denman that Bloomer was the owner of said raft, that Denman, relying on his representations, dealt with Johnson in relation to said raft, under the belief that Bloomer was the owner thereof, that belief having been induced by the representation of Johnson, then Bloomer is not permitted, in this suit, to deny that he was the owner of said raft.

4th Instruction. If the jury believe from the evidence, the facts upon which the third instruction is predicated in regard to the agency and representations of Johnson, and if they further believe from the evidence, that after said raft broke from its fastenings, Johnson took charge of said raft on behalf of his principal, and on a settlement with plaintiff, promised, in behalf of the defendant, to repay said plaintiff whatever money had been expended by said plaintiff about said raft, then no question arises in the case about the delivery of said raft to the plaintiff before it broke away; and the jury will find for the plaintiff a verdict for the amount paid by the plaintiff, with interest from the time said money should have been repaid.

7th Instruction. The Court will instruct the jury, that if they believe from the evidence, that the raft belonged to Clinton, and that it was sold and delivered by his agent to Denman, and that the sale to Denman has not been rescinded, then Denman is liable to Clinton, on his contract of purchase, for the price he agreed to pay for the raft, and he, Denman, is entitled to the money received by Bloomer for said raft.

The instructions referred to, as asked by the defendant, are as follows:

1st Instruction. The Court is asked to instruct the jury for the defendant, that if they believe from the evidence that the raft was the property of Clinton, and that Johnson, in selling the raft, and disposing of the money, was acting as Clinton's agent, that then they will find a verdict for the defendant.

5th Instruction. That, although they may believe from the evidence, that Johnson agreed to rescind the contract by which

the raft was sold to Denman, still they will find for the defendant, if they also believe from the evidence, that Johnson, in selling said raft, and in rescinding said contract of sale, was acting as the agent of Clinton, and that Clinton was the owner of the property.

A motion for a new trial was made and overruled. Bloomer brings the cause to this Court by appeal.

R. S. Blackwell, for Appellant.

The 3d and 4th instructions given on the part of the plaintiff below, were erroneous in this: it lays down the proposition that Bloomer is estopped to deny ownership of the raft, and agency of Johnson, by the representations of one assuming to be an agent, without any regard to proof of the fact of agency. 1 Greenleaf's Ev., 137, §113; 2 *ibid*, 46, §59, 60; Story's Agency, §135; 2 Starkie on Ev., 34–5.

Denman was bound to know the extent of Johnson's authority. Mechanics' Bank *v.* Bank Columbia, 4 U. S. Cond., 671; Atwood *v.* Mannings, 14 Eng. C. L. Rep., 43–4. No *estoppel* in such cases. Story's Agency, 128, §136 and note.

The giving of the 1st, 2d, and 7th instructions of plaintiff and the refusal of the Court to give defendant's instructions 1st and 5th, present the merits of the action. To maintain this action the plaintiff is bound to show privity of contract between himself and the defendant.

Privity need not necessarily be founded upon an express contract between the parties. Sometimes, the law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise upon which the action is founded. But the privity must exist, either by the express assent of the parties, or by construction of law. Whenever the party sought to be charged upon an implied promise, refuses to be bound, the presumption of privity is rebutted. No one can be made the debtor of another without his consent.

In this case Bloomer refused to purchase the raft of Clinton, but agreed to make advances upon it to secure a debt due him from Clinton, and also reimburse his advances out of the proceeds of the raft. The expenses of sending the raft to market were to be borne by Clinton, and the raft was at his risk.

The money received by Johnson of the plaintiff, was paid into Clinton's hands. The proceeds of the rafts did not secure Bloomer's claims against Clinton, and Bloomer refused to accept and pay the draft drawn by Johnson upon him.

The facts that Bloomer, 1st, refused to purchase the raft; 2d, that his object was to secure his debt and advances; 3rd, that he stipulated with Clinton against the risk and expense; 4th, that the money of the plaintiff never came to Bloomer's hands; 5th, that Bloomer refused to pay the draft of Johnson, clearly evince an intention on the part of Bloomer, not to make himself liable for and on account of the raft, further than to the extent of the advances he had already made upon it, rebut the implied promise sought to be established against him, and contradict in the most equivocal manner, all idea of privity between the plaintiff and himself. These principles are clearly laid down in the following cases: Williams v. Everett, 14 East, 582; Stewart v. Fry, 2 Eng. C. L. Rep., 129; Stephens v. Babcock, 23 *ibid* 93; Sims v. Britain, 24, *ibid* 78; Young v. Dibrell, 7 Humph., 270; Wilson v. Greer, 7 *ibid*, 513; Grant v. Austin, 1 Eng. Ex. Rep., 284; Tiernan v. Jackson, 5 Pet., 599; Seaman v. Whitney, 24 Wend., 260; England v. Clark, 4 Scam., 486; Trumbull v. Campbell, 3 Gil., 502.

Privity, as required in this action, is founded on the maxim, that no man can be made a debtor without his consent. The distinction between privity, as respects the proceeds of property wrongfully taken from the owner and converted into money without his consent, and privity of contracts, is often confounded. In the first case, the owner may treat the tort feasor as a purchaser, an agent, or bailee, whose disposal of the goods is thereby sanctioned and confirmed by the owner, and in this way a privity, in law, is established between the parties. Jones v. Hoar, 5 Pick., 285 and note.

In this action of assumpsit for money had and received, the plaintiff must show, 1st, the receipt of the money by defendant; 2d, the receipt of it for use of the plaintiff. In this case, Johnson was the agent of Clinton to sell the raft, pay off the hands, and the residue of the proceeds, after paying Bloomer, to Clinton. He was the agent of Bloomer for the single purpose of receiving and paying over Bloomer's debt and advances out of the proceeds. When Johnson sold the raft and received the

advance of $300 from Denman, he acted as Clinton's agent and paid the money out to Clinton's hands. The money then was received by Clinton and by Bloomer. Sumner *v.* Hamlet, 12 Pick., 82.

This is an equitable action, and plaintiff must have a better right *ex æquo et bono* to recover, than Bloomer has to retain the money. Buel *v.* Boughton, 2 Denio, 91. If Johnson had no authority to draw upon Bloomer, and promise by Bloomer to accept and pay the draft is a *nudum pactum*. Fenn *v.* Harrison, 3 T. R., 754, (3 & 4 Cond., 412;) May *v.* Coffin, 4 Mass., 341.

WILLIAMS & LAWRENCE, for Appellee.

Wherever one man has in his hands money belonging to another, "*ex æquo et bono*," an action for money had and received lies. The cases relied upon by the counsel for the defendant in regard to privity of contract, are all cases in which the plaintiff has brought his suit for money deposited by a third person, and the cases have been decided upon the ground that the third person depositing the money had a right to recall it. But in this case we are pursuing our own money, which has passed into the possession of Bloomer, through the hands of his agent, with a knowledge, on Bloomer's part, of all the circumstances. The cases, then, cited by the defendant's counsel, do not apply to the case at bar; and moreover, the authority of those cases has been overturned in this country, and is shaken by contrary authorities in England. We rely upon the following authorities: Hall v. Marston, 17 Mass., 563; Mason v. Waite, *ibid*, 579; Eagle Bank v. Smith, 5 Conn., 71; Hitchcock v. Lukens, 8 Porter, 338; Wiseman v. Lyman, 7 Mass., 288; Eddy v. Smith, 13 Wend., 488; Hudson v. Robison, 2 Maul.& Sel., 478; 2 Borrow, 1012; Cowper, 200; 31 Eng. Com. Law Rep., 396; Camp v. Tompkins, 9 Conn., 555.

But this record does not present the question of "privity," which the counsel for the plaintiff in error attempt to raise. The instructions asked for the defendant below, and refused, (numbered 1 and 5,) merely direct the jury to find for the defendant, if they believe Johnson was Clinton's agent, and the raft belonged to Clinton. But there was evidence showing Johnson to have been also Bloomer's agent, and if he was

Bloomer's agent, then no question of "privity" could arise, and it would have been error in the court to have directed the jury to find for the defendant, simply because they might believe Johnson was Clinton's agent, without amending the instruction by requiring the jury to believe also that Johnson was not Bloomer's agent. If he was Bloomer's agent, then no question of "privity" could arise, and it would have been palpably wrong to have required the jury to find for the defendant because Johnson was Clinton's agent, when the jury might at the same time believe that he was also Bloomer's agent, and that being admitted, the plaintiff was confessedly entitled to recover.

TRUMBULL, J. The facts of this case are briefly these. One Clinton had a raft of lumber at the mouth of Fever River, which he proposed to sell to Bloomer, of Galena, whom he was owing. Bloomer declined purchasing, but made advances upon the raft under an arrangement with Clinton that it was to be sent down the Mississippi river and sold. Out of the proceeds of the sale the expenses of taking the raft to market were first to be paid, then the sum due Bloomer including his advances, and the balance was to be paid over to Clinton. Johnson, a clerk in the employ of Bloomer, went down the rirer, and at Qnincy made sale of the raft to Denman, who advanced to him part of the purchase money which was used by Johnson in paying off the hands upon the raft. Subsequently the sale to Denman was rescinded, and Johnson gave Denman a draft upon Bloomer for the amount he had received from Denman, and for certain expenses that had been incurred by the latter in taking charge of the raft. The raft was subsequently sold by Johnson, and the proceeds paid over to Bloomer, but he refused to accept the draft drawn on him by Johnson, and this action was brought by Denman to recover the amount. The jury found in Denman's favor and he had judgment.

It is asserted here, that no such privity of contract existed between Denman and Bloomer, as would authorize the former to maintain this suit.

In determining this question, Denman is entitled to all the inferences legitimately arising from the finding of the jury, and if the Court can see that they were warranted by the evidence in inferring a state of case that would sustain the action then it is

bound to uphold the judgment, even though it should be of opinion, that there was a slight preponderance of evidence against the finding.

Clinton, who was introduced as a witness on the part of Bloomer, testified: "that he made an arrangement with Bloomer to send the raft down the Mississippi river for sale on witness' account, that Bloomer agreed to advance in contemplation of a sale, that the raft was to be sent down the river at the risk and cost of witness, that the proceeds were to be applied first to pay the expenses of the raft, the amount of defendant's debt and advances were to be paid out of the proceeds and the remainder to be paid over to witness," that the hands on the raft were in witness' employ, " that he was informed by Bloomer that he would send Johnson, the clerk, down the river with the raft for the purpose of making the sale, the witness assented to this arrangement and agreed to pay Johnson $25, for his trouble, &c." This evidence taken by itself, clearly shows that Bloomer had control of the raft, and that Johnson was his agent to make sale of the same. Bloomer was "to send the raft down the Mississippi river for sale" on Clinton's account, and the very fact, that the balance was stipulated to "be paid over" to Clinton, shows that the proceeds of the raft were not to be received by him. No man in possession of his own money, after agreeing to pay certain claims out of the same, would further stipulate with the claimants, that the balance should be paid over to himself. It is true that in another part of his evidence, Clinton says that Johnson was acting for him in the sale of the raft. In one sense it is true that both Johnson and Bloomer were acting for Clinton. He had put the raft into Bloomer's hands to be sold on his account, and he might, therefore, well say that both Bloomer and his clerk were acting for him in making the sale; but if he meant to be understood as saying that Johnson was acting for him, otherwise than as the clerk of Bloomer, he was evidently mistaken, as such a statement would contradict the substance of the transaction, as he had previously stated it. Johnson testified "that he considered himself as the agent of Clinton in selling the raft, paying off and discharging the hands, and accounting for residue of the proceeds after paying Bloomer's debt and advances, and that he was Bloomer's agent only to secure his debt and advances out of the proceeds of the raft." What Johnson may have con-

sidered cannot alter the real character of the transaction as shown by the other evidence in the cause. In a previous part of his testimony he had stated an agreement between Clinton and Bloomer that he should go down the river and make sale of the raft, and Clinton states that Bloomer informed him that he, Bloomer, would send Johnson to make the sale. By what process he was transformed from Bloomer's clerk, into Clinton's agent, is not very apparent from the record. At all events a verdict that the raft was placed under Bloomer's control to be sold, and that Johnson was his agent to make the sale, is not so manifestly against the evidence, as to call upon the court to set it aside.

Assuming then, in accordance with the finding of the jury, that Johnson was Bloomer's agent, and as such authorized to sell the raft, it is clear that his principal is liable for his acts in and about such sale.

It was decided when this case was here before, 11 Ills., 177, that if Johnson had authority to make the sale to Denman, he had authority to rescind it, and it follows as a necessary consequence, that when such sale was rescinded, his principal became liable to refund the money which had been paid upon it, in an action for money had and received; 1 Cd. Pl., 356; Towers *v.* Barrett, 1 Term R. 133; Gillet *v.* Maynard, 5 John., 85.

The 1, 2, 3, 4 and 7 instructions given to the jury in behalf of the plaintiff below, have also been objected to.

The principles of law involved in the first and second instructions, have been substantially settled in disposing of the main question in the case. The third lays down the proposition, that a party is not permitted to deny the truth of the representations of his duly authorized agent about the subject matter of his agency, upon the faith of which another has acted. Of the correctness of this proposition there can be no question. Story on Agency, sec. 134.

The fourth instruction asserts no principle of law not recognized by the previous ones.

The seventh instruction, although it contains a correct proposition of law, was inapplicable to the case, and ought for that reason, to have been refused; but we do not think the jury could have been misled by it, particularly when considered in connection with the fourth instruction, given on behalf of the defendant.

The refusal to give the first and fifth instructions asked by defendant, is also alleged as error. These instructions contain correct propositions of law so far as they go, and yet we can readily perceive how they might have misled the jury if given. Clinton may have been, and was in fact the general owner of the property, and Johnson might be regarded in one sense as his agent in selling the raft, although Bloomer may at the same time have had a special property in the raft, authorizing him to sell and control it, and Johnson may have been his clerk for that purpose.

Had these instructions excluded the idea that Bloomer had a special property in the raft, and that Johnson was also his agent in making the sale, it would clearly have been error to have refused them. The authorities referred to by appellant's counsel clearly show, that in a case of such a character, to authorize a recovery in an action for money had and received, a privity of contract must exist between the parties, and there would be none in the case supposed.

Judgment affirmed.

The BOARD OF TRUSTEES of the Illinois and Michigan Canal, Pltffs in Error, *v.* The PEOPLE, *ex relatione*, JOHN V. A. HOES and others, Defts in Error.

ERROR TO LA SALLE.

An alternative mandamus becomes the foundation of all subsequent proceedings, and must show on its face a clear right to the relief demanded, by setting forth all the material facts, so that they may be admitted or traversed. (*a*)

The usual mode of taking advantage of a defective alternative mandamus, is by motion to quash. This may be the only mode of reaching mere formal defects. Objections to substantial defects may be raised at any time.

This was a proceeding for a mandamus, commenced in the La Salle Circuit court, by Hoes and others, to enforce the construction of a bridge over the Illinois and Michigan canal. At the March term, 1849, T. L. Dickey, Judge, presiding, Hoes on behalf of himself and others, filed an affidavit, stating that a public road, leading from the town of Ottawa, in said county of La Salle, leading across the canal, had been laid out and established

(*a*) School Inspectors, &c., vs. People, 20 Ill. R. 531.

by the County Commissioners, in March, 1835, which road was intersected by the canal, and had been used as a public highway since 1835, until it was obstructed by the opening of the canal in 1848. That a certain State road, authorized by an act of the Legislature of 1845, was laid out in that year, which was also obstructed by the canal at the same point. Also, that another road leading from Ottawa, which had been used and traveled since 1832, was also obstructed by the opening of the canal; all these roads were on section 10, T. 33 N., R. 3 east of 3d P. M. That an application had been made to the Canal Trustees, to remove the obstruction by the erection of a suitable bridge, which the trustees had neglected and refused to build. This affidavit was accompanied by exhibits, showing the laying out of said roads by the proper authorities. The circuit court thereupon directed that an alternative writ of mandamus should issue to the Canal Trustees, commanding them to construct a bridge, or show cause to the contrary, at the next term of the court.

A writ was issued in the form as set out in the opinion of the court, on the seventh of May, 1849, which was served on the trustees, by copy. At the special term of the circuit court, in July, following, it was ordered, that a peremptory writ of mandamus issue, requiring and commanding the trustees to erect the bridge.

The Canal Trustees sued out a writ of error, and brought the cause before this court, at Ottawa, but by consent of parties, the cause was continued to Springfield, for hearing and judgment.

The errors assigned, state that there was no proper case or facts shown in the pleadings, which authorized the issuing of the writ. That the peremptory mandamus improperly emanated, and that the alternative was improperly served and was substantially defective.

R. S. Blackwell, and I. N. Arnold, for Pltffs in Error.

The Canal Trustees, are not bound to erect the bridge in controversy, because no such duty is imposed upon them by law.

At common law, counties were bound to erect and repair bridges. And no person or corporation is compelled to build or repair them, unless by force of some statute, or in cases of tenure or prescription. 1 Bacon Abr., 533 & 534, Tit. Bridges; 1 Burns'

Justice, 250, citing 22 Hen. 8, c. 5 ; 3 Com. Dig., 34, Tit. Chimin (B 1) ; Queen *v.* Inhab. of the Co. of Wells, 6 Mod. R. 307,case 400 ; Regina *v.* Justices of St. Peters, in York, 2 Ld. Rnym. 1251 ; The King v. W. R. of York, 7 East Rep., 588 ; The King v. Inhab. of Bucks., 12 East, 192 ; see also 5 Bur. R., 2594, 13 East R. 220.

This rule recognized in this country, 17 Johns., 452 ; 7 Wend., 477 ; 2 Comstock, 169, 170 ; also 2 N. H., 513.

Same rule incorporated in our statutes, Territorial Laws, 1807, page 300, §15 ; Laws, 1819, page 301, §2 ; Eyman *v.* People, 1 Gilman, 7, 8, see also Pope's stat., 1815, page 640, §15 ; Laws, 1835–6, page 297, §2 ; Rev. Stat. 1845, pages 482, 485, & 488 §15, 23, & 37. English Parliaments recognize Com. Law rule by requiring Canal and Railway Co's to restore easement. 45 E. C. L. 161 ; 10 M. & W., 263, see also 13 East., 220 ; 16 East., 305 ; 6 M. & W., 699. Same provision in Union Canal Co., Pa. Union Canal *v.* Pinegrove, 6 W. & S. 560 cited, 1 Sup. U. S. Dig., 362, §25. Same provision in Erie Canal Bill. 20 Johns., 742, see also 3 Hill, 569 ; 25 Wend., 462. So in Massachusetts, 3 Mass., 263 ; 7 Metcalf, 70. And New Jersy. 1 Spencer, 324. And Connecticut. 4 Day, 208. Legislature of this State also, Laws, 1818, page 45, §4 ; page 119, §5 ; Private Acts, 1827, p. 27, §1 ; Private Acts, 1833, p. 81, §11 ; Wabash and Miss. Railroad Co., Laws, 1835-6,p. 42, §17;(Same session with Canal bill,)p. 145 ; Similar Charters in Laws of 1834, 1835,&1836-7. Also in the only two Canal Acts ever passed. Beardston and Sangamon Canal Co., Laws, 1835-6, p. 100,§10. Same session, Rock River Rapids Canal Co., Laws, 1845, p. 237, §4.

Where provision is omitted, the charge is upon the Counties. King *v.* Inhabitants of Berkshire, 2 East, 342 ; Walesbury *v.* Clark, 4 Day, 208 ; City of Lowell *v.* Proprietors of Locks and Canals, &c., 7 Metcalf, 1 ; answer case in 1 Gill., 222 ; Kyle *v.* Auburn & Rochester R. R. Co., 2 Barbour, Ch. Rep., 489. This principle recognized. Laws, 1845, p. 90, §21.

County of La Salle benefited by the Canal and ought to bear the charge. The right of Way for the construction of the Canal was granted prior to the establishment of the roads obstructed, and the County is bound to erect the bridges. 3 U. S. Stat. at large, 659 ; 3 Story's Laws, 183 & 2062 ; 4 ibid, 244, c. 51 ; 4 ibid ; 4 ibid, 662, c. 87.

County Court no power to lay out a highway under such circumstances. Barbour *v.* Andover, 8 N. H. R., 398; Laws 1835, p. 138, § 32.

This grant accepted by Illinois Legis. Laws, 1829, p. 17, § 10. Presumption in favor of Location and Survey. Laws 1829, p. 15, §5; 8 Humph., 110. Right of way reserved by State. Laws 1831, p. 43, §11; Laws, 1837, p. 42, §10; Reserved by Act of Congress, 13 Pet., 513.

The survey, location, construction, and completion of canal, worked an extinguishment or discontinuance of the Highways in controversy. Power of the Legislature adequate. 6 How. U. S. Rep., 507; 11 Verm., 198; 4 Pick., 463; 2 Peters., 245; 4 Humph., 315; 2 N. H. 23–5; 10 Eng. C. L., 413.

Roads have been repeatedly discontinued in this State by Legislature and county courts. Ample power in Canal Trustees to discontinue. Laws, 1829, p. 17. §10; Laws, 1831, p. 43, §11; Laws, 1835, p. 225, §21&22; Laws, 1836, p. 148, §21 & 22. Trustees have same power. Laws, 1842, p. 56, §10; Laws, 1845, p. 31, §1. These Laws to be liberally construed. 4 Blackf., 505; 17 Conn. 46–23; 23 Pick., 49; 9 Metcalf, 553.

The location, survey, and completion of canal worked a discontinuance. 11 Verm., 198; 17 Conn., 463; 14 Pick., 279, 280; 12 Peters., 97. Not sufficient facts shown in mandamus to justify the judgment awarding peremptory writ. 7 East., 345; 5 Eng., C. L. R., 266; 10 Wend., 26; 25 Main, 333; 51 Eng. C. L. R. 898. It does not show a legal Highway. User interrupted by State in surveying and constructing canal. Road of 1835, no width given. Laws, 1835, p. 131 §9; 5 Blackf., 462, 1–4 Ohio, 613; Laws 1845, p. 89, §21. Liability of Canal Trustees not shown. 3 Iredell, 411; 1 Hawkins, P. C., 705; 4 Iredell, 16; 1 Harrison, 222; 1Green, 314; 6 Burr., 2700; 3 Chitty C. Law, 594–5. Does not show a fund provided by law for the erection. 1 Gilm., 570-1; 7 Mass., 187-8; 7 Wend,. 476-7; 1–4 Ohio Cond., 268; 6–7 Ohio Cond., 192. Precise place where bridge to be erected not designated. County of La Salle ought to have been relators. 25 Main., 291; 16 Pick., 105-6; 11 Ill., 202; 19 Wend., 56. Mandamus will not lie, right not legal. 12 John., 414; 19Wend., 56; 5 Wend., 122; 9 S. & M., 90. The rule is different where a way is obstructed by a private Corporation. Trenton Water Power Co., 1 Spencer, 659;

Leopold *v.* C. & O. Canal Co., 1 Gill. 222 ; King *v.* Inhabitants of Lindsey, 14 East, 317.

N. H. Purple & J. V. A. Hoes, for Defts in Error.

It it doubted whether a party in contempt is entitled to a writ of error. Mandamus is proper where the law has established no specific remedy, and where in justice and good government there ought to be one. Bacon's Ab., 418 ; 1 Cowen, 423. The highway is a public easement, the legal right vesting in the people, and any one may enforce and obtain a mandamus in such a matter. People ex rel. Case et al. *v.*, Collins. 19 Wend., 64. In the case at bar, mandamus is the proper and appropriate remedy. 19 Wend., 56. The Canal Trustees had no right in cutting their canal across this highway, utterly to destroy it ; and are bound to unite, for the public accommodation, the highway thereby divided, by a reasonably convenient thoroughfare over or under their canal. Leopold *v.* Chesapeak & Ohio Canal Co., 1 Gil., 222. The case of Leopold *v.* Cheaspeak & Ohio Canal Company, 1 Gill, 229, was decided upon the Charter granted by State of Maryland, in 1823. See Laws Maryland, 1823, p. 85. This law contains no provision requiring Company to build Bridges.

The road laws of this State in force at the time of authorizing the constructing of this canal, and those passed since, point out the method of vacating roads, and prohibit the obstruction of those established by "placing any obstruction therein," or "digging any ditch across the same." Laws, 1835, §2, 8. This is in reply to the reference on the other side. To the laws authorizing the Companies to take "lands, &c." The ditch is as good as those laws.

The legislature did not intend, in authorizing the construction and its numerous feeders, to repeal the Road Laws, or authorize the entire destruction of the numerous highways which must necessarily be crossed by them or they would have provided some remedy. Nor could they have intended to have imposed the heavy burthen of uniting the several highways thus divided, upon the people of the counties or districts in which they may chance to be. The most the Legislature could have intended was to so far modify the Road Laws as to authorize the canal to intersect the roeds ; the public to be accommodated by a passage way over or under the canal to be provided by the canal authorities.

That the Canal Trustees understood the law as requiring the erection of bridges by them, is a matter of public notoriety deemed proper to be referred to in presenting the case to the court. They have constructed bridges at nearly every point where the canal or its feeders intersect a highway, and are now maintaining them at the costs of the canal fund. Will the court discharge them from either building others where they have refused or neglected to build them, and where highways have been regularly established, and where the public accommodation requires them.

The writ in this case is not substantially defective. The case referred to on the other side, (10 Wend., 25,) does not sustain the position that it is assumed to. The writ in this case contains all that is material. The command to do the particular thing required to be done, and the reason why "the canal at that point obstructing the public highways," no reference to affidavits on file to help it out as in the case referred to. But admitting the writ to be defective, as is alleged. The parties have appeared, if that is necessary, it does not appear to be, and the peremptory writ has been awarded, and it is therefore now too late to take exception to the writ. 10 Wend., 25.

The only question now for the court to determine is, whether there was sufficient appearing upon the record, (10 Wend., 33,) to authorize the court to award the peremptory writ.

TREAT, C. J. This was a proceeding by mandamus to compel the trustees of the Illinois and Michigan Canal, to erect a bridge over the canal in La Salle county. Upon a petition and accompanying papers, the Circuit Court directed an alternative mandamus to issue. The writ, after reciting the term of the Court and the names of the parties, proceeded to state that the Court "did order that an alternative mandamus issue out of said Court, directed to and commanding the said trustees, that immediately upon the receipt of said writ, they cause a bridge of suitable dimensions to be built over the Illinois and Michigan Canal, at the centre east and west of section ten, township thirty-three north, of range three east of the third principal meridian, in said county, the said canal at that point obstructing a public highway; or that they show cause to the contrary, before our said Circuit Court. Now, therefore, we, being willing that full and speedy justice be done in this behalf, as it is just, command you,

the said Trustees, that immediately after the receipt of this writ, you cause the said bridge to be built, or that you show cause to the contrary," &c. The writ was served on the Trustees, but they failed to make any return thereto, and the Court awarded a peremptory mandamus. The Trustees sued out a writ of error from this Court.

It is insisted, that the alternative mandamus is too defective to sustain the judgment. An alternative mandamus becomes the foundation of all the subsequent proceedings in the case. It answers the same purpose as the declaration in ordinary actions. It must show on its face a clear right to the relief demanded by the relator. He must distinctly set forth all the material facts on which he relies, so that the same may be admitted or traversed. The defendant is called upon to perform the particular act sought to be enforced, or, by a return, deny the facts alleged in the writ, or state other matters sufficient to defeat the relator's application. He is not required to answer the petition on which the writ is ordered. This is the well established practice in the proceeding by mandamus. The King *v.* The Bishop of Oxford, 7 East, 345 ; The King *v.* The Margate Pier Company, 3 Barnewell & Alderson, 220 ; Clarke *v.* The Company of Proprietors, 6 Adolplus & Ellis, N. S., 898 ; The Commercial Bank *v.* The Canal Commissioners, 10 Wendell, 26 ; The State *v.* Jones, 1 Iredell, 129 ; Hoxie *v.* The County Commissioners, 25 Maine, 333 ; The People *v.* Ransom, 2 Comstock, 490.

In this case, the alternative mandamus is fatally defective. It does not set forth the facts on which the relators rely. It does not apprise the defendants of the grounds upon which the remedy is sought. They are not permitted to traverse a certain state of facts, or admit the same to be true, and set up new matter in avoidance. The writ simply commands them to perform a particular act, or furnish an excuse for not doing it. It is not sufficient to uphold the proceedings. The judgment has no basis on which to stand.

The usual mode of taking advantage of a defective alternative mandamus, is by motion to quash. And that may be the only mode of reaching mere formal defects. But objections to substantial defects may be raised at any stage of the proceedings. This is like the case of a writ of error brought to reverse a judgment entered on a declaration showing no cause of action ; or

of, a conviction on an indictment that does not charge the commission of an offence. The proceedings fall for the want of a proper foundation to sustain them. The following cases are in point, if authorities are needed in support of so plain a proposition. In the case of The King *v.* Overseers of Mallet, 5 Modern, 421, the writ was held till after return made. In the King *v.* The Margate Pier Company, *supra*, the defendants were allowed to take advantage of a material defect in the writ, after their return was made. In Clarke *v.* The Company of Proprietors, *supra*, it was held by the Court of Exchequer, that, on demurrer to a traverse of the return to an alternative mandamus, the defendant might impeach the validity of the writ. In the case of The Commercial Bank *v.* The Canal Commissioners, *supra*, a demurrer to the return was carried back and sustained to the writ.

It is not necessary to express an opinion on the question, whether the Trustees are bound to construct and maintain bridges across the canal.

The judgment must be reversed, with costs, against the relators.

Judgment reversed.

SUSAN P. ENOS, *et al.*, Pltffs in Error, *v.* JABEZ CAPPS, Deft in Error.

ERROR TO SANGAMON.

Neither a default, nor a decree *pro confesso*, can be taken against an infant. A guardian *ad litem* should be appointed, who should file an answer, after which the complainant must make full proof, whether the answer filed admits or denies the allegations of the bill.

In chancery, as at law, a decree jointly binding on several defendants, so that each is liable for the whole, if reversed at all must be reversed as to all; but where a decree in form is joint, but is several in its effect, it must be reversed as to a part of the defendants.

This was a bill in chancery filed by Capps against the plaintiffs in error and others. The bill charges that Capps had an equitable interest in certain lands, which Pascal P. Enos held as trustee for one Moore, and of which he died seized. That Moore and the heirs of Enos, are combining, &c., to deprive Capps of

the land. P. P. Enos deceased, and left a widow and several children, who were all made parties.

This writ of error is prosecuted by Susan P. Enos and Julia R. Enos, who are respectively under the age of twenty-one years, acting by Pascal P. Enos the younger, as their next friend.

The decree sought to be reversed, was rendered by Ford, Judge, at September term, 1836.

LINCOLN & HERNDON, for Pltffs in Error.

S. T. LOGAN, for Deft in Error.

TREAT, C. J. This was a suit in chancery brought in 1834, by Jabez Capps against John Moore, William S. Hamilton, Salome Enos, widow of Pascal P. Enos, deceased, and P. P. Enos, Z. A. Enos, M. M. Enos, S. P. Enos, and J. R. Enos, his heirs at law. The heirs were then all minors. The bill set up an equitable title in the complainant to a tract of land, of which Pascal P. Enos died seized; and it contained a prayer that the heirs might be required to convey the legal state to the complainant. Process was served on all of the defendants except Z. A. Enos, S. P. Enos, and J. R. Enos. At the October term, 1835, Salome Enos was appointed guardian *ad litem* for the infant defendants; and at the September term, 1836, the bill was taken for confessed against all of the defendants, and a decree entered requiring Salome Enos to convey to the complainant all of the interest of the heirs in the land. In 1847, a writ of error for the reversal of the decree was sued out in the name of all of the defendants. The complainant pleaded, that more than five years had elapsed between the entering of the decree, and the suing out of the writ of error; to which the defendants replied, that two of the heirs were still infants, and within the saving clause of the statute. This Court sustained a demurrer to the replication, and dismissed the writ of error. The decision was put on the ground, that as any one or more of the defendants might under our statute have removed the case into the Supreme Court by appeal or writ of error, and as some of them had lost their right to do so by lapse of time, they should not be permitted to avail themselves of the non-age of their co-defendants, to accomplish indirectly what the law would not

allow them to do directly. See 4 Gilman, 315. This writ of error is prosecuted by S. P. Enos, and J. R. Enos, who are still minors, and within the protection of the statute.

The decree was unquestionably erroneous. No answer was ever filed by the guardian *ad litem* nor was any proof introduced to sustain the averment of the bill. Neither a default, nor a decree *pro confesso* can be taken against an infant defendant. There must be a guardian *ad litem* appointed for him, and the guardian must file an answer; and the complainant must then make full proof of his right to the relief claimed. Even where the answer of the guardian admits the bill to be true, the complainant must prove the truth of its allegations with the same strictness, as if the answer had interposed a direct and positive denial. McClay *v.* Norris, 4 Gilman, 370; Hough *v.* Doyle, 8 Blackford, 300. The decree, then, as to the present plaintiffs in error cannot be sustained.

The only remaining question is, whether the decree must be wholly reversed, or only so much thereof as relates to the plaintiffs in error. At law, it is well settled that a judgment against several defendants cannot be reversed as to one, and affirmed as to the others. The judgment is an entire thing, and must be affirmed or reversed *in toto*. It is jointly binding on all of the defendants. Each is individually liable for its full payment. Where the same reasons apply to a decree in chancery, the same rule must be held applicable. A joint decree against several defendants for the payment of a particular sum of money, is undoubtedly a decree of that character. In such case, each defendant is personally liable for the performance of the entire decree. He cannot discharge himself from responsibility, by the payment of his aliquot share. If erroneous, the decree must be wholly reversed at the instance of a party bound to perform it. But the decree in the present case is not of such a character. The land in question descended to the heirs as tenants in common. On the death of their ancestor, each became seized of an undivided fifth part thereof. Although their title was derived from the common source, each held a several and distinct estate in the land, which he could dispose of without the assent or concurrence of the other tenants in common. Each could maintain ejectment for the recovery of his portion. He could alien the same, and thereby make his grantee a tenant in common with

the other heirs. Under this decree he could release himself from all responsibility, by a conveyance of his interest to the complainant. He might thus, as respects himself, fully satisfy the decree; and at the same time leave it in full force and effect as to his co-defendants. The decree, although in form a joint decree against the heirs, is in fact but a several decree against each of them. It establishes no joint liability. It operates only on the separate estates of each of the heirs. There is no more difficulty in reversing this decree as to the plaintiffs in error, and leaving it in full operation against the defendants who are barred by the lapse of time from reversing it, than there is in reversing a distinct part of a decree, and affirming another portion having no necessary connection with the part reversed. (*a*) In the opinion of the court, the decree should only be reversed as to the plaintiffs in error. They cannot complain of such a course. Their interests will not in any manner be affected by a partial reversal of the decree. It will leave the complainant a tenant in common with them, in the place of the other heirs. To this they cannot object, for if the decree should be wholly reversed, the other heirs might immediately, and without their consent, put the complainant in the same position, by a conveyance of their portions to him. This decision will be in strict conformity to the well established practice in cases of appeals from decrees in chancery—an appeal being the only mode, in the absence of statutory regulation, of reviewing proceedings in chancery before a superior tribunal. A party aggrieved by one part of a decree cannot, by appeal, call in question another part of the decree in which he is not interested, although the terms of the appeal may be broad enough to embrace it. Cuyler *v.* Moreland, 6 Paige, 273; Hoxie *v.* Van Shaick, 7 Paige, 221. Nor can a defendant, who does not join in an appeal, have the benefit thereof, even though the result of it may show that the decree was erroneous, as well against him as the appellant. 1 Barbour's Ch. Prac., 395; 3 Daniels' Ch. Prac., 124.

So much of the decree of the circuit court as relates to the plaintiff in error is reversed, with costs.

Decree reversed.

(*a*) Hayes vs. Thomas, Beech. Breese. R. 180; Moore vs. Capps, 4 Gil. R. 316.

Jones *v.* The People.

JOSHUA W. JONES, Pltff in Error, *v.* THE PEOPLE, Defts in Error.

ERROR TO SCOTT.

In a trial for larceny, if the Court instruct that possession of property recently stolen, is *prima facie* evidence of guilt, it is wrong to refuse an instruction, based upon the hypothesis that the accused had fairly acquired the property by purchase. (*a*)

Jones was indicted for larceny at the Sept. Term, 1848, of the Green Circuit Court, and obtained a change of venue to Scott county. At the September Term, 1849, of the Scott Circuit Court, Jones was tried and convicted. After hearing a motion for a new trial, and overruling the same, the Court sentenced Jones to one year in the Penitentiary.

Jones brings the cause to this Court, by writ or error.

W. I. FERGUSON, and M. MCCONNEL, for Pltff in Error.

D. B. CAMPBELL, District Att'y, for the People.

TREAT, C. J. The plaintiff in error was convicted on an indictment for larceny. On the trial, the Court, at the instance of the prosecution, instructed the jury that " possession of property, recently stolen, is *prima facie* evidence of the guilt of the possessor, unless he shall make a satisfactory and uncontradictory account of how he obtained the possession." The Court declined to give the following instruction, demanded by the prisoner: " If the jury believe, from the evidence, that the defendant bought the property, and paid for it in the city of Springfield, and this purchase was open and public, unconnected with any suspicious circumstances of guilt, that is a satisfactory account of his possession of the property, and removes all presumption of guilt, growing out of his possession thereof." The refusal to give this instruction is assigned for error.

The instruction is subject to no just exception. It asserts a correct legal proposition, and the Court erred in refusing it. It is manifest, from the circumstances of the case, that the refusal of the Court to give the instruction, may have materially prejudiced the prisoner. The Court had already in effect, instructed the jury that, if the property was found in the possession of the prisoner soon after it was stolen, a *prima facie* case was made

(*a*) Conkwright vs. People, 35 Ill. R. 204.

against him, and he was bound, in order to discharge himself, to show satisfactorily how he obtained the possession.

The instruction in question, supposed a state of case, which fully repelled any presumption arising from the mere fact that the property was found in the possession of the prisoner. It was based on the hypothesis that he had fairly acquired the property by purchase. If it came into his hands in that way, the subsequent possession was entirely consistent with his innocence.

The refusal of the Court to give the instruction, may have left the impression on the minds of the jury, that the facts indicated therein, if appearing in evidence, were not sufficient to overcome the presumption of guilt, resulting from the possession of the property.

The judgment is reversed, and the cause remanded for further proceedings.

Judgment reversed.

ELIZABETH HAMILTON, *et al.*, Pltffs in Error, *v.* WINTHROP C. GILMAN, *et al.*, Defts in Error.

ERROR TO SANGAMON.

A decree cannot be entered against infants, without proof to sustain the case.

This was a bill against parties, some of whom were infants. No proof was taken in support of the bill.

CATON, J. This record does not show that any evidence was before the Court, to sustain the case made in the bill. Without such proof, no decree could be entered, especially as against the infant, Defendant.

The decree is reversed, and the suit remanded, with leave to the Complainants, to amend their bill.

Decree reversed.

JONATHAN PRIOR, Pltff in Error, *v.* JOSEPH WHITE, Deft in Error.

ERROR TO HANCOCK.

Parties may stipulate in a chattel mortgage in such way as to limit or qualify the right of possession and use in the mortgagor, so as more effectually to secure the mortgagee.

Notes may be given after the execution of a chattel mortgage, for a pre-existing debt, without vitiating the transaction.

The declaration of a mortgagor as to his intention in executing the mortgage, unless knowledge of them is brought home to the mortgagee, are inadmissible in evidence, and his connection with them must first be shown, before they can be offered in testimony. (*a*)

It is not error to refuse an instruction, when another instruction is given, whereby the party asking it, has the full benefit of the law as applicable to the conduct of the parties connected with the transaction.

If evidence is admitted, competent for one purpose, which may have an improper effect, the party aggrieved, should ask an instruction explaining its legitimate effect; and then the views of the Court, admitting the testimony, may be canvassed.

This was a trial of the right of property, before a Justice of the Peace of Hancock County. White was the claimant under a chattel mortgage from Daniel Prentiss. Prior claimed the property by virtue of an execution in his favor, against Prentiss. The cause was taken to the Circuit Court of Hancock County, and was tried before Minshall, Judge, and a jury at September Term, 1850, when a verdict and judgment were rendered for the complainant, White. Prior, by writ of error, brings the cause to the Supreme Court, and assigns for error, the admitting of the chattel mortgage, the notes and notice on the trial in the circuit court, the refusal of proof of the declarations of Prentiss, giving improper instructions, and refusing to give instructions asked for by claimant.

White introduced a chattel mortgage for the goods in controversy, dated and acknowledged April 25, 1850, recorded April 27, executed by Prentiss, to him, with these recitals and conditions:

1. Provided, &c., that if the said Prentiss shall well and truly pay, &c., to the said Joseph White, the sum of $200, according to the tenor of 3 several promissory notes, bearing even date herewith, and payable in manner following, to wit: One for $80, payable in two years, &c., with interest, &c., then this mortgage to be void, &c.

2. A stipulation in the usual form, that Prentiss should retain possession, &c.

(*a*) Rust vs. Mansfield, 25 Ill. R. 338; Myers vs. Kinzie, 26 Ill. R. 37; Hessing vs. McCloskey, 37 Ill. 353; Miner vs. Phillips, Ill 42 Ill. R. 130.

3. But if the same, or any part thereof, shall be attached or claimed by any other person or persons, at any time before payment, or the said Daniel Prentiss shall attempt to sell the same, without the authority and permission of the said Joseph White, or his assigns, in writing expressed, then it shall and may be lawful for the said Joseph White, or his assigns, to take immediate and full possession of the whole of said goods and chattels, to his and their own use, &c.

The mortgage was properly entered on the Justice's docket. Three notes under the mortgage, were also offered in evidence. Claimant proved by the constable, a seizure under the execution of a portion of the property described in the mortgage, found in the possession of Prentiss. White also introduced a notice from him to the constable, that he, White, claimed the property seized upon, by virtue of his mortgage.

Prior offered proof, as to the declarations of Prentiss, in reference to his object in mortgaging his property, &c., and also, that the notes produced on the trial in the circuit court, were different from those produced on the trial before the Justice of the Peace.

R. S. Blackwell, Williams & Lawrence, for Pltff in Error.

Browning & Bushnell, for Deft in Error.

Caton, J. It has been held, that in case of a chattel mortgage, when under a provision in the mortgage, the mortgagor retains the possession and use of the property, he has such a legal interest in the property as may be seized and sold on an execution against him—the purchaser under the execution succeeding to all the rights of the mortgagor, and no more. Bailey *vs.* Burton, 8 Wendall, p. 347.(*a*)Where, however,the possession is transferred to the mortgagee, then the mortgagor has but an equitable interest in the chattel, which is not subject to an execution at law. Marsh *v.* Lawrence, 4 Cowen, 461.

In this State, the right of the parties to stipulate in the mortgage, that the mortgagor may retain the possession and use of the property for a certain time, is secured by statute, and we can see no reasonable objection to allowing the parties to limit or qualify this right of possession and use in the mortgagor, so as more effectually to protect the security of the mortgagee, as

(*a*) Beach vs. Derby, 19 Ill. R. 622 ; Merrit vs. Nile , 25 Ill. R. 282.

was done in this case. The provision here is, that the mortgagor may retain the possession and use of the property; but in case the chattels, or any part thereof shall be attached or claimed by any other person, at any time before the payment of the money secured, or in case the mortgagor shall attempt to sell them without the consent of the mortgagee, then the latter shall have the immediate right to the possession of the whole of the said chattels, to his own use. We cannot perceive how this can be held to be fraudulent, as against the policy of the law, or in any way unreasonable. So long as the property is liable to be taken from the possession of the mortgagor, and transferred to that of a stranger, who might be disposed to remove it beyond the limits of the state, the security afforded by the mortgage, to say the least, must be extremely precarious. This is a contingency, against which, the party should have the right to protect himself. If he allows the mortgagor to retain possession of the goods, the parties may fix the limitation of that possession, which may as well depend upon the happening of an event, especially when that event may affect the stability of the security, as upon the lapse of a specified period of time. There was no error, then, in admitting the mortgage in evidence.

Nor do we think that the fact that the notes had not actually been executed at the time of the making of the mortgage, but were made subsequently, so as to correspond with the mortgage, rendered the transaction fraudulent *per se*. This was undoubtedly a circumstance tending to prove fraud; and, as such, was properly submitted to the consideration of the jury; but if, as was stated in the claimant's eighth instruction, the mortgage and notes were really given to secure a *bona fide* pre-existing debt, they should be upheld and enforced. The cases referred to in Connecticut, were not at all parallel with this. Those were mortgages upon real estate, which purported to secure different liabilities from those actually existing between the parties. Those mortgages were postponed to subsequent encumbrances, because the policy of their recording laws, required the a tual condition of the title to real estate to be exhibited upon the face of the conveyances, and spread upon the public records.

In our apprehension, the most important question in this case, is presented upon the decision of the Circuit Court, in ruling out the declarations of the mortgagor, made prior to the execution

of the mortgage. We shall not stop to review all of the decisions referred to, and which have been examined on this question, but shall content ourselves with adverting to the two cases in Massachusetts. The first is Clarke v. Wade, 12 Mass. R. 438, where, for the purpose of proving a deed fraudulent, the declarations of the grantor, made before and subsequent to the execution of the deed, where offered and rejected by the Court, although the grantor had since died. After examining the question, the Court concludes: "Upon the reason of the thing itself, as well as upon authority, we are all of opinion that the evidence in the case at bar, was properly rejected."

In that case, like the one before us, there was no evidence tending to connect the grantee with the declarations offered to be proved, or showing that he was cognizant of them at the time he took the conveyance. This is a case directly in point, supporting the decision below.

On the other side, is cited the case of Bridge v. Eggleson, 14 Mass. R. 244. In that case, several conversations of the grantor, made before the conveyance, tending to show his expected insolvency, were proved. At one of these, the grantor was present, and the Court said: "So far as the conversation tended to prove the insolvency or embarrassment of Goodwin, before he conveyed his estate, we think the evidence proper. The fact was essential to be proved, in order to establish a motive on his part, to make a fraudulent conveyance,"

This case does not profess to overrule or conflict with the former. In speaking of that case, the Court said: "This decision does not establish the inadmissibility of declarations made before the deed, if connected with evidence of knowledge on the part of the grantee."

Enough has been quoted, to show a striking distinction which the Court took between those two cases; and the same distinction exists between the case before us, and the one relied upon in the 14th Mass. R. Certainly the declarations of the mortgagor, not made at the time of the execution and delivery of the mortgage, or in the presence of the mortgagee, and not relating to the title of the property, ought not, by the ordinary rules of law, to be admitted in a controversy between the mortgagee and a third person. They are not a part of the *res gestæ* and are not made by a party to the suit. They are in every sense of the

word hearsay evidence. Indeed, they are made by a party whose interest it is to defeat the mortgage, and to have the property applied to the payment of a judgment against him. But it is said, he could have no such interest or object before the execution of the mortgage. This may not be so ; he may as well anticipate the existence of such an interest and be prompted by the same object, before the execution of the mortgage as after. Finding himself pressed to make the mortgage, he might have the same motives then, to make declarations which would tend to defeat it, which he would have afterwards, to postpone it in favor of an execution against him. It is admitted on all hands, that such declarations are not evidence against the mortgagee, unless they were brought to his knowledge prior to the execution of the mortgage. If they are not evidence against the mortgagee they cannot properly be admitted, for it is against him alone ; and to prejudice his interests that they are offered. If a knowledge of a fraudulent intent by the mortgagor, is brought home to the mortgagee, that may be competent evidence against the latter as tending to show his participation in the fraudulent design. Hearsay evidence, or the declarations or statements of third persons, may often be competent, when the party to be affected can be connected with them, but when that is the case, it is not competent to admit them till such connection be shown. It will not do to say that it was the absolute right of the party to have the declarations admitted, and then if he did not connect the claimant with them, that the court should instruct the jury that they were not evidence against him. In this case there was no pretence that the claimant had any knowledge of these declarations, or that he had the least intimation of any fraudulent design on the part of the mortgagor. Such being the case had the evidence been admitted, the Court would have been obliged to have withdrawn it from the consideration of the jury, and we all know, in a case of this kind, how imperfect security that often is, against the pernicious effect which such evidence is calculated to produce. The evidence once admitted and the mischief is done, which to a certain extent is often irreparable. In this case it was of no avail to prove that the mortgagor was actuated solely by fraudulent motives, unless the mortgagee participated in the fraudulent design. Here there was already, at least, as much evidence of fraud on the part of the former, as of

the latter, and of what avail could it have been to have cumulated evidence of fraud against the former, so long as there was an insufficiency, as the jury have found against the latter. We are of opinion that the legal rights of the party were not prejudiced by the exclusion of his testimony, and that in this the Court committed no error.

We do not think the judgment should be reversed, for the error assigned upon the refusal of the court to give the second instruction asked for by the plaintiff in error. The principle of law which is there alluded to, as far as it is properly applicable to this case, is more accurately stated in the seventh instruction for the plaintiff in error, which was given; so that the party had the benefit of the law, as applicable to the conduct of the parties at the time of the execution of the mortgage.

It was not denied on the argument, that the notice which was admitted, might be competent evidence to go to the jury for some purpose, but then it was insisted that the party claimed for it an effect to which it was not entitled, and that the Court admitted it for a wrong reason. The decision of the Court consisted in the admission of the evidence, and it is with that, rather than the reason for the decision, which we are now to consider. Had the party anticipated that the jury would allow that evidence an improper influence or effect, it was the right of the party to ask an instruction, explaining its legitimate effect. In that way the views of the court upon that evidence might properly have been brought before this Court for review.

Upon the evidence, we do not think a new trial should have been granted. There were undoubtedly some circumstances tending to show that the mortgagor designed to delay his other creditors, but still it may well have been, that he designed to produce that result, no further than would necessarily follow from his securing a *bona fide* debt due to White. This he had a right to do, and there is nothing connected with the claimant, showing that he had any other design than to secure his own debt. As the jury found that the transaction was an honest one we are not disposed to disturb their verdict.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

THE COUNTY OF GREENE, Pltff in Error, *v.* MOSES O. BLEDSOE, Deft in Error.

ERROR TO PIKE.

Where the condition of a bond may be broken by the omission or commission of a single act, the breach may be assigned in the words of the covenant, but if it may be broken in various ways, the assignment should state the particular breach.

Where the law requires a public agent, to take security in real estate of treble the value of the sum loaned, the duty is answered, if he has availed himself of the best means of forming a correct opinion of the value of the property, and believes it adequate.

In order to prove a breach of duty, it should be shown, that the agent did not believe the security adequate, or that he was guilty of negligence by not informing himself.

An appearance and cross-examination of witnesses is a waiver of objection to the sufficiency of notice.

In depositions, it is not indispensable that the officer taking them, should literally follow the requirements of the statute, if the substance of the law is complied with. (*a*)

This was an action upon a school commissioner's bond, brought against the defendant in error. The declaration contains several counts; in the first, the bond is set out, and the averment that Bledsoe, as school commissioner, loaned one Eakin $1,232, of the school fund of Greene county, on mortgage security, and that "the title to said real estate was not clear, unencumbered and indisputable, and that the said real estate was not in value treble the amount loaned, as aforesaid, at the time the said loan was made, nor hath been since; that proceedings were had by the successor of Bledsoe, to foreclose the mortgage; that judgment was obtained upon the bond; that executions were issued, and the whole sum realized upon the executions and the sale of the mortgaged premises was but $534 83; and so the plaintiff says that the said Moses O. Bledsoe, as school commissioner and agent for, &c., hath in the premises forfeited and broken the condition of his said bond, contrary to the form of the statute in that case made and provided." And avers loss of the plaintiff in the premises at $2,000.

The second count avers that no more was made, because Eakin had not any unencumbered real property, out of which the judgment could be satisfied; avers breach of condition of bond contrary to the form of the statute, in this that Beldsoe did not faithfully loan and have secured the sum loaned, as required by the statute.

The third count, like the second, averring that the *Fi. Fa.* was

(*a*) Goodrich vs. Hanson, 33 Ill. R. 499.

returned, no property found. The fourth count, same as third, averring the insolvency of Eakin at the time the obligation taken by Beldsoe, as school commissioner, became due.

To this declaration the defendant interposed several pleas, upon which issues were joined, viz.: That he did not unfaithfully and negligently loan the $1,232.

That he did faithfully loan and have the money secured.

That he had settled with the plaintiff, and fully paid and satisfied the plaintiff all that was due and owing.

That he had resigned his office, delivered over his books and papers, &c., to plaintiff, and that he settled with the plaintiff, reported said loan and mortgage to the plaintiff, which was accepted and approved. A demurrer to this plea was sustained.

That he faithfully performed his duties as school commissioner in loaning the money; that he had good reason to believe, and did believe that the mortgaged property was worth treble the value of the sum loaned.

That the property at the time of taking the mortgage was treble the value of the sum loaned.

That Joseph Eakin was not insolvent at the maturity of the mortgage as alleged in declaration.

That at the time the mortgage was executed he had good reason to believe and did believe that the mortgaged property was worth three times the sum loaned. Also a plea of *non est factum.*

A demurrer to the first count of the declaration was sustained by the Circuit court.

On the trial of the cause on the circuit, the jury found for the defendant; the county of Greene brought the cause to this Court.

The exceptions to the manner in which the depositions were taken, it is not material to notice; the opinion of the court states them sufficiently.

D. A. Smith, for Pltff in Error.

Browning & Bushnell, for Deft in Error.

Caton, J. The first count of this declaration is upon a bond executed by Bledsoe and his suerties, conditioned that he should faithfully discharge his duties as school commissioner of said county, and should, at the expiration of his term of office,

pay over to his successor, the funds in his hands. The count, after setting forth the bond and condition in the usual way, proceeds to aver, that the defendant Bledsoe, as such school commissioner, on the first of February, 1839, had in his hands the sum of $1,232, which he loaned to Eakin, to secure which he took a bond, together with a mortgage upon certain premises described. And it is averred that the title to said real estate was not clear, indisputable and unencumbered, and that it was not in value of treble the amount of the sum loaned. The count then shows that the mortgage had been foreclosed and the mort gaged property sold for sum of $533 33, which is all that has been made of said debt, " and so the said plaintiff says that the said Moses O. Bledsoe, as such school commissioner and agent for, &c., as aforesaid, hath in the premises forfeited and broken the condition of his said bond, contrary to the form of the statute, &c." A demurrer was sustained to this count which is assigned for error.

The averment that the title to the mortgaged premises was not clear, indisputable and unencumbered, does not show a sufficient breach of the bond to render the defendants liable. Where a covenant, or the condition of a bond may be broken by the omission or commission of a single act, the breach may be assigned in the words of the covenant or condition, but where the condition may be broken in various ways, the party in his assignment must specify the particular mode in which the condition has been broken. Here the title may have been encumbered in various ways, or it may have been disputable from various causes, and it was the right of the defendants to know how the land was alleged to be encumbered. The People *v.* Brush, 6 Wend., 454. Here it is not even shown, whether the complaint is that the mortgagor's title was defective or whether it was encumbered, and the defendants are not advised what specific complaint or defect they are called upon to meet.

The other breach complained of, however, is of a different character. The averment there is, that the real estate taken in security, was not of treble the value of the amount of money loaned. The condition of the bond is, that the commissioner should faithfully perform all the duties which were or should be required of him by law. As the law then stood he was required to secure the loan upon real estate, in value treble the amount

of the loan. This duty could be violated in but one way, and hence it was sufficient to assign the breach, by negativing the words of the statute, which by adoption constituted a part of the condition of the bond.

In the case of the People *v.* Haines, 5 Gilman, 528, which was a suit upon a school commissioner's bond, the complaint was that the mortgagor had no title to the mortgaged premises, and it was decided that: "If the commissioner acts in good faith, and with due caution and circumspection, then he does his duty and incurs no responsibility; but if he loans the money either in bad faith, or without such care and circumspection, then he diverts and misapplies it, and is responsible at once for all the money thus misapplied." The principle of this decision is applicable to the case before us. If the commissinoer had reason to believe, and did believe that the mortgaged premises were of treble the value of the sum loaned, then he has discharged his duty with fidelity, and is not responsible for the consequences. No standard is fixed, either by law or public estimation, by which we can determine, with certainty, the value of real estate. It must necessarily be estimated by the judgments of men, and hence, at best, it is but matter of opinoin, which we know must vary widely in the estimates of different individuals, and much more so here than in older States and in large cities. There, the rents and profits, to a very considerable extent, afford a standard of value, while here, the prospects of the future often, and indeed generally, have a much greater influence than the present income of the estate in determining its value. With us then, the value of real estate is peculiarly matter of opinion, and it is incapable of being determined with absolute certainty, and the Legislature never could have designed to require of the commissioner, that he should determine at his peril, and with absolute certainty, that which was incapable of demonstration. Doubtless, it was in veiw of this, and of the fallibility of human judgment, which induced them to require, what would be exorbitant security if the thing mortgaged were of a fixed and unalterable value. The requirement of the law is answered, if the commissioner has availed himself of the best means of forming a correct opinion of the value of the property mortgaged, and believes that it is of the required value. To require more than this would make the law oppressive, and would render it extremely hazardous for any one to accept the office of school commissioner.

If this is all the law demands of the commissioner to fulfil its requirements, then, in order to prove the breach which negatives the terms of the law, the plaintiff must show, to the satisfaction of the jury, either that the commissioner did not believe that the land was of the requisite value, or that he was guilty of a want of proper care in not ascertaining that it was of inferior value. The objection that it should have been averred that the commissioner knew that the land was of less value than required by the statute, or that he might, with proper care, have known that fact, we think was not well considered. The case in 5 Gilman, above referred to is directly in point against this objection. In that case there was no want of fidelity or vigilance charged in the declaration, and yet it was held that one of these must have been wanting to make the commissioner liable. We are of opinion that the demurrer to this first count should have been overruled.

Of the many questions which were presented relating to the depositions, but one or two require particular notice. Of the objections to immaterial testimony, it may be remarked, that most of the issues joined were entirely immaterial, and while the greater part of the depositions were entirely foreign to the real merits of the action, yet they were more or less applicable to these issues, and if parties will allow immaterial issues to be formed, they ought not to complain that they have been tried.

The appearance of the defendants and their cross examination of the witnesses was a waiver of all objections which they might have urged to the sufficiency of the notice to take the depositions.

We think the Circuit Court erred in rejecting the depositions of Reno and others, because the officer before whom they were taken, did not state in the precise place directed by the statute, that the witnesses were sworn. In the introductory part of the depositions, the officer states that the witnesses were sworn previous to their examination, as required by the statute, and in addition to that, at the foot of each deposition, is the signature of the witness, and an ordinary jurat signed by the officer, stating at what particular hour the witness was sworn and examined. The certificate at the foot of the depositions does not in express terms state that the witnesses were sworn, but the officer had already stated that fact twice, once in the caption to the deposi-

tions to which the closing certificate refers, and again in the jurat at the close of each deposition, where each witness signed his name. We cannot doubt that the depositions were taken strictly in conformity to the law, and the certificate we think is substantially sufficient. The statement that the witnesses were sworn at the proper time and place is under the official sanction of the officer, and although he has not followed the literal directions of the statute, as to the particular place or connection in which that statement is made, yet we think that is not sufficient to justify the conclusion that the depositions are not entitled to credence. This court has uniformly held, that where the substance of the statute has been complied with, the depositions should not be rejected, although the literal provisions of the law have been departed from. In the case of Ballance *v.* Underhill, 3 Scam., 453, a deposition was held to be admissible, although it was nowhere stated, that the witness was sworn before he gave his deposition, the Court holding that it would presume that the oath was administered at the proper time. In Hawks *v.* Lands, 3 Gilman, 227, the literal requirements of the statute were allowed to be more widely departed from, than in the case before us. The statute provides that in all cases, both where the interrogatories are sent out with a commission to take a foreign deposition, and where they are orally propounded in case of a domestic deposition, the officer taking the same, "shall cause such interrogatories, together with the answers of the witnesses thereto, to be reduced to writing in the order in which they shall be proposed and answered, and signed, by the witness." In that case the deposition was of a non-resident witness, and the officer taking the deposition had not caused the interrogatories to be written down with the answers, but had merely referred to them as they were contained in the commission, and this departure from the statute was held not only proper but even commendable, as it saved expense and answered every beneficial purpose. The court could see by the reference, what question had been put to and answered by the witness, and that was as satisfactory as if they had been re-written in the deposition. So here, we can see that the witnesses were properly sworn, and at the proper time, and when that is the case it would be altogether too technical to say that the party should lose the benefit of their evidence, because the officer did not certify that fact in the particular place

directed by the statute. We think the circuit court erred in rejecting these depositions.

Whether the testimony which is really immaterial to the merits of the case, should be rejected upon another trial, will depend upon the state of the issues at that time. Should the counts on which the immaterial issues are formed be dismissed, then the immaterial evidence must be rejected. As the plaintiff has the right to dismiss those counts without the leave of this, or the circuit court, it is unnecessary to make any order upon his application for leave to do so.

The judgment of the circuit court is reversed, and the cause remanded, with leave to the defendants to plead to the merits of the first count of the declaration.

Judgment reversed.

PARIS MASON, for use of SARAH MASON, Guardian of MARTHA M. MASON, Pltff, *v.* TARLETON F. BROCK, Deft.

AGREED CASE FROM MORGAN.

In divesting a married woman of her real estate, the mode prescribed by statute, must be substantially complied with.

A notary public cannot take the acknowledgment of a deed, unless he authenticates it by his official seal.

The provision of law which authorized certain officers to use their private seals until provided with public ones, has no application to Notaries Public.

The agreed case presented to the court for consideration, states that plaintiff sued defendant on two notes, given in 1839, for the price of certain lots in Grafton, sold by Sarah Mason as guardian, &c. The defendant, for defence, relied upon the want of title at the time of the institution of this suit. For replication, the plaintiff relied upon the fact, that Mrs. Allen, who had the title in fee to said lots on the 17th May, 1842, had, with her husband, William H. Allen, tendered a deed of that date, conveying the same to the defendant, before the institution of this suit; and offered in evidence a deed of that date, certified by Paris Mason, as Notary Public; said certificate concluding as follows:

"In witness whereof I have hereunto set my hand and private seal, at Grafton, Jersey county, this 17th May, 1842, no public seal having been furnished.

[SEAL.] PARIS MASON, Notary Public."

Said seal being a mere scrawl. Mrs. Allen and her husband were residents of said county on the 17th of May, 1842. Which certificate, in every other respect except the quotation above, was admitted to be in due form of law. Upon the foregoing issue and facts, the case was submitted to the circuit court at October term, 1850, Woodson, Judge, presiding, when a judgment was rendered for the defendant. The plaintiff below brings the cause to this court. The error assigned was the refusal of the circuit court, to admit the deed from Allen and wife to Brock, in evidence.

HENRY H. BILLINGS and LEWIS B. PARSONS, for Pltff in Error.

Neither at common law nor by our statute, is there any prescribed form for a notarial seal. R. S. 470. It is even doubtful whether a notary's signature is not sufficient without any seal. Bank of Rochester v. Gray, 2 Hill, 228.

The reason of the old common law doctrine of seals having passed away, the law itself, at least in its strictness, has passed, and is not generally adopted in this country. At common law a seal must be impressed upon wax, wafer or other tenacious substance, and a mere stamp on paper is not sufficient. Warren v. Lynch, 5 John., 244. In Virginia, a scrawl, aside from statute is a good seal. Jones & Temple v. Logwood, 1 Wash., 57. Same in Pennsylvania. 1 Sergt & Rawles, 72. In Maryland a scroll set opposite the name is a seal, if it was so intended, though nothing is said about a seal in the body of the instrument. Trasher v. Everhart, 3 Gill. & John., 246. In New Hampshire an impression on paper is a sufficient seal. Whether a scroll would be a sufficient seal to a protest—quere? Center v. Burley, 9 N. H., 569. In Alabama, evidence of intention to make a scroll a seal, is sufficient to make it such. Lee v. Adkins, 1 Minor, 193. Also to same point, Alexander v. Jameson, 5 Binney, 244; 3 Phillips' Ev., 1274, note 884; United States v. Coffin, Bee's S. C. Reports, 1 McLean, 462; United States v. Exrs of Stephenson. Where an officer, taking an acknowledg-

ment, styles himself such an officer as is authorized, it will be *prima facie* evidence of his being so. Willinch's lessee *v.* Mills, 1 Peters' C. C. 429; Johnson's lessee *v.* Haynes, 1 Hammond, 55; 3 Phillips' Ev., 1247. The cases above are decided without any particular statute varying the common law rule.

The signature of the party is what now gives an instrument credit and authenticity. 1 Alabama, above cited; McDill *v.* McDill, 1 Dallas, 64. In Indiana, under a statute like our own, R. S., ch. 85, §56, a scroll upon an execution issuing from the Circuit Court, is decided to be a good seal. Dixon *v.* Doe, 5 Blackf., 106. Also in Kentucky, under a law requiring the officer to certify (the acknowledgment) with the seal of his office annexed, where the officer uses nearly the same words as in the case at bar, a scroll is declared a sufficient seal. Collins *v.* Boyd, 5 Dana, 316. Courts will give a liberal construction to acknowledgments, and sustain them, if by a reasonable and liberal intendment, they can do so. Would not the same rule apply with greater force where the irregularity is only in the *testatum* of the officer?

D. A. Smith, for Deft.

The question in this case, is as to the validity of a deed by a *feme covert*, conveying her fee simple estate, acknowledged before a notary public of Jersey county, and certified under his hand and private seal, no seal of office being provided. Our statute is plain, positive, and peremptory in its requirements, that the acknowledgment must be authenticated under the seal of office of the notary. In case, 11 Ills., 120, this Court holds the following emphatic language: "There is no room for construction, where the terms of a statute are clear and unambiguous. The legislature had an undoubted right to pass the law in question, and it is enough for the Court to know, that thus it is written, '*Quod scriptum, scriptum.*'" 1 Wash., 57; 2 Cond. R., 179. As to office of notary public, and necessity of his notarial, or public and official seal to authenticate his acts, see 7 Porter, 529; 1 Ala., 527; 2 Hill, 230; 9 N. H., 569; 13 Verm., 334; 4 Blackf. 185; 6 *id.*, 356; 3 Monroe, 328; 4 Dana, 239, 330.

Treat, C. J. The only question in this case, relates to the

validity of a deed made by a husband and wife for the purpose of conveying the real estate of the latter. A married woman can only be divested of her real estate in the mode prescribed by statute. The certificate of acknowledgment, is an essential part of the due execution of a deed, by which the real estate of a *feme covert* is to be transferred; and unless it is in substantial compliance with the statute, no title passes. Mariner *v.* Saunders, 5 Gilman, 113; Hughes *v.* Lane, 11 Illinois, 123.

The only objection taken to the deed in question, is that the certificate of acknowledgment is not properly authenticated. The conclusion of the certificate is as follows:

"In witness whereof, I have hereunto set my hand and private seal, at Grafton, Jersey county, this 17th May, A. D. 1842, —no public seal having been furnished.

[SEAL.] PARIS MASON, Notary Public.

The seal was a mere scrawl. The statute in force when this certificate was made, provides that deeds may be proved or acknowledged before "any clerk of a Court of record, mayor of a city, or notary public; but when such proof or acknowledgment is made before a clerk, mayor, or notary public, it shall be certified by such officer, under his seal of office." Rev. Laws of 1833, p. 138

In our opinion, the certificate of the notary is fatally defective. The statute imperatively requires it to be under his official seal. It makes the affixing of the official seal an indispensable part of the certificate. Without the seal, the certificate is incomplete and imperfect. It has no validity or efficacy, unless the seal is added. It might as well be insisted, that a writ of error issued from this Court, which was not under the seal of the Court, would be valid, as to say that a certificate of acknowledgment by a notary, need not be evidenced by his notarial seal. The same authority that requires the process to be under the seal of the Court, directs the certificate to be under the official seal of the notary. The Courts have no more power to dispense with the requirements of the statute, in the one case, than in the other. It is only by force of the statute, that the certificate of a notary has any effect, as evidence of the execution of a deed; and the statute requires it to be under the official seal of the officer. A certificate, which is not verified by his seal of office, derives no force or efficacy from the statute. We cannot say, that the seal

is a mere formality, that adds nothing to the dignity or solemnity of the instrument. It is enough, that the law positively requires it. The propriety of the requisition rests with the legislature. A notary is empowered to take the acknowledgment of a deed and certify the same under his official seal.(a)He has no power to do it in any other manner. If he has no notarial seal, with which to authenticate his official acts, he is destitute of any authority to certify the acknowledgment of a deed. He must procure an official seal, before the authority conferred on him to take the acknowledgment of deeds attaches. He cannot make use of a scrawl or private seal, for the purpose of authenticating a certificate of acknowledgment The provision of law allowing certain officers to use their private seals, until they should be provided with public seals, had no application to a notary. He has to provide himself with an official seal. It is not furnished him by the public. The statute is silent as to the form and character of the seal. He may adopt a seal, with such an inscription as his judgment may dictate, or his fancy may suggest. It must, however, be capable of making a definite and uniform impression on the paper on which a certificate is written, or on some tenacious substance attached thereto,so that when a question arises as to the genuineness of an authentication, it may be determined by reference to the seal in the possession of the officer.

The judgment of the Circuit Court is affirmed, with costs.

Judgment affirmed.

T. S. Brockman, Appellant, *v.* William Aulger and Sidney Parker, Appellees.

APPEAL FROM BROWN.

In a bill for an account between partners, it is the duty of the master to state the accounts and include that statement in his report.

In case of reference to a master to take and state an account between partners,the parties and witnesses should be examined on oath, and their statements reduced to writing.

If the party or a witness refuses to appear before the master, or to answer ; the Court, if informed, will punish for contempt.

The master should require all books and other evidences to be presented which will enable him to present a full statement, and strike a correct balance.

(a) Booth vs. Cook, 20 Ill. R. 130 ; Holbrook vs. Nichol, & 36 Ill. R. 163 ; Harding vs. Curtis, 45 Ill. R. 252.

After the report is prepared, it is proper for the master to hear exceptions, and correct his report, and if he disallows exceptions, these should be reported to the Court, with the evidence relating thereto to be heard.

This was a bill in Chancery, filed to obtain an account of partnership transactions. The proceedings under the bill, are fully stated in the opinion of the Court. The third exception, taken in the Circuit Court, to the report of the master, is that, "no report is made of the accounts between the parties on the partnership books."

The decree was pronounced by Minshall, Judge, at the March term, 1850, of the Brown Circuit Court.

N. H. PURPLE and JOHN BAILEY, for Appellant.

JAS. W. SINGLETON and R. S. BLACKWELL, for Appellees.

CATON, J. This was a bill filed for an account between partners. It states, that the complainant owned a carding machine and that the defendant was a wool carder by occupation. That they entered into an agreement, by which the complainant was to furnish the machine and to pay all the expense of running the same, except manual labor and repairs, and to furnish lard to be sold to customers. The defendant was to run the machine at certain specified rates, and to have one-third of the compensation received for carding, and the complainant two-thirds. The defendant was to sell the lard furnished by the complainant to such customers as should want the same, and to pay the whole of the money received therefor over to the complainant. In pursuance of the agreement, the defendant run the machine during the time specified. That the complainant complied with the agreement, and paid for the repairs. The earnings of the machine amounted to the sum of $1,494.72 which was received by the defendant, two-thirds of which belonged to the complainant, and that the defendant received for lard belonging to the complainant, the sum of $40 66. That the complainant has repeatedly called on the defendant to account for the money thus received, and to pay over to him his proportion, but that he has refused to do so except the sum of $606 43, leaving the sum of $427.83, still due the complainant. That the defendant had the exclusive control of the business, and kept the books, and made the entries therein himself, to which reference is made, and of which a summary is filed with the bill.

(*a*) Whiteside vs. Pulliam, 25 Ill. R. 285; Reigard vs. McNeil, 38 Ill. R. 406; Story vs. Livingston, 13 Pet. U. S. R. 359.

The bill also states the defendant is indebted to the complainant in the sum of $124.20, for goods sold, work done, money loaned, a bill of particulars of which is exhibited. The bill charges that the defendant refuses to account and to pay to the complainant the amount due him.

The bill was taken for confessed and a reference was made to a master to take and state an account between the parties.

The master reported that he was attended by the parties and their solicitors, and that the complainant proved "two items in his account against the defendant Aulger, amounting to fifteen dollars. The defendant Aulger then and there introduced and proved his account against the complainant amounting to two hundred and eighty-four 63-100 dollars. It therefore appears from the accounts proven, that the complainant is indebted to the defendant, Aulger, in the sum of two hundred and sixty-nine 63-100 dollars, all of which is respectfully submitted."

Several exceptions were filed to this report, which were disallowed by the court, and a decree rendered in favor of the defendant for the amount reported by the master to be due him.

We think that the third exception, at least, should have been sustained. No account is, in fact, stated by the master, as was required by the order of reference. The accounts of the parties taken before him should have been stated in the report. Indeed, it does not appear that any account of the partnership transactions was taken by the master, but we should infer from the report, that that was not done. The reasonable inference from the report is, that only some individual accounts between the parties were taken. Unless the defendant's account, which was heard and allowed by the master, was stated and sent up by the master in his report, it was impossible for the court to determine whether that was such an account as should have been allowed in the suit, and on which the defendant had a right to a decree for the balance in his favor. The existence of the partnership and of partnership transaction, and his liability to account, as partner, were admitted by the defendant, by allowing the bill to be taken for confessed. Whether the defendant's account related to the partnership transactions or with any thing stated in the bill, it does not appear. As the case stood it was only upon such an accounting that the defendant could claim a decree for a balance in his favor.

As this case must again go before the master, it is not deemed improper to say a word in relation to the course proper to be pursued by him in taking the account. Particularly in case of a reference to a master to take and state an account between partners, it is proper and even necessary that witnesses, as well as either party, at the request of the other, should be brought before him and examined on oath, touching the partnership transactions, which examination should be carefully taken down by the master. And if a witness, or either party refuses to appear in obedience to the master's summons, for that purpose, or refuses to answer a proper question, allowed by him, it is the duty of the master to report the contempt to the circuit court, whose duty it would be to punish the contempt.

The master should also require the production of all partnership books and papers, that by a full and patent examination, he may be able to state, with accuracy and precision, the true state of accounts between the parties. The report, too, should present a detailed statement of the accounts of all the transactions on either side, showing what items are allowed, striking a balance in favor of the party entitled to it. After the draft of the report is prepared, it would be proper, although by our practice, perhaps not indispensable, that the parties or their solicitors should be again called before the master, to hear the report read, when either party has an opportunity to take exceptions to the report, which exceptions should be argued before the master who allows or disallows them, and in case he allows any of the exceptions, he reforms his report accordingly. When exceptions are disallowed by the master, if the excepting party desires it, he sends up the exceptions disallowed, together with all the evidence relative thereto, when the exceptions stand for hearing before court.(*a*)This gives the master an opportunity of reconsidering the subject, before his report is finally made, and of making such alterations, as reflection and the suggestions of counsel may convince him are right; this saves much time and trouble in the circuit court, and frequently avoids the necessity of a re-reference. Although in our practice we have, by common consent, departed from the strict and technical rules of the English practice, in case of proceedings before the master, yet the substance of that practice is founded in reason and tends to promote more exact justice, and ought not to be widely departed from.

(*a*) See Mc Clerg vs. Norris, 4 Gil. R. 370, and note *b*.

The decree of the circuit court must be reversed, and the suit remanded for further proceedings.

Decree reversed.

THE PEOPLE, Pltff, *v.* HENRY M. SMITH, *et al.*, Defts.

ORIGINAL SUIT.

A collector of revenue is discharged from liability to the State, if he pays the Treasurer, even if the Treasurer fails to report the act to the Auditor. The remedy of the State is against the Treasurer.

This was an action of debt brought against Henry M. Smith, and his sureties, on the bond of Smith as collector of Pulaski County.

The facts of the case are stated in the opinion of the court.

D. B. CAMPBELL, District Attorney, for Pltffs.

A. G. CALDWELL, for Defts.

TREAT, C. J. This is an original suit in this court, brought on the bond given by the Collector of Pulaski County, for the collection of the taxes for the year 1847. It is submitted on an agreed state of facts, as follows: the collector, on the 12th of Jan., 1848, paid to Milton Carpenter, then Treasurer of State, one hundred dollars on account of the revenue for the year 1847, and obtained the treasurer's receipt therefor; but the receipt was not countersigned by the Auditor, nor was a duplicate filed with the auditor, in conformity with the uniform practice in such cases; in consequence of which, the collector has never been credited with the amount on the books of the auditor. The only question relates to the validity of this payment. By the law of March 2d, 1833, the treasurer was requried to give duplicate receipts for payments made on account of the revenue, one of which was to be filed with the Auditor, and entered on the books of his office; the other was to be countersigned by the Auditor, and delivered to the person making the payment; and no payment was to be considered as made, until the treasurer's receipt was countersigned by the Auditor. Rev. Laws of 1833, p. 104, §6.

In the revision of the laws in 1845, that provision was not retained. The statute now in terms only requires the treasurer to receive the proceeds of the revenue, keep a true account thereof, and "report monthly to the Auditor, the amount of money which he may have received, stating on what account the same was paid into the treasury." R. S. ch. 13, §13–14. This change in the law seems to be conclusive of the question. The payment was made to the authorised agent of the State and operated *pro tanto* to discharge the collector. The neglect of the treasurer to report the payment to the Auditor ought not to prejudice the collector. The latter performed his whole duty by paying the money into the treasury. The remedy of the State is against the treasurer. We understand that regulation prescribed by the act of 1833, has, notwithstanding the change in the law, been pursued until the present time; and this case forms the only instance, in which payments have been made to the treasurer, without the filing of a duplicate receipt with the Auditor. This pratice, may with great propriety be sanctioned by the Legislature, by the re-enactment of the law of 1833. The practice operates as a salutary check on the treasurer. Under it, the books of the Auditor will exhibit the true state of the receipts into the treasury, without regard to the monthly reports of the treasurer. The present case forcibly illustrates the propriety of the practice. No duplicate receipt was issued and filed with the Auditor, and the treasurer failed to include the payment in his report to the Auditor. In the settlement with the treasurer, the sum in question was not charged against him. If the treasurer omitted to report the payment, the State may yet recover the amount from his representatives, on the ground that it was not taken into consideration in the settlement.

Judgment must be entered for the defendants.

Judgment for defendants.

ABRAHAM N. WARD, Appellant, *v.* WILLIAM M. OWENS, *et al.*, Appellees.

APPEAL FROM CUMBERLAND.

The statute authorizing testimony to be introduced orally in chancery, does not dispense with the necessity of incorporating the testimony in the record. (*a*)

This Court will not presume that any proof was made, that does not appear of record.

All that is necessary for an understanding of this case, is set out in the opinion of the Court. The decree was ordered by Harlan, Judge, at the October term, 1850, of the Cumberland Circuit Court.

STUART and EDWARDS, for Appellant.

LINCOLN and HERNDON, for Appellees.

TREAT, C. J. This was a bill in chancery to set aside a conveyance. The answer denied the allegations of the bill, and the cause was at issue by the filing of a replication. A decree was entered for the complainant, which the defendant assigns for error. The record fails to show, that any evidence was given to sustain the averments in the bill. The statute authorizing testimony to be introduced orally at the hearing, was only designed to change the mode of taking proof in chancery cases, and does not dispense with the necessity of incorporating it into the record. The evidence, or the facts proved by it, ought to be stated in the record. This Court will not presume that any other proof was made than what appears in the record. Such was the express decision in the case of White *v.* Morrison, 11 Illinois, 361. There is then no basis on which this decree can stand. It will be reversed, with costs, and the cause remanded for further proceedings.

Decree reversed.

(*a*) Nichols & Thornton, 16 Ill. R. 113; Corley vs. Scarlett, 38 Ill. R. 317.

HATHAWAY LINTON, Adm'r, &c., of ROYAL A. NOTT, dec'd, Pltff in Error, *v.* VALENTINE S. ANGLIN, Deft in Error.

ERROR TO CLARK.

Where a declaration avers that the cause of action arose in the county from which the process issued, and that the plaintiff resides in such county, process may issue to any other county. (*a*)

The Circuit Court having acquired jurisdiction to issue process beyond its territorial limits, the defendant may be served in any other county where he may be found.

Linton as administrator of Nott, deceased, sued Anglin in the Clark Circuit Court, for the sum of $535.18, in an action of debt.

The declaration avers that plaintiff resided in the county of Clark, at the time of the commencement of the suit. The process, which was a *capias ad res*, was issued to Coles county, and executed there. The pleadings were heard before Wilson, Justice, at May term, 1848. Linton sued out the writ of error. The errors assigned, are the overruling of the demurrer to the plea in abatement, and in not giving judgment for plaintiff, on the demurrer.

S. T. LOGAN, for Pltff in Error.

LINCOLN & HERNDON, for Deft in Error.

CATON, J. The declaration in this case, shows that the cause of action arose in the county of Clark, and that the plaintiff was a resident of that county. This, according to the uniform decisions of this Court, authorized the process to be issued to a foreign county. The defendant filed a plea in abatement, averring that the writ was issued to, and served upon him in the county of Coles, and that he was not a resident of that county, to which a demurrer was filed, which was overruled by the Court, and the plea held to be good.

This is assigned for error. The statute provides that "it shall not be lawful for any plaintiff to sue a defendant out of the county where the latter resides, or may be found, except in" certain specified cases, "when process may issue against the defendant, to the county where he resides."

We have no doubt that the legislature intended to use the

(*a*) Shepard vs. Ogden, 2 Scam. R. 259; Keeney vs. Greer, 13 Ill. R. 432 and notes.

word "resides," in such a sense as to include the place where the defendant, for the time being, might be, whether that was his permanent place of residence, or not. Were a different construction to prevail, transient persons would be placed on a better footing than permanent residents, which, taking the whole law together, we think was not the intention of the legislature. The Court having acquired the jurisdiction to issue its process beyond its territorial jurisdiction, the object was to reach the defendant; and if he could only be reached at the place of his permanent residence, the object of the law in conferring the jurisdiction, would often be defeated. We think the demurrer should have been sustaining. The case of Haddock *v.* Waterman, 11 Ill., 474, we think in point in this case.

The judgment is reversed, and the cause remanded.

Judgment reversed.

ALBERT G. CARLE, Pltff in Error, *v.* THE PEOPLE, Defts in Error.

ERROR TO CHAMPAIGN.

The present mode of recovering a penalty from a person for voting, who does not possess the proper qualification, is by an action of debt. (*a*)

The facts of this case, are sufficiently stated in the opinion of the Court.

A. GRIDLEY and O. PETERS, for Pltff in Error.

No indictment will lie against a person for voting, who is not qualified, but the remedy is by an action on behalf of the people to recover the penalty. Revised Stat., §20, ch. 38.

The indictment is insufficient, because it does not show, that the election at which the voting took place was a legal election, or an election held in conformity to law; nor that the vote was received, or deposited in the ballot box, as required by the law of 1849; nor for whom he voted, whether for County officer or otherwise; nor that he knowingly, corruptly, or wilfully voted.

(*a*) But see Law of 1861, p. 268, Sec. 4.

McGuire *v.* The State; 7 Humph., 55; Lequat *v.* The People, 11 Ills., 330.

The indictment does not show what was the want of qualification, whether non-age, non-residence, &c.

D. Campbell, District Atty., for the People, cited, Rev. stat., ch. 35, secs. 17, 20, 39, 40, 41; 2nd Hawk's, P. C. ch. 25, §4; 1 Russell on Crimes, p. 9, 44, 47, 48, 49.

TREAT, C. J. The plaintiff in error was indicted and convicted, for voting at an election, without possessing the qualifications of a voter. The indictment was framed on the 20th sec. of the 37th chap. of the Revised Statutes, which reads thus: "If any person shall vote at any election, who is not a qualified voter, he shall forfeit and pay any sum not exceeding fifty dollars, nor less than twenty five, to be recovered in the same manner as other penalties under this chapter." Upon a careful consideration of this section in connection with the other provisions of the chapter, we are clearly satisfied, that the penalty is not recoverable by indictment. By a reference to the other parts of the chapter, the intention of the Legislature, will be apparent. There are five provisions in this chapter, in which penalties are imposed for the violation of particular duties connected with elections, in each of which it is declared, that the party offending, "shall forfeit and pay" a specified sum, "to be recovered by an action of debt." The chapter also defines five distinct offences, which are punishable by indictment. Of one, it is provided that the offender "shall be fined in the sum of one hundred dollars, to be recovered by indictment;" of three, "he shall be liable to be indicted," and fined and imprisoned; and of the other, he "shall be liable to indictment" and "fined in any sum not exceeding one thousand dollars." The penalty in question falls directly within the first class of cases, and is recoverable in an action of debt, in the name of the People. The same language is employed in imposing this penalty, as in those for the recovery of which an action of debt is specifically given; and the direction as to the mode of recovering, must be understood as referring to the remedy prescribed in these cases.

The judgment will be reversed.

Judgment reversed.

THOMAS PENNY, Pltff in Error, *v.* MARTIN GRAVES, Assignee of JOHN WHITE, Deft in Error.

ERROR TO SANGAMON.

Although parol testimony is inadmissible to vary, contradict, or explain the terms of a written agreement, a party may show by parol, that a note was given without consideration, or that the consideration has in whole or in part failed.

Parol evidence may be received, to impeach the consideration of a note, but not to vary its terms.

This suit was first commenced before a justice of the peace, and taken by appeal, to the Sangamon Circuit Court. On the trial of the cause in the Circuit Court, the plaintiff below offered in evidence, a note, with endorsements as follows :

ALTON, Dec. 30th, 1842.

$52. 13. Six months after date, for value received, I promise to pay George Wilson, and Andrew Beard, fifty-two 13-100 dollars—this being for 12 per cent. interest on account of hogs bought. HIRAM PENNY.

Endorsment.—Feb'y 23d, 1844, for value received, we assign the within to James White, without any recourse back on us.

G. WILSON.
ANDREW BEARD.

Endorsment.—For value received, I assign over the within note to Martin Graves, without any recourse back on me whatever. August 22d, 1849.

JAMES WHITE.

And closed his case.

The defendant below, then introduced Bela C. Webster, who testified that the note was in his handwriting; that he was present at its execution, and knew all the circumstances under which it was given; recollected that the note was given to the payees, who were acting for themselves and some others, (of whom, Penny had purchased hogs, which he took to Alton,) with the distinct understanding, that in case certain notes, which were given by B. C. Webster & Co., to the persons from whom Penny bought the hogs, should be paid before, or at maturity, the amount in said note specified, nor any part thereof should be required to be paid by Penny, unless the persons aforesaid, should claim interest. The payees themselves, according to his recollection, stated they should not claim any of the amount of

the said note, unless claimed by others. The notes of Webster & Co. were paid before maturity. No one of the persons claimed interest, so far as he knew. Several of them, when being paid, or about that time, said that they were satisfied, without any interest from Penny. The note was executed at the suggestion of Penny, in order that satisfaction might be given to the persons, of whom the hogs were purchased, with the understanding aforesaid.

Alexander Penny was sworn, and testified to the same facts as Webster.

Plaintiff objected to the testimony of these witnesses when offered. It was then agreed by the parties that the testimony should go the jury, and they might render a verdict in the case, which if for the defendant, should be subject to the opinion of the court, as to the admissibility of the testimony of Webster and Penny. The jury rendered a verdict for the defendant. The judge, Davis, presiding, decided that the testimony was inadmissible and rendered a judgment for the plaintiff below, for the amount of the principal and interest of the note.

To which opinion of the court, excluding the testimony of Webster and Penny, and rendering a judgment for the note aforesaid, the said Penny excepted, and brought the cause to this court.

Stuart & Edwards, for Pltff in Error.

Lincoln & Herndon, for Deft in Error, cited 1 Greenleaf's Ev., §275, 281 ; 2 Gil., 266 ; 12 Metcalf, 138, 275 545 ; 9 ibid., 39 ; 7 Blackford, 378, 491 ; 1 Denio, 400 ; 5 ibid., 166.

Trumbull, J. The difficulty in this case arises not so much in determining what the law is, as in applying it to the particular case.

The rule is well settled, that parol testimony is inadmissible to vary, contradict, or explain, the terms of a written agreement, and yet it is allowable to show by parol, that the consideration of a promissory note has wholly or in part failed, or that it was given without consideration. It is not always easy to distinguish between these two classes of evidence and determine to which, particular testimony belongs, but when that is determined, the law is well established.

Did the evidence offered in this instance, go to impeach the consideration of the note, or to vary its term? If the former, it ought to have been admitted; if the latter, it was properly excluded.

The consideration of the note, was an extention of time to the maker within which to pay certain sums of money which he was owing the payees and others, and that this was a good consideration cannot be questioned. The notes of Webster & Co., were on time, and Penny gave the note in question, in consideration that the persons he was owing would wait with him, till these notes fell due. The evidence offered did not go to show that Penny did not get the benefit of the extended time, or that it was in any manner abridged, consequently it did not tend to show that the consideration of the note had in any manner failed. The payment of the notes of Webster & Co., at or before maturity, had nothing to do with the consideration of the note in question. They were not parties to it, but it was given by Penny on account of an arrangement between him and the payees with which Webster & Co., had nothing to do.

The effect of the parol evidence, was to show that the note although absolute in terms, was in fact conditional. The object of offering it manifestly was to defeat a recovery altogether, and such would be the consequence if it were admissible. Had Penny intended, that the note should not be collected in case the notes of Webster & Co. were paid at maturity, and the persons from whom he had purchased hogs did not claim interest, he should have had such intention expressed upon the face of the note; not having done so, he cannot now be permitted to vary or change the terms of his written contract by parol evidence, upon the familiar principle that the writing affords the only evidence of the terms and conditions of the contract(*a*)Lane *v.* Sharp 3 Scam., 567; Mager *v.* Hutchinson, 2 Gill., 266; Ely *v.* Kilborn, 4 Denio, 514; Erwin *v.* Saunders, 1 Cowen, 249; Graves *v.* Clark, 6 Blackford, 183.

Judgment affirmed.

(*a*) Baker vs. Whiteside, Beech. Breese. R. 174; Scott vs. Bennett, 3 Gil. R. 254; Barrett vs. Stow, 15 Ill. R. 424 and note; Cook vs. Whiting, 16 Ill. R 484 and note; Hill vs. Enders, 19 Ill. R. 163; Walters vs. Smith, 23 Ill. R. 345; Morgan vs. Fallenstein 27 Ill. R. 32; Foy vs. Blackstone, 3 Ill. R. 533; Harris vs. Galbraith, 43 Ill. R. 311; Miller vs. Wells, 46 Ill. R. 49 and note.

Compher *et al. v.* The People.

WILLIAM COMPHER, *et al.*, Appellants, *v.* THE PEOPLE, Appellees.

APPEAL FROM TAZWELL.

By demurring to a plea which refers to various statutes, only such facts are admitted as are well pleaded, the construction given to such statutes is not thereby admitted to be correct.

A bond conditioned that A. B. shall perform all the duties required to be performed by him, as collector of a county, in the time and manner prescribed by law, requires that he shall perform all the duties properly appertaining to his office, and that shall from time be required of him while in office.

Parties who go surety upon official bonds of this character, must be supposed to do so with a knowledge and expectation that the revenue laws will be changed, and they have no right to complain, if the duties of their principal are not materially varied, and are of a character properly appertaining to the office. (*a*)

This was an action brought on a bond executed by Compher, as collector of Peoria county. The other defendants were his surities. The bond was executed on the 24th of Sept., 1849, and is in the usual form. The defendants pleaded, first: that on the sixth of Nov., A. D. 1849, the General Assembly of the State, without the consent of the defendants, changed the time for the rendition of judgment against delinquent tax payers. Second: That at the time the bond was executed, it was by law, the duty of the collector, and he was authorized and empowered to distrain for taxes and revenue, due the State on the fiirst day of Feb., 1850 and that on the sixth day of Nov., 1849, and after the execution of the bond, the General Assembly, without the consent of these defendants, by law, prohibted the said collector from distraining and collecting said taxes and revenue until the first day of March thereafter. Third: That on the sixth of Nov., 1849, the Legislature, without the consent of the defendants, changed the time, when the said collector, by the law in force at the time of the execution of the bond, was bound to settle with the Auditor, and fixed the same on the first day of July, A. D. 1850. Fourth: That on the sixth of Nov., 1849, the Legislature, without the consent of the defendants, changed the law under which they executed the bond, so as to require them to pay interest from and after the first day of July, A. D. 1850. Fifth: That the laws under which the contract was made have been repealed. Sixth: That by the several laws in force at the time of the excution of the said writing obligatory, the said collector was duly authorized to proceed to collect, by distress,

(*a*) People vs. Leet, 13 Ill. R. 269.

the revenue for the year 1849, on the first day of Feb., 1850; that in the laws also then in force, the said collector was duly authorized to obtain judgment against the list of delinquent lands, at the June term of the County Court of Peoria county, and to proceed to sell the same on the third Monday after the commencement of said term; and that by the law, also, then in force, the said collector was bound to settle with the Auditor of public accounts, within sixty days after the time fixed by law for holding the first term of the Circuit Court of Peoria county, in the year, A. D. 1850, which would occur on the 29th day of July, A. D. 1850; that subsequent to the making of said writing obligatory by the defendants, to wit: on the fifth day of November, A. D. 1849, the General Assembly of the State of Illinois, changed the time of holding the Circuit Court of Peoria county, in such manner as the time for holding the same, would occur on the fourth Monday of March, A. D, 1850, so that in fact, the time then fixed by law to settle with the Auditor, would occur on or about the 25th day of May, A. D. 1850; that on the sixth day of November, 1849, the general Assembly again changed the time of making said sale of delinquent lands fixing the time thereof on the second Monday of June, A D. 1850, and on the same day passed a law prohibiting the said collector from proceeding to collect said taxes and revenue due the State, by distress, until the first day of March, A. D, 1850; and on the same day extended to said collector the time for making his said settlement with the Auditor of public accounts, on the first day of July, 1850, thereby then and there, and wholly without the consent of the defendants, materially altering and changing the liability of the defendants in the premises. The defendants also pleaded payment of $819.52, and *non est factum*. Issues of fact were taken upon the fifth plea, the pleas of payment and *non est factum*. The issues upon the fifth plea, and the plea of *non est factum* were found for the plaintiff, and the issue of payment for defendants. The first, second, third, fourth, and sixth pleas were demurred to, and the demurrer was sustained, and judgment given on these pleas, for the plaintiff. The defendants elected to abide by the demurrer. The points made by defendants are presented by the several pleas demurred to. The defendants contend, that the change of the law referred to in the pleas released the securities.

Compher *et al.* *v.* The People.

The cause was heard before Davis, Judge, at the October term, 1850, of the Tazewell Circuit Court. The defendants appealed.

N. H. PURPLE & R. S. BLACKWELL, for Appellants.

The contract of a surety upon an official bond, is to be construed according to the law in force at the time of the execution of the bond. Reynolds *v.* Hall, 2 Illinois, 38, (1 Scam. ;) People *v.* Moon, 4 *ibid*, 123,(3 Scam.;) U. S. *v.* Kirkpatrick, 9 Whea., 720 ; Comb *v.* Woolfe, 21 Eng. C. L. Rep., 253.

Such has been the understanding of the Legislature of this State, and when they intended to hold the sureties beyond the terms of their undertaking, as expressed in the contract, they invariably framed the condition of the bond in such manner as to hold the sureties responsible, notwithstanding future changes in the law. R. S. 1845, page 76, §2, 77 §2, 422, §1, 497, §7, 505, §49, 514, §2, 551, §68, 589, §3.

The terms of the bond sued upon in this case, do not contemplate any change in the law ; and the assent of the sureties to such changes cannot be presumed. 2 Am. Lead. Ca. 169 ; Davis *v.* People, 6 Illinois, 409, (1 Gilman ;) People *v.* McHatton, 7 Illinois, 638, (2 Gilman).

The Legislature have no right to vary the terms of the undertaking, the sureties have a right to be consulted in reference to every arrangement between the creditor and principal, and if the contract is varied without their assent, whether the alteration is material or not, the sureties are discharged. There is a conclusive presumption that by the alterations, the sureties are injured. Field *v.* Rawlings, 6 Illinois, 583, [1 Gilman ;] Sharp *v.* Bedell, 10 Illinois, 88 ,[5 Gilman ;] State *v.* Medary, 17 Ohio, 565 ; Rees *v.* Barrington, 2 Versay, Jr. 540 ; Norton *v.* Roberts, 4 Monroe, 493 ; 2 Am. Lead. Ca. 149.

STUART & EDWARDS, LINCOLN & HERNDON, D. B. CAMPBELL and D. L. GREGG, for Appellees.

D. L. GREGG, made the following points :

The main question presented in this case, by the assignment of error, is, whether the sureties in a Collector's bond, are dis-

charged from their liability, by the passage of laws without their consent, changing the time in which such collector shall perform certain duties pertaining to his office, such as obtaining judgment against delinquent tax payers, distraining for taxes, settlement with the Auditor, &c.

It is competent for the Legislature to make, from time to time, such changes in the revenue laws as the public good may require. The obligation of the bond refers not only to acts in force at the time of its execution, but to such as may subsequently be passed.

This principle is recognized in the State of Indiana, as appears from the case of Kindle and others *v.* The State, 7 Blackford, 586. See also 9 Wheaton, 720, 736, and 9 Wheaton, 184, 190.

It has been expressly decided by the Supreme Court of Maryland, that an extension of time, by the Legislature, to a Sheriff, does not discharge his sureties. State of Maryland *v.* Carleton, et al., 1 Gill, 257. In the case of The People, &c., *v.* McHatton, 2 Gillman, 731. also recognize the same doctrine.

It may be laid down as a general principle, that, as the Legislature has a right to make changes in the laws which regulate the duties and responsibilities of public officers whenever the public good requires it, parties becoming sureties will be presumed to have reference to the probability of such changes. The case of Adams et al. *v.* The County of Logan, seems to sustain this view. 11 Illinios Reports, 336.

LINCOLN and HERNDON made the following points:

Mere delay by the principal in not suing the principal debtor will not discharge the surety. The taking of a mortgage, and giving time in the mortgage, will not discharge the surety. The surety is not released if collateral surety is sometimes taken from him. 11 Illinois, 352; 6 Howard U. S., 279.

The surety will not be released if the officers of the government fail and neglect to make the principal in the bond, account and pay over the money, at the times, and in the manner, prescribed by law. 9 Wheaton, 720; 5 Condensed, 733; 6 Condensed, 264; 11 Wheaton, 154; 1 Peters, 325.

The secret instructions of the department to the principal in the bond to retain the balance till drawn for, or any private instructions by the mere discretion of the offic in the depart-

ment. release the sureties. 3 Mason C. C., 446 ; 1 Howard U. S., 250.

In the case at bar, the Legislature passed a general law, not a particular and special law, to meet particular cases, allowing all officers a longer time to account than they had when the bond was signed, and in this case the term of holding the circuit court was altered so that it came on a few weeks later than under the old law. These general laws, and the altering the times of holding court, the Legislature have an undoubted right to act upon. The sureties, contract, with reference to this constitutional right and the frequent exercise of that right. 2 Gilman, 731 ; 7 Blackford, 586 ; 1 Gill, 249 ; 2 Gilman, 731.

Trumbull, J. The question in this case is, whether the sureties upon the appeal bond of the collector, are discharged by the changes in the law regulating the duties of collectors, enacted subsequent to the date of the bond. The alterations in the law, are set up in a number of distinct pleas, to all of which the circuit court sustained a demurrer.

One of the pleas, after referring to various statutes enacted subsequent to the date of the bond, alleges that thereby the liability of the sureties was materially changed ; and it is insisted that the plaintiffs below, by demurring to the plea, have admitted the truth of this allegation. This is not so. A demurrer only admits such facts as are well pleaded. The laws in question are all public acts, and by demurring to a plea construing them, the plaintiffs did not admit the construction to be correct. That is a matter to be determined by the court.

The changes in the law complained of, are all of a general character, and applicable to all collectors in the State. They impose no new duty upon the collector, which he was not before required to perform, nor are the liabilities of the sureties in any respect added to or increased, by the passage of the subsequent acts.

The provision of the Statute postponing the time when the collector should be authorized to distrain for taxes, from the first of February till the first of March, which was so much relied upon in the argument, did not increase the liability of the sureties. The law has always provided for discharging the collector from responsibility, on account of any taxes which could not be

collected by reasonable and proper diligence. If, therefore, he was unable to make the taxes of any individual, by reason of the removal or insolvency of such individual, between the first day of February and the first day of March, the law discharged the Sheriff from liability on account of such tax.

Thus his liability was diminished, in exact proportion as his power to collect was abridged.

The other alterations of the law set up by the sureties in their discharge, are a change in the time of obtaining judgment against delinquent lands from May 27th, to June first; and in the time for settlement by the collector with the Auditor, from June 27th to July first. How the sureties were prejudiced by these changes has not been shown, nor do we perceive. It was a matter of no importance to them, whether the judgment against delinquent lands, was a few days sooner or later, nor were their liabilities increased, by requiring a settlement with the Auditor a few weeks earlier, so that an abundance of time was still left the collector, within which to make the taxes, which is not denied.

The fourth plea, alleges a change in the law under which the contract was made, without the consent of the sureties, whereby they were required to pay interest, at the rate of ten per cent. from the first day of July, 1850. It would be a sufficient answer to this plea, to say, that the act of November 6, 1849, referred to in said plea, imposes no such liability upon the sureties. But the plea is defective, in not alleging upon what sum, or upon what account, they were required to pay interest. The parties have, however, treated it as a plea, setting up as a consequence of the change in the time of settlement, that the sureties have become liable to pay ten per cent. per annum, upon the balance that the collector should fail to pay, from the first, instead of the twenty seventh of July, as the law stood when the bond was executed. Even in this point of view, the plea presents no denfence to the action. The ten per cent. is not imposed by the law upon the sureties of the collector, but as a personal penalty upon him. Acts 1847, p. 81, §13.

The sureties, are in no event liable for this penalty, nor does it appear from the record that it has been assessed against them.

The point to be decided, then, is whether the sureties of the collector are discharged by the enactment of general laws sub-

sequent to the date of the bond, by which the collector's duties are varied, but not to the prejudice of the sureties.

It was decided by this Court, at its last term, at Mt. Vernon, in the case of The Governor *v.* Ridgway, ante, p. 14, that the sureties of an officer, upon his official bond, conditioned for the performance of the duties of the office, were liable for the failure of their principal, to perform duties prescribed by subsequent laws, provided such additional duties were of a character properly appertaining to the office, and connected with its duties, as regulated by law at the time the bond was entered into. It is unnecessary to repeat here, the reasons for that decision, or the authorities upon which it was based, as they can be seen by a reference to the case.

The condition of the bond in this case is that the said "William Compher shall perform all the duties required to be performed by him, as collector of the said county of Peoria, in the time and manner prescribed by law, that is, all the duties properly appertaining to the office of collector, and that shall, from time to time, be required of him during his continuance in office.

The power to control the revenue is one of the highest attributes of sovereignty. Without this power, no government could exist, and it cannot be supposed that the General Assembly intended to part with this important prerogative, or to contract that no change should be made in the manner of collecting the revenue, durin' the continuance in office of any of its collectors. Parties who go security upon bonds of this character, do so with the full knowledge and expectation, that the revenue laws will be changed, and the duties of the collectors altered as the public interests may require, and they have no right to complain of any alteration in the laws not materially changing the character of the duties of their principal, especially, when such alterations are in no wise prejudicial to their interest. Such are the changes of the law under consideration.

It is, however, insisted that this Court has given a different construction to this class of bonds, and the case of Reynolds *v.* Hall, 1 Scam., 35, is relied upon to support this position.

That case was very different from this. It decides that the sureties of the State Treasurer, were not liable for his acts as cashier of the State Bank, the duties of cashier having been cast upon him by a law subsequent to the date of the bond. The

decision is put upon the express ground, that a new office had been imposed upon the treasurer, not only unconnected with his office as Treasurer, but of a diversified and entirely different nature. To have held the sureties liable in that case, would have been to extend their liability by implication, beyond the terms of the contract, as understood by the parties, at the time it was made. Not so in this case. Here no new and distinct duty was imposed upon Compher ; on the contrary, all the changes in the law related to the detail of the duties before imposed upon him.

Two other cases decided in this Court. Davis *v.* The People, 1 Gil., 409, and The People *v.* McHatton, 2 Gil., 638, are also relied upon as decisive of this case. In both of those cases, the time fixed by law, when collectors were required to pay over the amount of taxes, was extended to Davis and McHatton by special acts of the Legislature, and it may well be said that their sureties did not contemplate, at the time the bond was executed, that the Legislature would, by special acts, make the time of settlement, or the liability of those particular collectors, different from that of all others in the State.

They could not have anticipated, that the case of the particular collector, for whom they had become sureties, would be made an exception to all others, and it would undoubtedly have violated the terms of the contract, as understood by the parties when it was made, to have held them liable under such circumstances.

There is another case, however, that of The People *v.* McHatton 2 Gil., 731, which is directly in point upon this branch of the case. It was held in that case, that the sureties of the collector were not discharged by a change in the time of holding court, whereby the time for paying the taxes into the State Treasury was extended. It is true the law did not at that time, specify the day for paying over taxes, except by reference to other acts, and such was the case when the present bond was executed, but the payment was to be made, within a certain number of days after the sale of the delinquent lands, which was also to take place a certain length of time, after the first term in each year of the circuit court of the particular county. The time of the sale and payment, were made to depend upon the time of holding the circuit court, but that was fixed by law at a certain time. The day of payment may, therefore, be said to have been fixed, for

that is certain which may be rendered certain. At all events, the time of payment was as much fixed, and as much changed, in McHatton's case as in this. The cases are, therefore, precisely analogous.

The case of Kindle *v.* The State, 7 Blackf., 586, is also directly in point upon most of the questions under consideration. The action was upon a County Treasurer's bond, and the Court say: "The contract refers to laws that may be passed during the term for which the treasurer holds, as well as the law in force at the time it was entered into. * * * * The law relied upon in this case as effecting the discharge of the sureties, is a general law having respect only to the times of settlement with the authorized agents of the government. As to such a matter, we think the Legislature intended, and the bond contemplates, that the law may be modified as experience shall show that the public good demands.

The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

WILLIAM T. MAJOR, Pltff in Error, *v.* M. H. HAWKES, *et al.*, Defts in Error.

ERROR TO McLEAN.

Upon a voluntary dissolution of a partnership, each of the partners, in the absence of any agreement to the contrary, may collect the debts and receipt therefor.(*a*) Nor does the insolvency of the partner receiving the money, nor the application he makes of it, alter the right.

A partner under such circumstances, has not the right, without consent, to apply partnership effects in discharge of his individual indebtedness, and a creditor of his, who should knowingly receive such effects, would be responsible therefor to the firm.

The defendants in error sued Major, in the McLean Circuit Court, to recover an indebtedness due to them as co-partners. Major proved the payment of his indebtedness to Hawkes, one of the co-partners, after the publication of a notice of dissolution, by mutual consent. A verdict was found on the circuit, against Major, and he brings the cause to this Court by writ of error. The cause was heard before Davis, Judge.

(*a*) Gordon vs. Freeman, 11 Ill. R. 56.

A. Gridley & O. Peters, for Plaintiff in Error, cited Story on Part., 474, note 2 ; Brewster *v.* Mott, et al., 4 Scam., 378 ; Gordon *v.* Freeman, 11 Ills., 14.

Lincoln & Herndon, for Defts in Error.

Trumbull, J. Upon the voluntary dissolution of a partnership, each of the partners, in the absence of any agreement to the contrary, retains the right to collect debts due the firm, and give discharges therefor. Story on Partnership, §328.

Hawkes had, therefore, just as much right to receive the money from Major, and give the receipt of the firm, as either of the other partners, and the receipt, if honestly obtained, was a defence to the further prosecution of the action. The fact, that Major first made an attempt to settle the account by giving Hawkes, credit upon a claim which he had against him individually, did not prevent him from afterwards paying the money to Hawkes, when he ascertained that the other partners would not assent to the first arrangement. Major was not responsible for the application which Hawkes made of the money, so that he paid it in good faith, nor does the insolvency of Hawkes, at the time, alter the case. The record shows, that he was known by the other partners to have been insolvent when the partnership was formed. They were willing to trust him, notwithstanding, and by becoming his partners, gave to him the same right to receive the debts, that should become due the firm, which either of them should possess. It is true, that without the assent of his co-partners, he had no right to apply partnership effects in discharge of his individual indebtedness, and a creditor of his, knowingly receiving such effects in discharge, would be responsible for the same to the firm.

To deprive Major of the benefit of the payment made to Hawkes, it was incumbent upon the plaintiffs below, to show that it was not made in good faith. It has been suggested by counsel, that the money was returned to Major, after being paid over, but there is no evidence in this case to justify such a presumption. The witness to the receipt, testifies that the money was paid over to Hawkes in his presence, and this is all the evidence in the record about the money. For aught that appears, Hawkes may have accounted with his co-partners for the money received from

Major, but whether he has or not, is quite immaterial to Major, provided he honestly paid the money, and has in no way aided or abetted in the misapplication of it. There would be no safety in paying a partnership debt to a single member of a firm, if the debtor was bound to see that the money was properly applied by the partner receiving it.

The judgment of the Circuit Court is reversed and the cause remanded.

Judgment reversed.

ROBERT DAWSON, Pltff in Error, *v.* ABEL HARRINGTON, Deft in Error.

ERROR TO BROWN.

The Statute creating a lien in favor of mechanics or others performing labor or providing materials, protects those who do so at the instance of the owner of the property. The benefits of the law are not extended to those who render services or furnish materials on account of the contractor.

This was a petition for a Mechanic's lien, by the defendant in error, Abel Harrington, against the plaintiff in error, Robert Dawson, filed in the Brown Circuit Court.

The bill sets forth, that Dawson, by his agent, G. W. Robbins, engaged Harrington to work in a certain mill, which Dawson was building, Dawson to pay Harrington $1.83, per day.

Bill alleges, that he worked one hundred days and had received thirty dollars, and thus there was still due $143.00.

Defendant answered, denying the authority of Robbins, as his agent, and showing that Robbins built the mill by special contract with Dawson; and, if Harrington worked upon the mill at all, it was in the employment of Robbins.

There was a trial by jury, Minshall, Judge, presiding. The evidence produced by Harrington shows that his work was worth $90. No evidence as to what length of time Harrington worked. The defendant offered to prove, that Robbins was to build the mill by contract, and had received payment in full, including Harrington's work, and this upon the evidence of Harrington,

given upon a former suit between Dawson and Robbins. This evidence was rejected by the court. The jury found a verdict for plaintiff for $106, upon which the court pronounced a common law judgment. The defendant moved for a new trial, which motion was overruled. The defendant now brings the case here by writ of error.

J. A. Singleton & R. S. Blackwell, for Pltff in Error.

C. L. Higbee & M. McConnel, for Deft in Error.

Treat. C. J. This was a proceeding to enforce a mechanic's lien, commenced by Harrington against Dawson. The complainant alleged in his bill that, in September, 1847, he was employed by one Robbins, who was the agent of the defendant, to work on a mill, then being erected by the defendant, at the rate of $1.83, per day; and that in pursuance of such contract, he worked on the mill one hundred days, for which there was due him a balance of $143. The defendant alleged in his answer that Robbins erected the mill for him, for a stipulated compensation; and he denied, that Robbins was at any time his agent, and that the complainant ever performed any labor on the mill, with his authority or consent. There was a replication to the answer, and a trial before a jury. The complainant introduced a witness, who testified, that complainant's work on the mill was worth $90; that he was originally employed by Robbins, who had contracted to construct the mill for the defendant; and that the defendant subsequently agreed to see the workmen paid, for what labor they might perform after a specified time, which time the witness could not recollect. On this evidence, the jury returned a verdict in favor of the complainant for $106. The court overruled a motion to set aside the finding, and rendered judgment for the complainant.

The statute provides that "Any person who shall, by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting or repairing any building, or the appurtenances of any building on such land or lot, shall have a lien upon the whole tract of land or town lot, in the manner herein provided, for the amoumt due to him for such labor or materials." R. S. ch. 65, §1. The proof did not bring the complainant

within this provision. He did not perform labor on the mill in pursuance of any contract made with the owner. He was employed by Robbins, who had contracted to erect the mill for the defendant. He must, therefore, look to Robbins for compensation, and not to the defendant. Robbins had a lien on the premises, and not those employed by him.(*a*)The statute only creates a lien in favor of persons performing labor, or providing materials, at the instance of the owner of the property. Its benefits are not extended to those rendering services or furnishing materials on account of the contractor. The undertaking by the defendant to pay for work that should be done after a certain day, cannot avail the complainant, as he failed entirely to show that any part of the services in question were rendered subsequent to that time.

The judgment of the circuit court must be reversed, and the bill dismissed with costs.

Judgment affirmed.

BELA C. WEBSTER, *et al.*, Pltffs in Error, *v.* AUGUSTUS C. FRENCH, *et al.*, Defts in Error.

ERROR TO SANGAMON.

Under a law which required the Governor to receive written sealed bids, until the first day of July, *Held*, that all bids received after the thirtieth of June, must be rejected. Under a directory statute, a duty should be performed at the time specified, but may be valid if performed afterwards. Under a peremptory law, the act must be done at the time specified.

The word "until," may in a contract or a law, have an exclusive or inclusive meaning; depending upon the subject, transaction or connection about, or in which it is used.

After the decision of this case as reported in the 11th of Illinois, page 254, on the case being remanded to the circuit court, the complainants, plaintiffs in error, filed a supplemental bill, to which answers were filed by all the respondents. But as the case turns exclusively upon the time, within which the biddings in controversy were offered, it is not necessary that the pleadings and proofs should be set out.

The record shows conclusively, that the bid of the complain-

(*a*) But see Law of 1869 p.

ants,(as also the bids of other parties,) were offered on the 2nd of July, 1849. The bill was heard, before Davis, Judge, and a *pro forma* decree dismissing the bill was entered by consent.

S. T. Logan, Lincoln & Herndon and M. Brayman, for Pltffs in Error.

Browning & Bushnell, Stuart and Edwards, and W. I. Ferguson, for Defts in Error.

Caton, J. At what time were the biddings closed? This is the first and most important question, and it must be determined by the true construction of the act of the legislature, under which the sale was made. That act says: "The Governor shall receive written sealed bids for said property, from all persons until the first day of July, A. D., 1849, at which time all the bids received shall be opened and compared by the Governor," &c. In order to determine whether all the bids must be in before the first day of July, we must not only look at the language of the act, but we must also consider its objects, and the nature of the transaction contemplated. By this mode of sale, as we attempted to show when this case was before us at the last term, in order to insure a just competition among bidders, fairness is indispensable. Certain rights must be secured to those who bid, and eminently important among these, is, that a certain determinate time shall be fixed when the biddings shall be closed. Without this, all men will not necessarily stand on an equal footing, which they certainly should. The same rule which shall be held to control this case, must also govern others of a like nature, and this rule should be such as to exclude as far as possible, any advantage which might be extended to one, and which another may not enjoy as a matter of right. This would not be the case if a discretion is left, as to the time when no further bids shall be received. It is not enough that in this instance, we can see that all who desired to bid, had an opportunity to file their proposals. In some other case it might happen, if a discretion is allowed, that the bidding will be kept open till certain bids are received and then closed, to the exclusion of others, less favored. The rights of the bidders are fixed by the closing of the biddings, and if that is determined by the lapse of time, certainty, which is essential

to the security of all rights is attained. Confidence as well as fairness is important to insure free competition, and by this certainty, confidence is promoted. We do not mean to say, that a party may not by the terms of the sale reserve the right to receive bids so long as he pleases, or close the bidding at his discretion. An express provision to that effect, in the terms of a law like this, or in the term offered for a sale by an individual, would undoubtedly authorize such a course, but in the absence of such express provision, or of a necessary implication to that effect, such authority ought not to be presumed.

If, then, the terms of this act, will fairly and reasonably admit of a construction which fixes a determined period, when the biddings shall be closed, that construction should be adopted. The provision of the act is that bids shall be received until the first day of July, 1849, at which time the bids shall be opened. We think that the language of this act not only admits of this construction, but that according to the ordinary use of language, it is the most natural construction, even without any aid from the subject matter of the provision. The word "until," may, either in a contract or a law, have an exclusive or an inclusive meaning according to the subject to which it is applied, the nature of the transaction which it specifies, and the connection in which it is used. In the case of Sands *v.* Lyon, 18 Connecticut, 27, the Court said: "The word 'after,' which is used in the devise we are considering, like 'from', 'succeeding,' 'subsequent,' and similar words, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations, and is used in different senses, and with an exclusive or inclusive meaning, according to the subject to which it is applied." Of the same class are the correlatives of those words, as "until," "at," "before," "within," and the like. (*a*) All of these words may be used in the same exclusive or inclusive sense and may be used as words of similar import. They are most generally used as words of limitation and indeed almost universally so, unless there are other controlling expressions in the connection, showing that a different meaning was intended. Before the first of July, and until the first of July convey nearly, if not precisely the same meaning. In statutes prescribing time for redemption the words "within" is held to be exclusive, although the positive words of exclusion "and not after," which are usually inserted in statutes of limitations, are not used. The People *v.* Luther, 1 Wendell, 42.

(*a*) Richardson vs. Ford, 14 Ill. R. 333.

In this case we entertain no doubt that the time within which bids might be received expired with the 30th of June. The legislature have exercised the power of determining how long the right to put in bids should continue and when that time expired, the rights of the bidders were fixed and they could not be defeated by bids coming in after that time. Those rights were guarantied by the terms of the law and of the advertisement.—Bids were invited until a given time, but after that time none were authorized to bid. Had no bids been filed before the first day of July, the power of the Governor to sell would have been gone. No one having closed with the terms offered by the State, she was not bound by any other offer.

But it was urged upon the argument, that the subsequent words specifying the time when the bids should be opened, extended the time of bidding up to the opening of the bids, or in other words, that the closing of the biddings, and the opening of the bids were to be simultaneous acts. The provision of the law required that bids should be received till the first day of July, at which time all bids received should be opened. We entirely concur with counsel that this provision prescribing the time when the bids should be opened was but directory. According to the decision in this case, when it was before us at the last term, the responsible bidder who by putting in the highest bid brought himself within the terms offered by the State, in the law and the advertisement, closed a contract with the State, which either party had a right to insist upon. By this he acquired a vested right of which he ought not to be deprived, by the delay of the vendor in opening the bids at a particular time. The governor was still vested with a necessary discretion to determine who were responsible bidders, and of the responsibility of the security offered, but still all had a right to have their bids considered, if they were put in in time, and the highest responsible bidder who offered responsible security, had a right to claim that his bid should be accepted. It must have been foreseen, that various accidents might occur which would prevent the opening of the bids even for days after the time specified in the law, as the sickness or unavoidable absence of the Governor, the Secretary of State or the treasurer, in whose presence the bids were required to be opened. If the bids could not be opened after the time designated, in such a case, the rights of both parties would be lost. It was

the intention of the legislature to affect a sale of the property at the time, and as the governor had no authority again to offer the property, that intention might be defeated, if the specification of the time for opening the bids, should not be held peremptory. By a directory statute, it is not to be understood that no duty is imposed to do the act at the time specified, in the absence of a satisfactory reason for not then doing it, but simply that the act is valid if done afterwards ; while a peremptory law requires the act to be done as specified and at no other time.

But we think the argument which proves that the provisions, fixing the time for opening the bids, is directory, conclusively establishes that the provision fixing the time, within which the bidding should be closed, is peremptory. If it were otherwise, the time for bidding might have been extended indefinitely, till the necessity which might have occasioned the delay in opening the bids, ceased. No necessity can require such a construction of this law.

With the view which we entertain of this case it is unnecessary to inquire what effect the fact that the first day of July, 1849, was Sunday, might otherwise have had. All the bids were required to be in before that time. And, as we have seen, they might be opened after that day ceases to be a matter of the least importance, as the complainants bid was not put in till the second of July, in our opinion it was not a bid and no rights could be acquired under it which can be enforced in a court of equity. It is unnecessary to say that all the bids put in after the 30th of June must share the same fate.

The decree of the Circuit Court dismissing the bill must be affirmed.

Decree affirmed.

The People *v.* The Auditor.

THE PEOPLE, *ex relatione*, MARK SKINNER, THE AUDITOR.

APPLICATION FOR A MANDAMUS.

It is the duty of the Auditor to apportion the proceeds of the two mill tax, collected under the provisions of the 15th article of the Constitution, upon such state indebtedness, as shall be exhibited to him for the purpose, and draw his warrant on the treasury.

This provision of the Constitution is complete, and can be executed without legislative aid.

The proceeds of this tax should be apportioned annually, on the first day of January, to the payment of the principal of such of the indebtedness provided for, as shall be presented for that purpose.

Neither the surplus revenue deposited with the State, by act of Congress of 23d June, 1836, nor interest bonds, are indebtedness, within the appropriation of this tax.

It is not competent for the legislature to direct that any portion of this tax shall be reserved for the benefit of such creditors as may fail to present their demands on the day named by the Constitution.

So much of the act of the 12th of February, 1849, as requires, that the surplus revenue deposited with the State, shall share in the proceeds of this tax, is unconstitutional.

This application is grounded upon the following petition:

"That on the first day January, A. D. 1851, your petitioner, being the legal holder of certain state indebtedness of the State of Illinois, other than the canal and school indebtedness of said State, to wit: New Internal Improvment Stock, to the amount of one hundred and seventy-one thousand eight hundred dollars, did, on said first day of January, present the same to the Auditor of the State of Illinois, Thomas H. Campbell, Esq., and demanded from him payment of the same, or so much thereof as your petitioner would be entitled to receive, from all moneys in the treasury of the State of Illinois, collected under and by virtue of a tax imposed under and by virtue of the fifteenth article of the Constitution of the State of Illinois, and under and by virtue of the twenty-first section of an act entitled, "An act to amend the several acts concerning the Public Revenue," in force February 8th, 1849, passed in furtherance of said section of the Constitution. And your petitioner left with said Auditor, at the time of making such demand, said State indebtedness, for the purpose of having proper credits entered thereon, in obedience with the provisions of said 15th article of the Constitution, and of the said law passed in aid thereof. And your petitioner further shows, that on the second day of January, A. D. 1851, your petitioner applied to said Auditor and demanded your petitioner's *pro rata* portion of all money then in the treasury of the

State of Illinois, collected under and by virtue of said tax, to which the said Auditor replied, that he doubted his authority to pay the same, or issue his warrant on the treasury therefor, and therefore refused so to do.

And the said Auditor further informed your petitioner, that his Excellency, A. C. French, the Governor of the State of Illinois, had preferred a claim, without presenting any legal evidence of indebtedness or voucher therefor, to receive a portion of said tax moneys, upon and on account of some claim in favor of the United States, for certain money, amounting to about the sum of four hundred and seventy-five thousand dollars, heretofore loaned or deposited by the said United States, to or with the State of Illinois ; and petitioner further shows that said Governor preferred the said claim with out any authority from the United States in that behalf, and not for the purpose of paying the same to the United States but solely to use and employ any money he might receive on account of said claim, in the purchase of Illinois bonds, in manner and form as directed in the first section of "An act concerning the Public Debt," in force April 13th, 1849.

And your petitioner, would further show that said Auditor informed him that certain interest bonds, or bonds given for interest on other state indebtedness, and which said interest bonds will and do not bear interest until from and after some time in A. D. 1867, have also been presented to said Auditor for payment as aforesaid.

And your petitioner further shows, that there is now collected from said tax and in the treasury of the State of Illinois, one hundred and sixty-six thousand dollars, or thereabouts, which ought to be distributed and paid over to your petitioner and others, in conformity with the requirement of the Constitution, and the law.

And your petitioner prays that a writ of mandamus may be issued out of and under the seal of this honorable court, directed to said Auditor, commanding him forthwith to apportion and pay to your petitioner, by his warrants on the treasury of the State of Illinois, the amount which your petitioner is entitled to receive from said tax money, excluding from the computation and apportionment to be made by said Auditor, the said pretended claim on behalf of the United States, and the said interest bonds."

The People *v.* The Auditor.

The answer of the Auditor, admits that the state indebtedness was presented, and that a demand was made on the first and second days of January, as stated in the petition, and that payment was refused. Admits also, that Governor French, acting under the provisions of an act, entitled "An act concerning the Public Debt," in force April 13, 1849, and with such authority as is solely derived from law, has presented a claim, on behalf of the state, for payment from the proceeds of said tax, of the amount of the money heretofore loaned by the United States to the State of Illinois, under and by virtue of the provisions of an act of Congress, entitled "An act to regulate the Deposits of the Public Money," approved June 23, 1836, and of an act entitled, "An act to postpone the fourth installment of deposit with the States," approved October 2, 1837; or of so much thereof as a *pro rata* division of the proceeds of said tax among the persons presenting claims would pay. And further, that various persons have also presented for like payment, various bonds of the state issued for the interest that has accrued on the state indebtedness. Admits that there is in the treasury about the sum stated in the petition. States that he is not advised, whether he is the proper officer to whom such claims should be presented for payment, nor does he know that he is empowered to draw his warrant on the treasury for the payment of them. Also, that he is not advised, whether the claim presented by the Governor, nor whether the interest bonds, are entitled to payment under the Constitution.

An agreement was filed, consenting that if the Court should be of opinion, that the Auditor should apportion the money, excluding from the computation the claim made by the Governor, on account of the deposit fund due the United States, as also the interest bonds, or either of them, and that it was the duty of the Auditor to pay the petitioner his *pro rata* proportion of said tax moneys, then a peremptory mandamus might issue accordingly.

The Relator made the following points in support of his petition:

The 15th article of the Constitution imposes the tax, and specifically directs that the proceeds shall annually, on the first day

of January, be apportioned and paid *pro rata*, on all state indebtedness other than the canal and school debts, presented on that day, by the holders, and credits shall be endorsed thereon, &c.

The 21st section of the Revenue act of 1849, passed in the very words of the Constitution, assesses the tax, and makes a specific appropriation of the proceeds. The law was unnecessary, but it removes all question as to the necessity of legislative action, to give vitality to the constitutional provision.

Neither the Constitution, nor law in aid thereof, specifically appoint the officer or person to whom the claims are to be presented, and by whom the tax money should be apportioned and paid. But all general appropriations are paid under the order and direction of the Auditor, to whom the claimant first applies in all cases, where the law does not specifically direct otherwise, and who issues his warrant on the treasury to pay, &c. In this case, an appropriation is made, and the duty of carrying out the appropriation, is devolved upon the Auditor, and as clearly belongs to and is as incumbent on his office, as in the case of any appropriation. See R S., chapter "Auditor and Treasurer." Nothing can be clearer than that all claims must be presented to the officer whose duty it is to pass upon them.

The Constitution and the Revenue act, specifically direct that the tax money shall be paid in reduction of the principal of the state debt. This necessarily and absolutely excludes interest. No one would pretend that payment could be made on the interest coupons if presented. An "interest bond" is but an amalgamation of several coupons, and is therefore in no wise different.

The law entitled "An act concerning the Public Debt," in force April 13th, 1849, is clearly opposed to the letter and spirit of the Constitution in contemplating an appropriation of the moneys to the benefit of the state and not of her creditors, by pretending at the same time, and with the same money, to pay the state debt to the United States, and also to buy up the state bonds in the market. The legal holder of a debt is the creditor always, and not the debtor. In this case, the state attempts to appear as the holder of a debt against herself, to the immediate injury of her dilligent creditors. But the United States deposit money was always considered a donation, made in the guise of a loan. And at any rate, the question is conclusively settled against the present claim of the state, by the act of 25th Congress, Ch. 1, where

it is directly and in terms enacted that, this money shall remain on deposit with the States until otherwise directed by Congress. No act altering or changing this disposition of the money has since been made, and therefore there is no officer or person now authorized by Congress to present this claim. But again, $355,000 of this money has been by the state merged in the school fund, and is part of the school debt, which is in terms excluded by the Constitution from sharing in the proceeds of the tax. And again, the Constitution, and the law, (Revenue act,) both contemplate the presentation of some evidence of indebtedness, on which credits are to be endorsed, &c. In this case, no legal evidence of indebtedness, issued by virture of any law of the state, is pretended to be presented. The state has never executed any such evidence of indebtedness to the United States, the United States have no such evidence of indebtedness to present, have appointed no agent to present any ; but on the other hand, congress, by the act above quoted, has in terms expressly prohibited the presentation of any such claim, until Congress shall otherwise direct.

The objection that no particular 1st January is named in the law, is scarcely worth replying to. It is as plain as a postulate, that the law means the 1st of January of every year after a tax shall have been collected. In this case the tax money, or principal portion of it, has been in the treasury for more than six months. It is better for the state to apply the money or few claims, than on many, and thereby save an immense expense in keeping accounts, &c. Suppose the whole debt had been presented. The dividend would scarcely have been ten cents on a bond, and the Auditor would have required an army of clerks to aid him in the matter.

If the above views are correct, then the Auditor is the proper officer to whom to present the claims. It is his duty to apportion and pay to the legal holders of all claims, presentable by the law, that present their claims on the 1st day of January, of any year, after a tax shall have been collected under the law. That in the present instance the claim preferred by the Governor, on behalf of the United States deposit fund, and the claims presented on behalf of interest bonds, must be excluded from the computation and apportionment to be made by the Auditor ; and a writ of mandamus must issue as prayed for.

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D. L. GREEG, for the Respondent.

It is contended on the part of the respondent:

1. That the Auditor of Public Accounts is not entitled, by law, to make a distribution of the proceeds of the tax provided for by the 15th article of the Constitution, or to issue his warrant for the payment of the same or any part thereof.

The duties of the Auditor are defined by law. R. S., ch. 13, §7, 8. He is not authorised to act beyond the settlement of ordinary accounts, unless specially directed so to do. His general powers do not extend to the payment of moneys belonging to special funds. That this is so regarded, is shown by the fact, that whenever such funds have been created, special provision is made by law, for their disbursement. The "interest fund" provided for by the act of March 1, 1845, is paid out by the Governor. R. S., 600. So also of other special funds, as that for the support of the deaf and dumb asylum, and the hospital for the insane, &c., &c. Had these funds been within the class of "accounts" which the Auditor is required to take under his charge and disburse, such provisions for their payment would have been unnecessary and superfluous.

The 15th article of the Constitution directs the assessment and collection of a two mill tax, and provides that the fund so created shall be apportioned and paid over, *pro rata*, on the principal of that portion of the state debt not included under the heads of canal and school indebtedness. The language of this article is copied into the Revenue Act of February 8, 1849, (§21,) but no direction is given either in the Constitution or law, specifying the officer by whom such apportionment and payment shall be made. The Auditor, as has been already shown, does not possess the requisite power for this purpose. If it exists at all, it must be vested in the Governor. He is bound by the Constitution (Art. IV, §9) to "take care that the laws be faithfully executed," and where the law is silent, as to the officers who shall give effect to a specific power, which is required to be executed, the duty must fall into his hands.

Therefore, it must be concluded that the petitioner has mistaken his proper remedy. He should have made his application for payment to the Governor, and not to the Auditor of Public Accounts.

2. That the deposit fund is a *debt* due from the State of Illinois to the United States and consequently, entitled to share in the *pro rata* distribution of the proceeds of the two mill tax, provided for by the 15th article of the Constitution. It is shown to be a debt, from a consideration of the terms on which it was received. On its receipt, certificates of deposit were issued to the General Government, expressing the usual legal obligations, and pledging the faith of the state "for the safe keeping and repayment thereof." U. S. Statutes at Large, vol. 5, p. 55.

The State of Illinois is bound to refund every dollar when Congress shall require the same to be done. Act of June 23, 1836, and act of October 2, 1847. Stat. at Large, p. 57, 501. The obligation of re-payment is not less sacred, than in the case of bonds in the hands of individual creditors.

The act of February 12, 1849, (Laws, p. 70,) recognizes this obligation, and provides for the application of "the annual dividend upon the surplus revenue due the General Government." This the state has a right to do, as the amount is, for the present, under her sole and exclusive control.

If, then, it be established that the amount of surplus revenue deposited with the state, under the act of Congress above cited, is a valid and subsisting debt, due to the United States, it follows conclusively, that the proceeds of the Constitutional tax must be applied upon it *pro rata*, as in the case of other indebtedness.

3 That the proceeds of the two mill tax can be applied *only* to the extinguishment of the *principal* of the public debt. Hence, interest of every kind is excluded, whether liquidated by the issue of interest bonds, or otherwise. It is none the less interest because funded. It still retains its distinctive character, and must be excluded from a proportional share in the proceeds of the tax. It follows, then, that the bonds of this character presented for payment, are entitled to no consideration which will place them on the footing of the original bonds. They represent merely a portion of the *interest* of the public debt, and stand on an inferior footing.

Treat, C. J. It is the duty of the Auditor to apportion the proceeds of the two mill tax, assessed and collected under the provisions of the 15th article of the Constitution, among the

holders of state indebtedness presented for the purpose, and draws warrants on the treasury for the payment of their respective shares. He is required to audit the accounts of "all persons authorized to receive money out of the treasury, by virtue of any appropriation made, or to be made by law, particularly authorizing such account; and "on ascertaining the amount due any person from the treasury, the Auditor shall grant his warrant on the treasury for the sum due." R. S., ch. 13, §7, 8. This general direction clearly embraces the apportionment and distribution of the two mill tax. The fund receivable from this source is expressly devoted to a particular object—the payment of the principal of a certain portion of the state debt. It is specifically appropriated by the constitution, and by the law passed in pursuance thereof. Laws of 1849, p. 126, §21. But an appropriation by the legislature was unnecessary. The provision of the Constitution is complete in itself, and can be executed without the aid of legislation. Money can only be drawn from the treasury on the warrant of the Auditor, except where the law has prescribed a different mode, as in the case of the interest fund which is required to be apportioned and paid by the Executive. R. S., 600. In the absence of any law specially designating the officer, by whom the apportionment and distribution of the fund in question are to be made, the general provision of the statute clearly devolves the duty on the Auditor.

The duties of the Auditor in respect to this fund are plain and manifest. The 15th article of the Constitution is clear and explict in its terms. It is capable of but one construction. It levies a two mill tax for the specific purpose of extingushing the principal of the state endebtedness, except the canal and school debt; and direct that the proceeds shall annually be applied pro rata on the principal of such of the preferred indebtedness, as shall be presented for the purpose. The fund is not to be apportioned generally on the preferred indebtedness, but only on such part thereof, as shall be exhibited to the Auditor for payment, It is to be applied exclusively to the reduction and discharge of the principal of the indebtedness, and not on account of the interest. The Auditor has, on the 1st day of January, in each year, to ascertain the amount of the two mill tax actually paid into the treasury, and likewise the amount of unpaid principal on such of the preferred indebtedness, as shall,

on that day, be presented to him for payment; and then to declare a dividend on the principal of such indebtedness, so that each holder thereof may receive his proportionate share of the fund in the treasury. He must then issue a warrant on the treasurer, in favor of each holder, payable out of the special fund and indorse the amount on the bond or other legal evidence of the indebtedness, as so much paid thereon on account of the principal.

As before remarked, the proceeds of the tax are to be applied exclusively in the satisfaction of the principal of the indebtedness. This is the express requirement of the constitution. No portion of the fund can be apportioned and paid on account of interest. Interest bonds are necessarily excluded. They cannot be considered as principal, within the true intent and meaning of the constitutional provision. It would not be contended, that interest coupons could be included in the apportionment of the fund. An interest bond is but an amalgamation of several coupons into one obligation. The indebtedness, though changed in form, still retains its distinctive features. It is still a part of the interest of the public debt, as contradistinguished from the principal. The law, authorizing the funding of the interest, shows on its face, that it was not the design to convert the interest into principal. The interest bonds are not payable, and do not bear interest, until 1857. The chief object of the law was to avoid the confusion and inconvenience resulting from the large quantity of coupons, identical in number and amount, and often detached from the obligations to which they belonged. Laws of 1847, p. 161. Besides, specific provision, however inadequate, had already been made for the payment of the interest. R. S., 600. It may possibly be, that interest bonds, after their maturity, should be regarded as part of the principal of the public debt, and entitled to share in the proceeds of the two-mill tax. But upon that queston no opinion is now intimated.

Nor can the surplus revenue deposited with this State, under the provisions of the act of Congress, of the 23d of June, 1836, be now considered as an indebtedness on the part of the State, that can be presented for payment out of this fund. It was expressly provided, by the act of Congress, of the 2d of October, 1837, that the surplus revenue previously distributed should "remain on deposit with the States, until otherwise directed

by Congress." That act continues in full force. There must, therefore, be some affirmative action by Congress, before this deposit can be recalled. Until such legislation is had, the general Government cannot present the certificates of deposite, and claim to participate in the distribution of the fund in question. The Governor is not in any sense the holder of these certificates of deposit. If they could be presented for payment, it would be the right of the United States, and not of the State, to designate the agent to whom the dividend should be paid. The creditor has the option to present his debt for payment or not. The State cannot appoint an agent to represent its creditors, much less to divert any part of the fund from its intended destination. It is not even competent for the Legislature to direct a portion of the fund to be reserved from the apportionment, for the benefit of creditors who may fail to present their demands, on the day indicated by the Constitution. So much of the act of the 12th of February, 1849, as requires the amount of the surplus revenue deposited with the State, to be taken into consideration, in the apportionment of the proceeds of the two-mill tax and the dividend thereon to be paid to the Governor, is a clear and palpable violation of the Constitution. The legislature might with equal propriety have directed the whole of this tax to be annually added to the school fund or distributed among the several counties in the state.(*a*)

Let a peremptory mandamus issue pursuant to the prayer of the petition.

Mandamus awarded.

(*a*) People vs. Dubois, 19 Ill. R. 225.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

JUNE TERM, 1851, AT OTTAWA.

CHARLES BALLANCE, Appellant, *v.* JAMES MCFADDEN, Appellee.

APPEAL FROM PEORIA.

The act of Congress, of 3rd March, 1823, in relation to French claims in Peoria confirmed only such claims as were continued in the report of the Register. The grant only operated to the benefit of such persons as had presented their claims pursuant to the act of the 15th of May, 1820.

Patents under these laws were only to be issued to the claimants, or to their legal representatives.

A person must have been an actual settler, prior to the first of January, 1813, and one who had not, previous to the third of March, 1823, received from the United States a confirmation of a claim, or a donation of a tract of land or village lot; and he must, in addition, have claimed the lot, settled upon and improved it, in order to bring himself within the confirmatory act of 1823.

A patent issued to a person, or his legal representative, who was not the claimant of a lot, does not vest any title in the patentee.

If it appears on the face of a patent, or from any legitimate evidence, that it was issued in a case not authorized by law; it is inoperative and oid, and may be impeached collaterally, in an action of ejectment.

This was an action of ejectment, commenced in the Peoria Circuit, for a small piece of ground in the city of Peoria, brought by appellee against a servant of the appellant, who was in possession. The lot claimed was a part of the land known as the French claims, being parts of lots 7 and 8 of Bigelow and Underhill's survey. There is nothing peculiar in the declaration, plea, verdict or judgment.

The land claimed is thus described in the declaration, "beginning at a post from which the north corner of French claims, numbered 1, 11, 41 & 42, as hereinafter described, bears north 46deg.30min. west, 50 feet, thence south forty-six and one half de-

grees east, one hundred and ninety feet, to the northwesterly edge of Water Street, as laid out by Bigelow and Underhill; thence south fifty degrees thirty minutes west, along the northwesterly edge of said Water Street, twelve feet and eight inches; thence north 39deg. 30min. west, one hundred feet, to the place of beginning, being part of a certain lot, designated as covered by claims number 1, 11, 41 & 42, in the south east fractional quarter of fractional section nine in township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey approved first September, 1840, by the surveyor of the Public Lands in the States of Illinois and Missouri."

The cause was heard in Peoria Circuit Court, at August term, 1850, before Kellogg, Judge, and a jury, and a verdict was found for claimant, and a judgment rendered upon the verdict. Ballance prayed and was allowed an appeal.

The facts of the case are fully stated in the opinion of the court.

C. BALLANCE and T. L. DICKEY, for Appellant, cited 18 Johnson, 360; 8 Alabama, 264; 8 Howard, 308; 4 Howard 462, 436; 12 Missouri, 256; 12 Peters, 454, 456, 458-9; 8 Howard, 337-8; 5 Conn., 269, 273; 10 Peters, 309; 4 Bin., 235; 8 Howard, 233, 313–4; 6 Cond. Rep., 357.

N. H. PURPLE and H. O. MERRIMAN, for Appellee, cited 4 Howard 169; 9 Cranch, (3 Cond. R.,) 286; 2 Peters, 227; 8 Howard 233, 301; 2 Gill, 602; 3 Mass., 21; 4 Gill, 270; Dwarris on Statutes, 39, 40, 46, 47, 48; 15 Johnson, 379; 4 Howard, 169, 445, 448; 4 Peters, 173; 7 Howard, 270.

TREAT, C. J. This was an action of ejectment, brought by James McFadden against Charles Ballance, to recover a lot of ground in the city of Peoria. A trial resulted in a verdict and judgment for the plaintiff. Various exceptions were taken by the defendant during the progress of the trial, and he now brings the record into this court by appeal. For a proper understanding of the case, it will be necessary to set forth at some length the evidence on which the plaintiff's claim of title is founded.

On the 15th of May, 1820, Congress passed "An act for the

relief of the inhabitants of the village of Peoria, in the State of Illinois," which is as follows: "That every person, or the legal representative of every person, who claims a lot or lots in the village of Peoria, in the State of Illinois, shall on or before the first day of October next, deliver to the register of the land office for the district of Edwardsville, a notice in writing of his or her claim; and it shall be the duty of the said register to make the Secretary of the Treasury a report of all claims filed with said register, with the substance of the evidence in support thereof; and also his opinion, and such remarks as he may think proper to make; which report together with a list of the claims which, in the opinion of the said register, ought to be confirmed, shall be laid by the Secretary of the Treasury before Congress, for their determination. And the said register shall be allowed twenty-five cents for each claim on which a decision shall be made, whether such decision shall be in favor of or against the claims; which allowance shall be in full for his services under this act."

On the 10th of November, 1820, Edward Coles, register of the land office at Edwardsville, made a report to the Secretary of the Treasury, of his proceedings under this act of Congress. He reported each claim, and the substance of the evidence adduced in its support, but declined to give any opinion as to which of the claims should be confirmed. The claims connected with this case are thus stated in the report.

"No. 1. Etienne Bernard claims a lot in the village of Peoria, containing about one arpent of land, situate about forty or fifty yards south of the lot of Joseph Graveline, and bounded eastwardly by a road or street, separating it from the lower part of Lake Peoria; southwardly by a road separating it from a lot occupied by John Baptiste Maillet, and westwardly and northwardly by commons or prairie."

"No 11. Louis Pilette, in right of his wife, Angelica, the daughter of the late Francis Wilette, of the village of Peoria, claims a lot in Peoria, containing about one-half of an arpent of land, and bounded northwardly by a street, eastwardly by a lot of Antoine Deschamps, southwardly by a street separating it from the Illinois river, and westwardly by a street."

"No 41. Felix Fontaine claims a lot in Peoria, of eighty feet in front, by three hundred feet in depth, (French measure,) and

bounded eastwardly by a street separating it from Lake Peoria, northwardly by a lot formerly occupied by Antoine Deschamps, but now claimed by him, Fontaine, and to the south and west by streets."

"No. 42. Felix Fontaine, in right of his wife, Josette Carsereaudit Fontaine, claims a lot in Peoria, of eighty feet in front by three hundred feet in depth, (French measure,) and bounded eastwardly by a street separating it from Lake Peoria, northwardly by a lot claimed by the heirs of La Bonsheir; westwardly by a street, and southwardly by a lot on which he(Fontaine) lived."

The proof reported by the register in connection with these claims need not be set out. Claim one covers the same ground as claims forty-one and forty-two; and claim eleven includes the same ground as claim forty-one. The premises in controversy in the present case are a part of claim forty-two.

On the 3d of Macsh, 1823, Congress passed "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," which was as follows:

"Sec. 1. That there is hereby granted to each of the French and Canadian inhabitants and other settlers in the village of Peoria, in the State of Illinois, whose claims are contained in a report made by the register of the land office at Edwardsville, in pursuance of the act of Congress, approved May the fifteenth, one thousand eight hundred and twenty, and who had settled on a lot in the village aforesaid, prior to the first day of January, one thousand eight hundred and thirteen, and who have not heretofore received a confirmation of claims, or donation of any tract of land or village lot from the United States, the lot so settled upon and improved, where the same shall not exceed two acres, and where the same shall exceed two acres, every such claimant shall be confirmed in a quantity not exceeding ten acres: Provided, nothing in this act contained shall be so construed as to affect the right, if any such there be, of any other person or persons to the said lots, or any parts of them, derived from the United States, or any other source whatever, or as a pledge on the part of the United States, to make good any deficiency occasioned by any other interfering claim or claims."

"Sec. 2. That it shall be the duty of the surveyor of the public lands of the United States for that district, to cause a sur-

vey to be made of the several lots, and to designate on a plat thereof the lot confirmed and set apart to each claimant, and forward the same to the Secretary of the treasury, who shall cause patents to be issued in favor of such claimants, as in other cases."

The survey required to be made by the second section of this act, was approved by the surveyor general, on the 1st of September, 1840.

On the 28th of August, 1845, a patent was issued to the legal representatives of Francis Wilette, for the lots covered by claims one, eleven, forty-one, and forty-two. It recited: "Whereas there has been deposited in the general land office, a certificate number two of the register and receiver of the land office at Edwardsville, Illinois, whereby it appears that in the report, dated 10th of November, 1820, of Edward Coles, register of the land office at Edwardsville, Illinois, the claim of Etienne Bernard is entered as number one; the claim of Louis Pilette in right of his wife, Angelica, the daughter of the late Francis Wilette, is entered as number eleven; the claim of Felix Fontaine is entered as number forty-one, (the said number eleven and forty-one, according to the survey, being for the same land, and covering the south west part of claim number one;) and the claim of Felix Fontaine is entered as number forty-two, (covering, according to the survey, the north-east part of claim number one;) and whereas, it further appears from the certificate aforesaid, that the said Francis Wilette is the inhabitant or settler within the purveiw of the confirmatory act of congress, approved 3d March, 1823, entitled, "An act to confirm certain claims to lots in the village of Peoria, in the state of Illinois;" and that it has appeared to the satisfaction of the said register and receiver, that the said inhabitant or settler did not, prior to the said act of 3d March, 1823, receive "a confirmation of claims or donation of any tract of land or village lot from the United States;" and that the legal representatives of the said Francis Wilette, in virtue of the confirmatory act aforesaid are entitled to a patent for a certain lot described as follows, to wit: the lot containing fifty-four thousand eight hundred and ninety-eight square feet, and fourteen-hundredths of square foot, surveyed and designated as covered by said claims number one, eleven, forty-one and forty-two, in the south-east fractional quarter of fractional section nine,

in township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey, approved 1st September, 1840, by the surveyor of the public lands in the States of Illinois and Missouri." And the patent then proceeds to grant the lot to "the legal representatives of said Francis Wilette, and to their heirs."

After the introduction of this patent, the plaintiff read in evidence a deed from Bartholomew Fortier and Angelica his wife, dated the 17th of April, 1849, conveying the premises described in the patent to the plaintiff. He then proved by the deposition of Madeline Glodon and Louis Le Compte, that Angelica Fortier was formerly the wife of Louis Pilette, and the only descendant of Francis Wilette.

It will not become necessary to allude to the evidence introduced by the defendant. An exception was taken to the admission of the patent in evidence, and that may be considered as presenting the whole merits of the plaintiff's case.

The act of Congress of the 3d of March, 1823, confirmed only such claims as were contained in the report of the register. The act of the 15th of May, 1820, required his report to be laid before Congress for its consideration, and the claims included therein were exclusively the subject matter of the confirmatory act. The grant only operated to the benefit of such persons as had presented their claims to the register, pursuant to the provisions of the first act. The lots thus specifically claimed were alone required to be surveyed. And patents were only authorized to be issued to the claimants thereof, or to their legal representatives. It was not enough, that a person was an actual settler prior to the 1st of January, 1813, and had not previous to the third of March, 1823, received from the United States a confirmation of a claim, or a donation of a tract of land or a village lot; but he must in addition have claimed the lot settled upon and improved, in order to bring himself within the provisions of the confirmatory act. No other persons were entitled to the benefit of that act. The report of the register, and the patent in question, both show that neither Wilette nor his legal representatives, ever made any claim to lot forty-two; but on the other hand, they clearly show that Bernard and Fontaine were the sole claimants. The Secretary of the Treasury, on the assumption that Wilette was the settler within the purview of these

acts of Congress, caused a patent to be issued to his legal representatives for this lot. Could a patent issued under such circumstances, vest any title in the patentee? We unhesitatingly answer in the negative. The Secretary clearly exceeded his authority, in directing a patent to issue to the legal representatives of Wilette. The lot was set apart and appropriated to other persons. It belonged either to Bernard or Fontaine severally, or to both of them conjointly. And but to one or both of them could the patent properly issue. The patent in question is a mere nullity. It has no more force than so much waste paper. It is very true, that a patent is evidence of title in the patentee to the thing granted, until the contrary appears. It is presumed to have been regularly and rightfully issued. But when it appears on the face of the patent, or from any legitimate evidence, that it was issued in a case not authorized by law, it is utterly inoperative and void, and may be impeached collaterally in an action of ejectment. This doctrine, so manifestly just and reasonable, is fully sustained by the decisions of the highest courts in the country.

In the case of Stoddard *v.* Chambers, 2 Howard, 284, the land in controversy was reserved from sale at the date of the entry, survey and patent. Of the rights acquired under the patent, the Court said: "On the above facts, the important question arises, whether the defendant's title is not void. That this is a question as well examinable at law as in chancery, will not be controverted. That the elder legal title must prevail in the action of ejectment, is undoubted. But the inquiry here is, whether the defendant has any title, as against the plaintiffs. And there seems to be no difficulty in answering the question, that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. Had the entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested. But at no other interval of time from the location of Bell until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid certificate. No title can be held valid which has been acquired against law; and such is the character of the defendant's title, so far as it trenches on the plaintiff's. It has been

argued, that the first patent appropriates the land, and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act, which must be performed according to law. A patent is utterly void and inoperative, which is issued for land that had been previously patented to another individual. (*a*) The fee having been vested in the patentee by the first patent, the second could convey no right. It is true, a patent possesses the highest verity. It cannot be contradicted or explained by parol; but if it has been fraudulently obtained or issued against law, it is void. It would be a most dangerous principle to hold, that a patent should carry the legal title, though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment which is a much more solemn act than the issuing of a patent. The patent of the defendant, having been for land reserved from such appropriation, is void." The cases of Jackson *v.* Lawton, 10 Johnson, 23; Patterson *v.* Winn., 11 Wheaton, 380; and Polk's Lessee *v.* Wendal, 9 Cranch., 87; and 5 Wheaton, 293; assert the same doctrine.

We are clearly of the opinion, that the patent vested no title in the legal representative of Wilette, to the premises in controversy in this case. The Court, therefore, erred in admitting it in evidence.

The judgment is reversed, and the cause remanded.

Judgment reversed.

ANDREW GRAY, Appellant, *v.* JAMES McFADDEN, Appellee.

APPEAL FROM PEORIA.

A patent under the act of Congress of the 15th May, 1820, passed in relation to French Claims, at Peoria, could only issue to the claimant, or his legal representatives.

This was an action of ejectment brought in the Peoria Circuit Court, to recover the possession of certain village lots in Peoria, being a part of the French Claims. The declaration and other pleadings are in the usual form. The action was brought against other parties by Mr. McFadden, but Gray was made defendant

(*a*) Garner vs. Willett, 18 Ill. R. 458; Ballance vs. Forsythe, 13 How. U. S. R. 22; Bryan vs. Forsythe, 19. How. U. S. R. 334; Ballance vs. Papin, 19 How. U. S. R. 342.

in their stead, he having admitted himself to be in possession of the premises, at the time of the commencement of the suit. At August term, 1850, of the Peoria Circuit Court, Kellogg, Judge, presiding, the cause was, by agreement, submitted to the Court for trial, whereupon the Court, after hearing the evidence, found for McFadden, and entered judgment accordingly.

Gray brought this cause to this Court by appeal. This and the preceeding case, turn upon the same point.

O. PETERS, E. N. POWELL & T. L. DICKEY, for Appellant.

H. O. MERRIMAN & N. H. PURPLE, for Appellee.

TREAT, C. J. This was an action of ejectment brought by James McFadden against Andrew Gray. It resulted in a judgment for the plaintiff. The premises in dispute were a part of French Claims eleven, forty-one, and forty-two in Peoria—eleven and forty-one covering the same ground. The proof on the part of the plaintiff was the same as in the case of McFadden *v.* Ballance. For the facts, and the opinion of the Court, reference is here made to the report of that case, *ante*, p. 317. That decision fully disposes of so much of this case as relates to lot forty-two. It was there held that the patent, under which the plaintiff claims title, was absolutely void as to that lot. And we hold that it was equally so as to lot forty-one. The patent had no sufficient basis. It was founded on the assumption, that Wilette was the settler within the purview of the act of the 3rd of March, 1823, and, consequently, that his legal representatives were entitled to the benefits of that act. That conclusion was unauthorized. It by no means follows, because Wilette settled upon and improved this lot, that his legal representatives were entitled to a patent therefor. As we have already said, in the former case, the secretary of the treasury clearly exceeded his authority, in causing a patent to issue to any other person than the claimant under the act of the 15th of May, 1820, or his legal representatives. It was not enough, that a person was a settler prior to the 1st of January, 1813, but he, or his legal representatives, must also have claimed the lot so settled upon and improved, to bring himself, or themselves, within the provisions of the confirmatory act. That act did not confirm any other claims, than those contained in the

report of the register. And the confirmation operated exclusively to the benefit of the claimants, and their legal representatives. No claim was ever made to lot forty-one, either by Wilette, or his legal representatives. It is true, that Pilette, in right of his wife, who was a daughter of Wilette, was a claimant; but he did not claim in the character of a legal representative. The phrase "the daughter of the late Francis Wilette," was merely descriptive of the person. Pilette and his wife, as individuals, and not as the legal representatives of Wilette, were the claimants. If they were entitled to a patent, it should have been issued to them by name, and not to the legal representative of another person. And this should have been the case, even if they had claimed the lot in the character of the representatives of Wilette. It was clearly the duty of the secretary to direct the patents to be issued to the real claimants, or to their legal representatives. Under the rule adopted by him, if Wilette had left ten descendants, they could all now claim to hold under this patent, as tenants in common, although in point of fact, but one of their number ever interposed a claim to the lot and that too, not on the behalf of such descendants generally, but for himself exclusively. Where a party made a claim under the act of 1820, and died either before the passage of the confirmatory act or the issuing of the patent, it might very properly issue to his legal representatives. But in other cases, the patent ought to issue directly to the claimant.

The Court erred in permitting the patent to be read in evidence; and its judgment must be reversed, and the cause remanded. (*a*)

Judgment reversed.

CHARLES BALLANCE, Appellant, *v.* EDWARD P. TESSON *et al.*, Appellees.

APPEAL FROM PEORIA

So much of the land, within the ancient village of Peoria, as was confirmed to the settlers and inhabitants by the act of Congress, of 1823, was withdrawn from sale, and no title, as against the claimants and their legal representatives, could be acquired by pre-emption.

The land covered by the French Claims, at Peoria, were taxable in 1845.

The title to the French Claims, at Peoria, was vested in the claimants on the approval of the Survey, in September, 1840.

(*a*) Dredge vs. Forsythe, 2 Black. U. S. R. 563.

Ballance *v.* Tesson *et al.*

The Government may make a perfect grant, without the issuing of a patent or any other evidence of title.

An act of Congress, containing provisions clearly indicating an intention to pass the fee unconditionally and absolutely, operates *ipso facto* to vest the title in the grantee. (*a*)

This was an action of ejectment brought in the Peoria Circuit Court, to recover possession of a lot containing 27,449 square feet and 7-100 of a square foot, surveyed and designated as covered by claim number thirty-three, in the south-west fractional quarter of section nine, in township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey approved first of September, 1840, by the Surveyor of the Public Lands, in the States of Illinois and Missouri. At the March term, 1851, Ballance claiming to be in possession of the premises, was admitted to defend. At May term, 1851, the cause was heard before Kellogg, Judge, and a jury, and resulted in a verdict and judgment against Ballance.

The statement of the evidence offered is fully set out in the opinion of the Court.

C. Ballance, for himself.

N. H. Purple & O. Peters, for Appellees.

Treat, C. J. This was an action of ejectment brought by Tesson and Rankin against Ballance, to recover a lot of ground in the city of Peoria, covered by French claim thirty-three. On the trial, the plaintiff introduced the following evidence: 1. The act of Congress, of the 15th of May, 1820, entitled, "An act for the relief of the inhabitants of the village of Peoria, in the State of Illinois." 2. The act of Congress of the third of March, 1823, entitled, "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois." These two acts are set forth at large in the case of Ballance *v.* McFadden, reported *ante*, 317. 3. A patent from the United States, dated the 29th of June, 1846. It recited, that the claim of Antoine Roi, was entered in the report of the register of the Land Office, at Edwardsville, made on the 10th of November, 1820, pursuant to the provisions of the act of the 15th of May, 1820, as number thirty-three; that Roi was the settler and inhabitant, within the purview of the act of the 3rd of March, 1823; and it then proceeded to grant the lot, as designa-

(*a*) Reichert vs. Phelps, 33 Ill R. 434.

ted and surveyed according to the section of that act, to "the legal representatives of said Antoine Roi, and to their heirs." 4. The deposition of Madeline Glodon, showing that Antoine Roi died about thirty years ago, leaving Mary Roi, since intermarried with Toussant Gendron, his only descendant. 5. A power of attorney, from Gendron and wife, to Narcisse Pensoneau, dated the 3rd of March, 1849, authorizing him to sell and convey the lot in question. 6. A deed from Gendron and wife, by their attorney, in fact, Pensoneau, to the plaintiffs, dated the 20th of June, 1849, for the same premises. 7. A certified copy of the plat and survey of the French claims, in Peoria, approved the 1st of September, 1840.

The defendant introduced the following evidence. 1. A certificate of the register of the Land Office, at Quincy, showing that the defendant on the 28th of July, 1832, established a right of pre-emption to the south west quarter of section nine, township eight north, of range eight east, which tract embraces the premises in controversy. 2. A certificate of the same officer, showing that the defendant entered the quarter section, on the 29th of November, 1837. 3. A patent from the United States to the defendant, for the same tract, dated the 24th of January, 1838, and containing this clause: "subject, however, to the right of any and all persons claiming under the act of Congress of 3rd of March, 1823, entitled, "An act to confirm certain claims to lots in the village of Peoria, in State of Illinois.

He then offered in evidence, a judgment of the Peoria Circuit Court, of the May term, 1846, against certain real estate on which taxes were due and unpaid, for the year 1845, amongst which were 105 acres of the quarter section before described; also, a precept issued on the judgment, directed to the Sheriff of Peoria county, dated the 10th of June, 1846; and a deed from the Sheriff to the defendant, dated the 19th of November, 1850, showing a sale to the defendant, on the 16th of June, 1846, of nine acres off of the east side of the 105 acres, and including the premises in dispute, for the amount of taxes and costs. This evidence was rejected.

The claim in question was thus described in the report of the register of the Land Office, at Edwardsville. "No. 33. Antoine Roi, claims a lot in Peoria, containing about one-half of an arpent of land, and bounded northwardly by a lot of Charles Le Douk,

eastwardly by a street separating it from the Illinois river, southwardly by unoccupied land, and westwardly by a street."

The plaintiffs had a verdict, and judgment for the premises demanded.

Has the defendant the better legal title to the premises in controvesy? If so, he must prevail in the action of ejectment. The equities of the parties cannot be adjusted in this proceeding. His entry, in 1837, was not in terms made subject to any rights acquired under the act of Congress of the 3d of March, 1823. The condition to that effect in the patent issued to him in 1838, appears to have been then for the first time imposed. The persons whose claims were confirmed by the act of 1823, did not acquire the legal title anterior to the approval of the survey in 1840. It was not the design of Congress to vest the title absolutely in the claimants, before the survey of the claims should be made and approved. The defendant, therefore, has the elder legal title unless that part of the quarter section covered by the confirmed claims, was in effect appropriated, or reserved from sale, by the act of 1823. We are inclined to the opinion, that so much of the land within the ancient Village of Peoria, as was confirmed to the settlers and inhabitants by the act of 1823, was by the terms of that act, necessarily withdrawn from sale, or further appropriation, and consequently, that the defendant acquired no title as against the claimants, or their legal representatives by virtue of his pre-emption and subsequent entry. The lots claimed were by the provisions of that act set apart and appropriated to a particular purpose. They were thereby severed from the mass of the public lands. They ceased to be the subject matter of public sale, or private entry. The act of the 15th of May, 1820, required all persons claiming lots in the Village of Peoria to give notice of their claims to the register of the land office at Edwardsville by the 1st of October thereafter; and it was made the duty of the register to report to the secretary of the treasury, the claims so presented, and the substance of the evidence adduced in their support, and his report was to be laid before Congress for consideration. Various claims were presented to the register, and by him reported in detail. The lots claimed were specifically described, so that their precise locality could be ascertained by a survey. The size of the lots and their boundaries were generally given. Such was the case

with the claim in question. The act of the 3d of March, 1823e with certain qualifications and restrictions not material to b, now noticed, confirmed the claims contained in the report of the register, and directed the suveyor general "to cause a survey to be made of the several lots, and to designate on a plat thereof the lots set apart and confirmed to each claimant, and forward the same to the secretary of the treasury," who was required to "cause patents to be issued to such claimants as in other cases." This action of Congress clearly amounted to an appropriation of the lots claimed by the settlers. It was a reservation of them from sale, or any further appropriation, by necessary implication. The lots were granted to the claimants. Nothing remained to be done to render the grant operative and effectual but the survey. And on the approval of the survey, the title *eo instanti* passed to the claimants, or to their legal representatives. In the interval of time between the passage of the confirmatory acts, and the survey of the lots pursuant to its provisions no person could acquire a valid title as against the claimants. The claims confirmed were not of a floating or uncertain character. A survey alone was required to give them a fixed and determinate locality ; and the means of making the survey were contained in the confirmatory acts, and in the report of the register to which it referred, and on which it was based. The claimants were to have no further agency in the location of their claims. They had already given them a definite location, by their improvements, and by the description of them in their notice of claims to the register. But it was insisted on the argument, that there was no such reservation or appropriation of these lots, as to be binding on subsequent purchases from the government, and the case of Menard's Heirs *v.* Massey, 8 How., 293, was relied on as supporting the position. In that case, Cerre, in 1799, obtained an unsurveyed concession from the Lieutenant Governor of Upper Louisiana, for thirty-five hundred and twenty eight arpens of land, on the big spring of the river Maramee, so as to include said spring," and, in 1806, he exhibited his claim for the same premises to the board of commissioners for confirmation. An act of Congress of the 3d of March, 1811, declared that " no tract of land shall be offered for sale, the claim to which has been, in due time, and according to law presented to the recorder of land titles in the District of Louis-

iana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the right of persons claiming lands in the Territory of Louisiana." The township including "the big spring of the river Maramee," was offered for sale in 1823, and sold. In 1833, the commissioners reported that the claim of Cerre ought to be confirmed; and, in 1836, Congress confirmed the claim according to the report. A controversy then arose between the representatives of the claimant and the purchasers at the sale. The Court held that the purchasers had the superior title; and in answer to the position, that the land was reserved from sale by the act of 1811, said: "In reserving lands from sale, it was necessary to know where they were situated, and how far they interfered with the public surveys. Either the President, or some other officer, must have had the power to designate the lands as those adjoining to salt springs and lead mines; or it must have appeared in some public office appertaining to the land Department what the boundaries of reserved lands were; and if it did not appear, no notice of the claim could be taken by the surveyors, nor by the registers and receivers when making sales. This was a conclusion that has from necessity been acted on at the land offices; and as Cerre's claim was not surveyed before the confirmation took place, no boundaries of his tract could be recognized when the public surveys were made and the lands sold. He claimed no tract of land. The laws refer to specific tracts that are claimed; it is not material whether the boundaries are proper, and according to the concession, or the claim be just or otherwise, so that the tract claimed be certain. This was also decided in the cases just cited. Certainly, a mere floating claim, founded on a concession that was ordered to be located by survey, and where no survey or location had been made, was not protected by the act of 1811. An actual survey is not indispensable; but boundaries must appear, in some form, from the notice of claim, and the accompanying evidences filed with the recorder. If, from these, the tract of land could not be laid down on the township surveys then the land could not be reserved from sale; although by the concession, and by the notice, a particular spot, (as the big spring of the Maramee,) was referred to in general terms as "the place where the land should lie." That case was, without doubt, rightly decided. The land claimed was described in so

loose and indefinite a manner, that it could not be considered as withheld from sale. A surveyor could not have located it from the description given in the concession, or in the claim afterwards presented to the commissioners. It required some further act of the party, to give the tract claimed a definite form and location. But the case was widely different with these French claims. The lots were situated within the limits of the village of Peoria, a well known locality. They had been occupied and improved by the claimants. Their extent and boundaries were stated, from which the exterior lines could be easily ascertained. There could be but little difficulty in determining their precise locality.

Was the land covered by their claims subject to taxation for the year 1845 ? This presents the question, when the title vested in the claimants. We answer, on the approval of the survey in September, 1840. The grant then became operative and complete. The confirmees, or their legal representatives, were from that time invested with the full legal estate in the lots as surveyed. The issuing of patents was not necessary to transfer the titles. It had already passed out of the United States. The patents are but evidence of title in the patentees. The law is well settled, that the government may make a perfect grant directly, and without the issuing of a patent, or any other evidence of title. An act of Congress, containing provisions clearly indicating an intention to pass the fee unconditionally and absolutely, operates *ipso facto* to vest the title in the grantee. A reference to one or two adjudged cases in the Supreme Court of the United States, upon grants made by the government, will fully establish this position. In Geignon's Lessee *v.* Astor, 2 Howard, 319, it was decided that an act of Congress requiring patents to be issued to persons, "whose claims are contained in the report transmitted to the secretary of the treasury, and which have been reported favorably on by said commissioners ; and such persons are hereby confirmed in their claims, agreeably to any surveys heretofore made, or the lines and boundaries established by the claimants respectively," vested the legal estate presently in the confirmees. The Court said: " but the title becsme a legal one by its confirmation by the act of Congress of February, 1823, which was equivalent to a patent. It was highe evidence of title, as it was the direct grant of the fee which had been in the United States by the government itself,

(*a*) Garner vs. Willett, 18 Ill. B. 458.

whereas the patent was only the act of its ministerial officers.' In Strother *v.* Lucas, 12 Peters, 410, the Court remark: "That a grant may be made by a law, as well as a patent pursuant to a law, is undoubted; and a confirmation by a law, is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*." The act of the 3rd of March, 1823, provides: "That there is hereby granted to each of the French and Canadian inhabitants and other settlers in the village of Peoria, in the State of Illinois, whose claims are contained in a report made by the register of the land office at Edwardsville, in pursuance of the act of Congress, approved May the fifteenth, one thousand eight hundred and twenty, and who had settled a lot in the village aforesaid, prior to the first day of January, one thousand eight hundred and thirteen, and who have not heretofore received a confirmation of claims, or donation of any tract of land or village lot from the United States, the lot so settled upon and improved." This portion of the act contains words of present grant, and in connection with the further provision directing the lots to be surveyed, manifests a clear intention on the part of Congress, to vest the title absolutely in the claimants on the completion of the survey. Patents were required to be issued not for the purpose of transferring the fee, but merely as evidence that the title had passed to the patentees.

The provision in the ordinance of 1818, that all lands sold by the United States within this State, should be exempt from taxation for the term of five years from the sale, did not apply to the claims in question. The lots were not *sold* by the United States. They were granted as a bounty to the settlers.

We hold that the premises in controversy were taxable in 1845, and that the Circuit Court erred in excluding the evidence offered by the defendant of the sale for taxes.

The judgment is reversed, and the cause remanded.

Judgment reversed.

Rankin *v.* Curtenius *et al.*

JOHN RANKIN, Appellant, *v.* ALFRED G. CURTENIUS *et al.*, Appellees.

APPEAL FROM PEORIA.

A patent which is not issued to the real claimant, or to the legal representatives o a claimant, of land in the old village of Peoria is void.
A motion to set aside a nonsuit is addressed to the discretion of the Court, and the decision upon it cannot be assigned for error.
If a plaintiff is dissatisfied with the ruling of the Court, he should submit his case for trial, and take exceptions; and if the finding is against him he can then test the correctness of the decision.
The Circuit Court has no authority to nonsuit a plaintiff, or to instruct the jury to find against him as in case of a nonsuit.

This cause was tried before Kellogg, Judge, and a jury, at the May term, 1851, of the Peoria Circuit Court. The facts connected with this trial are stated by the Court.

N. H. PURPLE & R. S. BLACKWELL, for Appellant.

E. N. POWELL & H. O. MERRIMAN, for Appellees.

TREAT C. J. This was an action of ejectment brought by Rankin against Curtenius and others, to recover the possession of a lot in the city of Peoria, covered by French claim seventy. On the trial, the plaintiff introduced the following evidence: 1. A patent from the United States, dated December 11th, 1849. It recited, that claim seventy was entered in the report of the register of the Land Office at Edwardsville, made pursuant to the act of Congress of the 15th of May, 1820, "in the name of Louis Pensoneau under Augustine Laroche"; that Laroche was the settler within the purview of the act of Congress of the 3d of March, 1823; and it then proceeded to grant the lot as surveyed under the 2nd section of that act, to "the legal representatives of the said Augustine Laroche, and to their heirs." 2. A deed for the lot from Laroche to Louis Pensoneau, *junior*, dated the 8th of May, 1819. 3. A deed for the same premises, from Harriet S. Pensoneau and Louis P. Pensoneau to the plaintiff, dated the 1st of May, 1849. 4. Proof that Louis Pensoneau, *junior*, died about the year 1825, leaving Harriet S. Pensoneau and Louis P. Pensoneau his only heirs at law. 5. A copy of the plat and survey of the French Claims in Peoria, approved 1st of September, 1840. The possession by the defendants was

admitted. The defendants read in evidence the report of the register of the Land Office at Edwardsville, of the 10th of November, 1820, in which the claim in question is thus described: "No. 70. Louis Pensoneau claims a lot in Peoria, bounded northwardly by a lot of Pierre Lavapieurdit Chamberlain, eastwardly by a street separating it from the Illinois River, southwardly by a cross street, westwardly by a back street." The Court then, at the instance of the defendants, excluded the whole of the evidence from the jury; and the plaintiff submitted to a nonsuit, with leave to move to set the same aside. He afterwards entered a motion to set the nonsuit aside, which the court denied, and he now assigns that decision for error.

The judgment of the circuit court must be affirmed on two grounds. First. The evidence was properly excluded. The patent was obnoxious to the same objections, as the one relied on in the cases of Ballance *v.* McFadden, and Gray *v.* McFadden, *ante*. It was not issued to the real claimant of the lot, or to his legal representatives Louis Pensoneau, the elder, was the sole claimant; and he claimed the lot in his own right, and not as a representative of Laroche. The confirmation operated exclusively to his benefit, if to the benefit of any one; and the patent should have been issued to him alone, or to his legal representatives. Laroche never claimed the lot, and consequently, was not entitled to the patent. If Louis Pensoneau, the younger, claimed the lot by virtue of the conveyance from Laroche, he should have become a claimant before the register. The patent having been issued without authority of law, the evidence did not tend to prove title in the plaintiff, and was, therefore, rightfully excluded.

Second. The refusal of the court to set aside the nonsuit cannot be assigned for error. The motion was addressed to the discretion of the court. The plaintiff voluntarily submitted to a nonsuit, and he cannot now complain that the court refused to set it aside. He might, notwithstanding the ruling of the court, have submitted the case to the jury. And not until a verdict was returned against him, and a judgment in bar entered thereon, could he call in question the decision of the court excluding the evidence. Under our practice, the court has no authority to nonsuit a plaintiff, or to instruct a jury to find against him, as in case of a nonsuit. If he suffers a nonsuit, it is purely vol-

untary. Amos *v.* Sinnott, 4 Scammon, 440. And he cannot afterwards compel the Judge to sign a bill of exceptions. The People *v.* Browne, 3 Gilman, 87. By submitting to a nonsuit, he is precluded from prosecuting an appeal of writ of error, for the purpose of reviewing the decisions of the court.(*a*) Barnes *v.* Barber, 1 Gilman, 401. The case of Lombard *v.* Cheever, 3 Gilman, 469, was precisely such a case as this. The plaintiff on the exclusion of certain evidence, suffered a nonsuit, under permission to move to set it aside The motion was afterwards made and denied. This court, after citing the case of Barnes *v.* Barber, said: "Nor does the fact, that the nonsuit was taken with leave to the plaintiff to move to set it aside, vary the result."

The judgment is affirmed.

Judgment affirmed.

JOHN BUCHENAU, Pltff in Error, *v.* PATRICK HORNEY, Deft in Error.

ERROR TO LA SALLE.

A party cannot rescind a contract of sale and at the same time retain the consideration he has received. If he rescinds he must return the property purchased, in as good condition as when he received it. unless it is entirely worthless. A tender is *strictí juries*, and must be clearly proved. (*b*)

A contract of sale cannot be affirmed as to part and rescinded as to the residue.

A vendor, if a sale is to be rescinded, must be put in as good a condition as he was before the sale, by a return of the property.

This was an action of assumpsit brought by plaintiff in error, against defendant in error, at November term, 1849, of La Salle Circuit Court, Spring, Judge of the Cook county court, presiding. The case was submitted to a jury for trial, when a verdict was found for the defendant. A motion for a new trial was overruled.

Bill of exceptions shows that on the trial, the plaintiff read the note declared on in evidence, and rested his cause.

The defendant called Edward Fanning, who testified that about the time of the date of the note, defendant and witness

(*a*) Brown vs. Malledy, 19 Ill. R. 290.

(*a*) Cunningam vs. Fithian, 2 Gil. R. 615; Murphy vs. Lockwood, 21 Ill. R. 619; Smith vs. Doty, 24 Ill. R. 163; Bowen vs. Schuler, 41 Ill. R. 196; Ryan vs. Brant, 42 Ill. R. 85; Vining vs. Leeman, 45 Ill. R. 246.

were in plaintiff's bakery. Defendant asked where he could buy a team; witness stated that plaintiff had one to sell. Plaintiff and defendant then made a bargain for the sale of a team, wagon and harness. Defendant asked witness to draw a note. He drew one, and defendant refused to sign it; witness drew another which defendant refused to sign, and then witness left. Nothing was said at the time in relation to the ownership of the property. That the horses had been used by Conrad Dash in his life time, and that said Dash had been in possession of the horses and wagon up to the time of his death, claiming ownership. The widow of Conrad Dash was the sister of plaintiff. She was insane at the time that plaintiff had acted in selling the property, and in paying the debts and funeral expenses of said Dash.

Defendant then called Henry Deuchart, who testified that he was present at the giving of the note. That the note was given for a span of horses, wagon and harness, sold by plaintiff to defendant. That during the negotiation for the sale, nothing was said about the ownership of the property. This was in the evening. The next day, at 3 or 4 o'clock in the afternoon, defendant came to the bakery of the plaintiff with the team, and told witness he had brought back the team. Witness asked "what team?" Defendant said, "the team you sold me." Witness replied, "I sold you no team. I have nothing to do with it." The plaintiff was not present at that time. Defendant then hitched the team to a post in front of the residence of Mr. Tyler, a neighbor of plaintiff. The place where the team was hitched, was as convenient a place to hitch a team as any in the vicinity of plaintiff's bakery, and on the evening of that day witness communicated the fact that the team had been brought back to the plaintiff. Conrad Dash had those horses and wagon in his possession, claiming ownership prior to, and up to the time of his death. On cross-examination, witness stated that when the team was brought back by defendant, as above stated, witness was casually in the bakery of plaintiff, and was not employed by, or authorized to do business for plaintiff, and when the team was so returned, one of the horses was entirely ruined and spoiled by having one of his legs corked, and the cord badly cut.

It was admitted that no letters of administration had been issued on the estate of Conrad Dash

GLOVER & COOK, for Pltff in Error.

There was no fraud; there might have been an implied warranty or title, but the plea sets up fraud and not warranty, and the allegatee and probatee must agree. 24 Wend, 102; 19 John. R., 77; Stanly *v.* Norris, 4 Blackford, 353; Thompson *v.* Ashton, 14 J. R., 317; Evertson's ex. *v.* Mills, 9 J. R., 138. There was no return of the property. Norton *v.* Young, 1 Greenleaf, 30; Coxe, 174; 10 east, 101; 18 Conn., 18; 15 Wend, 638. The plaintiff was not bound to take the property injured in value. 23 Pick., 283; 1 Denio, 69.

E. S. LELAND, for Deft in Error.

TREAT C. J. A party cannot rescind a contract of sale, and at the same time retain the consideration he has received. He cannot affirm the contract as to part, and avoid the residue, but must rescind it in *toto*. He must put the other party in as good a condition as he was before the sale, by a return of the property purchased. There may be an exception where the subject matter of the sale is entirely worthless. But if it is of any benefit to the seller, the purchaser must restore it before he can put an end to the contract. In this case, the defendant rested his defence solely on theground that there was fraud in the sale, and that he had disaffirmed the contract by restoring the property. The proof failed to show that it was returned. The defendant called at the plaintiff's shop and stated to a person, casually there, that he had brought back the team, and then fastened it in the vicinity. He did not declare the purpose for which it was brought back, or for whom it was intended. The plaintiff was soon after informed that the team was there, but he was not apprised of the purpose for which it was left. He was not even notified that the defendant was dissatisfied with his purchase. It does not appear that he even took charge of the property, or attempted to exercise the least control over it. The defendant should have tendered the property to the plaintiff or his agent, and at the same time made known his object in so doing. A tender is *stricti juris*, and ought to be made out clearly. But if there was a tender of the property, the plaintiff was

under no obligation to receive it. It was not in the condition in which the defendant received it. He did not offer to place the plaintiff in as good a condition as he was before he parted with the property. One of the horses had in the meantime become valueless. On either grouud, the verdict was unauthorized, and a new trial should have been granted.

The judgment is reversed, and the cause remanded.

Judgment reversed.

THE PRESIDENT and TRUSTEES, of the town of Ottawa, Pltffs in Error, *v.* the COUNTY of LA SALLE.

ERROR TO LA SALLE.

The act of 1839, empowering the president and trustees of incorporated towns to grant licenses, and requiring them to pay all moneys derived from this source into the county treasury, does not repeal special laws previously passed empowering particular corporations to grant licences, and to retain moneys so obtained for their own use.

These two acts are seemingly repugnant. They should, if possible, be so construed that the latest one shall not operate as a repeal by implication, of one previously passed. (*a*)

A subsequent law, which is general, does not abrogate a former one which is special ; nor does a general law operate as a repeal of a special law on the same subject passed at the same session.

An agreement in a case, is a part of the record for all purposes, if for any.

The County of La Salle sued the Town of Ottawa in assumpsit, to recover for licenses which had been granted for selling liquor, &c.

It was agreed that the sum of $312,50 had been received by the town from divers persons for such licenses, in the years 1847 and 1848. That this sum had been demanded, and payment thereof refused. That the county of La Salle was organized under the law of 1849, provdinig for township organization. At May term, 1850, T. L. Dickey, Judge, presiding, the cause having been submitted to him, gave judgment for the county. The President and Trustees of the Town of Ottawa, brought the cause to this Court.

H. G. COTTON and A. HOES, for Pltffs in Error.

E. S. LELAND and W. H. L. WALLACE, for the County.

(*a*) Hume vs. Gossett, 43 Ill. R. 299.

The Town of Ottawa *v.* The County of La Salle.

TREAT, C. J. The act of the 12th of February, 1831, authorized towns containing a population of not less than one hundred and fifty inhabitants, to become incorporated for municipal purposes. Corporations formed under this law possessed no power to license groceries. The power remained in the County Courts. The town of Ottawa was incorporated by a special act passed on the 21st of July, 1837. The charter expressly conferred the power to license and regulate groceries within the limits of the corporation. The 7th section of "An act regulating tavern and grocery licenses," approved March 2nd, 1839, was as follows: The president and trustees of incorporated towns shall have the exclusive privilege of granting licenses to groceries within their incorporated limits; and all sums of money which may be received for licenses as aforesaid, shall be paid into the county treasury." Between the passage of this law and May 1848, the town of Ottawa received the sum of $312.50, for licenses granted to keep groceries within its limits. The county of LaSalle brought an action to recover the money thus received and the Circuit Court, on the foregoing state of facts, rendered a judgment against the town for the amount thereof. That decision is assigned for error

The special act incorporating the town of Ottawa conferred upon it the power to license and regulate groceries within its limits, and the right to retain to its own use the moneys received for licenses. This right continued in the corporation, unless it was taken away by the general law of the 2nd of March, 1839. In our opinion, that law should not be so construed as to defeat the right. We think the section before quoted was designed to apply to towns incorporated under the law of 1831, and which possessed no power to license groceries, and not to extend to corporations created by special acts, on which the power to license groceries had already been conferred. The object was to confer this power on the former class of corporations, and at the same time to retain the money in the county treasury, where it had hitherto been paid. It was simply a transfer of the power to license groceries, from the county courts to the authorities of incorporated towns. The first clause of the section had no application to the town of Ottawa, for it already possessed the same power under a special law. By this construction, there is no

inconsistency between the two laws, but the provisions of both may remain in full force. To adopt a different construction would be to hold that the legislature intended to repeal so much of the charters of cities and towns, as conferred authority to grant licenses to keep groceries. There is nothing on the face of the law of 1839, except the general language of the 7th section, that indicates any design to interfere with the powers previously granted to such corporations. If there is a repeal, it is by implication only. It is a maxim in the construction of statutes, that the law does not favor a repeal by implication. The earliest statute continues in force, unless the two are clearly inconsistent with, and repugnant to each other, or unless in the latest statute, some express notice is taken of the former, plainly indicating an intention to repeal it. And where two acts are seemingly repugnant, they should, if possible, be so construed, that the latter may not operate as a repeal of the former by implication. Dwarris, 674; Bacon's Ab. Tit. Stat. D.; Bowen *v.* Lease, 5 Hill, 221; Bruce *v.* Schuyler, 4 Gilman, 221; Kinney *v.* Mallory, 3 Alabama, 626; Planter's Bank *v.* The State, 6 Smedes & Marshall, 628. So, a subsequent statute which is general, does not abrogate a former statute which is particular. Dwarris, 674. And a general law does not operate as a repeal of a special law on the same subject, passed at the same session. 4 Pike, 410. These authorities are decisive of the question. There is no necessary repugnancy between the general law and the special act, but they can be easily reconciled, and allowed to stand together. Full effect may be given to both, without impairing the provisions of either.(*a*)

The case was heard in the court below on an agreed statement of facts, and no bill of exceptions was taken to the decision of the court. It is now insisted, that the agreement is not before this court. A question arising in the case was, at the urgent request of the parties, submitted and decided at the last term and they then treated the agreement as part of the record. See 11 Illinois, 654. It is now too late to raise the objection. The agreement is a part of the record for all purposes, if for any.

The judgment is reversed.

Judgment reversed.

(*a*) Sullivan vs. People, 15 Ill. R. 233; Supervisors, &c., vs. Campbell, 42 Ill. R. 492.

JOHN HAMLIN, Admr, &c., Pltff in Error, *v.* FRANCIS P. KINGSLEY, Deft in Error.

ERROR TO PEORIA.

A. gave his note to B., in consideration that B. should pay one-half of a note previously executed by A., for money borrowed for both; which B. failed to do. B. assigned the note of A. to C., who knew the facts. *Held*: that in a suit by C. against A. on the note, A. might set up the facts in defence.

This was an action of assumpsit commenced in the Peoria Circuit Court, by William H. Fessenden against Francis P. Kingsley. During the pendency of the action Fessenden died, and John Hamlin, as Administrator, was substituted as plaintiff in the suit. The action was founded upon a promissory note given by Francis P. to George O. Kingsley, and by George O. Kingsley endorsed to Fessenden in his lifetime. The plea of F. P. Kingsley set out, that at the request of George O. Kingsley, he borrowed $320 of their sister, for which he gave a note which George O. was also to sign, and delivered one-half of the money to George O. Kingsley, in pursuance of a verbal agreement between the two brothers, the loan having been made for their mutual benefit. That a settlement of all accounts between George O. and Francis P. Kingsley was subsequetly had, upon which George O. Kingsley was paid what was due him. Upon this settlement George O. agreed to pay off and satisfy the note to the sister; and the note sued on, which was for $160., was given to George O., for the one-half of the money borrowed which Francis P. retained for his own use. That George O. refused to pay off or become liable to pay off the note for $320., and therefore the consideration of the note sued on had failed. That the note sued on had been assigned to Fessenden after it became due, and Fessenden had knowledge of this defence.

At March term, 1850, of the Peoria Circuit Court, Kellogg, Judge, presiding, the cause was submitted to a jury, and a verdict was found and judgment entered for the defendant below, and the plaintiff in that Court sued out this writ of error.

MERRIMAN & JOHNSON for Pltff in Error.

O. PETERS for Deft in Error.

CATON, J. The evidence shows, that about five years previous to the date of the note on which this suit was brought, the defendant had borrowed of his sister three hundred and twenty dollars, for which he gave her his note, and of which he let George O. Kingsley, the payee in this note, have one half, upon the agreement that he should pay one half of the note given to their sister. This he has never done. When the note in controversy was given, the testimony shows that it was agreed between the parties to it, that it should not be paid unless George O. Kingsley fulfilled his agreement to pay the half of the first note.

While it may not be competent, to show by parol the agreement made at the time of the execution of the last note, for the purpose of proving a want or failure of consideration, or to vary its terms; still the first transaction shows an advance by the defendant of one hundred and sixty dollars to the payee of this note; which, with interest thereon, amounts to more than is due upon the note, and might properly be set off against it, unless Fessenden, the plaintiff's intestate, was a *bona fide* holder of the note. We think, after a careful examination of the record that the evidence given at the trial was sufficient to warrant the conclusion to which the jury arrived, that the note was not assigned to Fessenden *bona fide*, and that so much of the amount which was due from the payee to the maker of the note, on account of the advance of the one hundred and sixty dollars, as was necessary to satisfy this note, was properly allowed as a set off against it. To detail all of the evidence, both direct and circumstantial, which in our opinion justifies this conclusion, would be both tedious and unprofitable, and we do not think it necessary to do so.

The judgment is affirmed.

Judgment affirmed.

WILLIAM FISHER, Appellant, *v.* LEVI F. CLISBEE, Appellee.

APPEAL FROM MARSHALL.

Ferrymen are common carriers, and subject to the same liabilities.
The rights and liabilities of ferrymen considered. (*a*)

This action was tried at March term, 1851, before T. L. Dickey Judge, and a jury, when a verdict was found and a judgmen rendered for the plaintiff. The declaration contains two counts, charging that the defendant was the owner and occupant of at ferry across the Illinois river, at Lacon, that the plaintiff, by his servant went upon the ferry boat to cross the river, that the boat was so managed and conducted, that plaintiff's horse, buggy, and harness were precipitated into the river, when the horse was drowned, and the buggy and harness became injured.

Defendant pleaded the general issue. By the bill of exceptions it appears, that the plaintiff proved the licensing of the defendant to keep the ferry, &c., and that one Kuhn came upon the boat in February, 1850, with the horse, &c., and while crossing the river the horse became restive, backed off the boat into the river, went under the ice and was drowned, and that the buggy and harness was injured.

The defendant proved, on his part, that the boat was strong, well built, and decked over, that when Kuhn came on the boat with others, he requested them to take their horses from their carriages. That the owner of the forward team did so. One of the others said his horse was kind, &c., and he did not remove him from the vehicle. That Kuhn did not unloose his horse, nor make any remark. That Kuhn's horse backed once, but was brought forward again; that the defendant told Kuhn, he had better unloose his horse from the buggy, which he did not do. That when the horse backed, Kuhn stood by his horse's head and took hold of one of the bridle reins, the same being hitched back on the hook in the saddle, and pulled forward, and thereby the horse's head was pulled round, and back, that the horse continued to back, Kuhn holding on and pulling on the check rein till the horse went off the boat into the river. That witness would not say positively that Kuhn heard defendant, the wind was blowing hard, &c.

Defendant also offered to prove, that had Kuhn unloosed the

(*a*) Claypool vs. McAllister, 20 Ill. R. 504.

horse, there would not have been any hazard, that it was not customary to have chains or bars across the ends of ferry boats on the Illinois river ; and that it is usual and customary for passengers to take charge of their own horses, &c. This testimony was objected to, and the objection sustained by the Court. The Circuit Court permitted the evidence in relation to the conversation connected with unloosing the horse, to go to the jury subject to objections.

The sixth instruction, as asked by defendant, was, " If the jury believe, from the evidence, that Kuhn so held the horse, or pulled the reins of the horse, as to cause him to go back and run off the ferry boat, they will find a verdict for the defendant, " which the court modified, and gave in the following language: " If the jury believe from the evidence, that Kuhn so held the horse, or pulled reins of the horse as to cause him to go back and run off the ferry boat, and that the horse would not have backed off, if Kuhn had not touched him, then they should find for the defendant. "

O. Peters for Appellant.

Ferrymen are not common carriers so as to be responsible for the loss of animals or vehicles placed on their ferries for transportation, at all events, unless caused by the act of God, the public enemy, or the act of the party suffering the loss.

That such is the rule in relation to common carriers of goods and merchandise is not now disputed. Ferrymen are rather carriers of the public travel for toll, on a certain passage, with no duty of delivery at the end of it, and not carriers of goods and merchandise, to be by them transported and delivered, unless specially delivered to, and accepted by them for carriage on freight. They are, or are like, carriers of passengers, and only liable for some negligence or fault in transporting passengers with their vehicles and teams ; they may be holden to strict or extraordinary care and diligence, but are not responsible for injuries to passengers or their vehicles or teams, without some neglect or fault on their part. Some of the distinctions between ordinary common carriers and ferrymen are quite apparent :—

Common carriers transport property for hire, as a public employment, and not persons ; or if they carry persons, they are

not subject to the rigid rules applicable to common carriers. Ferrymen carry passengers and such vehicles as passengers use for traveling, and their business is not, principally, to carry merchandise. Common carriers of merchandise are not obliged to take passengers to transport. Ferrymen are. Common carriers of merchandise, receive the property to be transported into their possession, and have the sole and exclusive control over it during the transit. Ferrymen do not have the sole and exclusive control over the persons, animals and vehicles that they receive upon their boats, and from the nature of the case, cannot have. Common carriers, are obliged by their calling, to deliver the property to the consignee, or at the place of assignment. Ferrymen are under no obligation to deliver at all, and it is no part of their duty to deliver, unless a usage to that effect is shown, and then they may be charged as common carriers of goods for hire ; though this is the result of the usage or implied undertaking, and not *ipso facto* resulting from their character or employment as ferrymen. Walker *v.* Jackson, 10 Mees. and Wus. R., 166–7. Passenger carriers even, may be liable as common carriers, by usage or contract, or by implication, but not merely as passenger carriers.

Dwight *v.* Brewster, 1 Pick. R. 50 ; Citizens' Bank *v.* Nant. S. Boat Nav. Co., 2 Story's R. 16.

Our statute fixes the duties of ferrymen. R. S., 251. Ferrymen, proprietors of toll gates and turnpike roads, are placed on the same footing, and derive their powers from the same source. Before either can exercise any exclusive privilege, there must be an adjudication, that the convenience of the public requires it; they must be licensed ; they must pay a tax in advance ; they must pay an annual tax. R. S. 251, § 1, 2, 3, 14 ; Lombard *v.* Cheever *et al.*, 469.

Passenger carriers, by land or water, are not subjected to the rigid rules applicable to common carriers. They are, at most, held to strict diligence, and are not liable, unless guilty of some negligence or fault. Story on Bailment, § 608, 609, 590, 607, 602, 376–7 ; Stokes *v.* Saltonstall, 13 Peters, 190.

Passenger carriers are not liable for loss of slaves. Buyer *v.* Anderson, 2 Peters. R., 155 ; for they cannot be packed away like merchandise, or inanimate objects, and the same rule is measurably applicable to cattle taken on board of carrier ships and

other conveyances, and for the same reason. Lawrence *v.* Anderson, 7 Eng. C. L. R., 38 ; Galwy *v.* Sloyd, 10 Eng. C. L. R. 359 ; Luxford *v.* Large, 24 Eng. C. L. R. 393 ; Miles *v.* Cottle, 9 Eng C. L. R., 221. Passenger carriers, by land and water, are now held liable for the baggage of passengers. Vehicles and teams of passengers are not in any sense baggage ; nor is money, or things not usual for one's personal use and accommodation in traveling. Orange Co. Bank *v.* Brown, 9 Wend. R., 85 ; Hawkins, *v.* Hoffman, 6 Hill's R., 586 ; Porter *v.* Drew, 25 Wend. R., 459.

And to make a passenger carrier liable, there must be a complete delivery to the carrier, and he must have exclusive control of the baggage or article of property. Loven *v.* U. & S. R. Road Co., 7 Hill's R., 47 ; Miles *v.* Cottle, *ut supra.*

If ferrymen are common carriers, in any sense, they may limit their duties and liabilities, either by special contract, or by a general notice, or by a well established usage or custom, which recognizes such a limitation. So that, whether ferrymen are common carriers or not, their liability is, or may be, limited by well established exceptions. 1 Ex. Animals having sense and will sufficient to occasion losses by their own act. And this must necessarily, on principle, extend to loss of carriages and their contents attached to horses, as well as to the horses themselves. 2 Ex. Articles of personal property, not delivered specifically into the exclusive charge and custody of the carrier, but retained by the owner or his servant, wholly or partially, under his own personal care and government. Tower *v.* U. & S. R. R. Co., 7 Hill's R. 47 ; Rogers *v.* Prink, Eng. C. L. R. 3 Ex. Personal property lost or damaged through negligence, carelessness or fault of the owner himself, or his servent or agent. Pardee *v.* Drew, 25 Wend. R., 459 ; 2 Greenl. Ev., § 215–220 ; White *v.* Winnimissett Ferry Co., Law Reporter, May No. 1851, p. 32. The Supreme court of Massachusetts held, in this case, 1. That ferrymen are not liable like common carriers, unless they take the property under their exclusive control. 2. That they are not liable, even if in fault, unless the plaintiff exercises ordinary care. 3. That their liability is like that of a toll bridge owner, rather than of a common carrier ; or like those passing the highway, and must be without fault, or not entitled to recover. See also Churchill *v.* Rosebuck, 15 Conn. R., 329.

Monroe *v.* Leech, 7 Met., 275 ; Smith *v.* Smith, 2 Pick. R., 621 ; 1 Moo. & Malk., 21 ; 4 Carr. & Pay., 106 ; Butterfield *v.* Forrester, 11 East, R., 6 ; Rathbun *v.* Payne, 19 Wend. R., 400.

The circuit court should have given the first, second and third instructions, asked by the defendant ; they contained the correct rule of law as applicable to passenger carries by land and by water.

The second instruction given for the plaintiff was erroneous. The conversation between the plaintiff and the ferryman should have been considered by the jury. Kuhn was directed to unloose his horse. Those who travel with passenger carriers by water are subject to the orders and control of the master of the boat or vessel, and must obey him. 3 Kent's Com., 183 ; 1 Camp. R., 38. It was a question for the jury to determine, whether the plaintiff was in fault, and to what extent.

The evidence offered by defendant and excluded, should have been admitted. This evidence proved that the loss would not have happened if Kuhn had taken the horse from the buggy, as directed by the ferrymen. That the defendant's boat was one of the best and safest on the Illinois river. That it was not customary to have chains or bars across the ends of ferry boats. That it was customary for passengers crossing with team to take care of their own horses and prevent their going off. All this was competent evidence to prove an implied contract with every passenger, as well as to show want of proper care on the part of Kuhn. The parties themselves could have made a contract that would have removed any liability of defendant ; these facts would have authorized the jury to infer such a contract. F. & M. Bank *v.* Champlain Trans. Co., 18 Verm. R., 13 ; Van Santwood *v.* St John, 6 Hill's R., 158. Opinion of Walworth and the Senators concurring. Kelsey *v.* Brown, 3 Day's R., 346 ; Renner *v.* Bank of Columbia, 9 Wheat. R., 582, 90, 91, and note at the end of that case ; 17 Wend. R., 305 ; 10 Verm. R., 161 ; 4 Pick. 371 ; Cowen & Hill's notes, part 2, pp. 1410–11–12, *et seq.*

The sixth instruction asked by defendant, was intended to present to the consideration of the jury, the naked question whether Kuhn caused the loss by his mismanagement of the horse. Defendant was entitled to this instruction without qualification. It was sufficient if it affirmatively appeared to the satisfaction of the jury, that he caused the loss ; this was a complete

defence; and it was unnecessary and improper for the court to encumber them with the belief of a negative. The true question was, did Kuhn cause the loss? and the defendant was entitled to have this question submitted to the jury, disencumbered of any other matter; but the rider which was stuck on by the Circuit judge, put them to guessing what would have happened, if another and suppositious state of facts had existed.

N. H. PURPLE, for Appellee, cited Stokes *v.* Saltonstall, 13 Peters, 191; Story on Bailments, 323; Jones on Bailments, 106, 107, 108; 2 Kent's Com. 464–5; Mors *v.* Slue, 1 Mod. R., 85; Allen *v.* Small, 2 Wend., 327, 340.

CATON, J. The main question in this case, requires us to determine the character and extent of the liabilities of ferrymen. We find the law too well settled to admit of doubt or dispute, that they are common carriers, as to all property which they transport in their boats, whether accompanied with passengers or not. This is the law as laid down by all of the elementary writers, whom we find treating on the subject, as well as the adjudged cases, and to this rule, we have not met with a single exception. We may refer to Jones on Bailment, 106; Story on Bailment, 323; 2 Kent's Com., 589, and we find it stated, in 2 U. S. Dig., 424, §25, that it was held in Cohen *v.* Hume, 1 McCord, 439, that "as soon as a carriage is fairly on the drop or slip of a flat, though it be driven by the owner's servant, it is in the ferryman's possession, and he is liable for any subsequent damage that happens to it or the horses." We regret that we have not access in this Division, to the report of this case, but at any rate, we have enough to show that the law, as applicable to common carriers, is applied to ferrymen in North Carolina. As such seems to be the well settled doctrine in England, and as we know of no State where a different rule has prevailed, we feel bound to consider the principle not now open to controversy; and certainly there is as much reason in holding the carrier, who transports travelers and their property across responsible, as him who conveys them up and down the river. Indeed, if there is any difference, there is more propriety in applying the strict rule to the former, than to the latter, for he enjoys a franchise,—a special privilege, which is granted

to him in consequence of his superior qualifications to fill a public trust, of great responsibility, while the latter enjoys no special privilege, but is engaged in a business open to all. A distinction was attempted to be drawn upon the argument, between ferrymen and other common carriers, because it was said they are not ordinary carriers of merchandise, but of the public travel, where the owner is usually along with his property. Upon the same principle, all packet boats, whose chief business it is to carry passengers and their baggage, should be exempted from the strict responsibility of common carriers. But no such distinction is any where recognized in the books, that we are aware of, and probably because there is no reason for it. We are clearly of opinion then that the defendant's liability was properly held by the circuit court to be that of a common carrier. This liability is very strict. They are held liable for all damage to goods intrusted to their care, unless the loss is occasioned by inevitable accident, not brought about by human agency, the public enemy, or the owner of the goods. It makes no difference whether the carrier has done all in his power to prevent the loss or not; his responsibility is still the same. He is the absolute insurer of the property against all losses, except those occasioned by the cause above specified. Forward *v.* Pillard, 1 T. R., 33; Hyde *v.* Navigation Co., 5 T. R., 389. As he is supposed to be better qualified, than even the owner himself, to take care of the property while in transitu, he has the absolute control over it, and can make such disposition of it as he sees proper, and he must see to it that he carriers it safely. Such is the authority and such the liability of a ferryman as to property which he transports. He may determine when it is safe and proper to go,—the number of teams which he can safely carry, and may assign to each its order and proper position, and when once received on board his boat, all are in his possession and under his control, and he has the right to make such disposition of them as prudence may dictate, and their safety require. His dominion over them is as complete as over his own property. He may even have the right, in case of peril, to command the services of his passengers. It is true, he may be liable for a wrongful exercise, or an abuse of his powers, as if he should refuse to go when he could safely do so, or should refuse to take a traveler when he could with propriety. It is true, that travelers usually have

a care, and to a certain extent take charge of their own teams and property while on the ferry boat, but this is in subordination to the ferryman himself. If they do not manage or dispose of them as he thinks best, he may take them entirely out of their hands and arrange them according to the dictates of his own judgment, for he is responsible for their safety. It is true, if the owner, by his willful and perverse conduct, occasions a loss which would not otherwise have happened, then he cannot charge the ferryman with a loss for which he alone is responsible. But while acting in good faith, and not in violation of the ferryman's commands, the owner may be considered as his servant so far as he does manage the property, after it has once got into the boat, and thus come into the possession of the boatman.

A distinction has been drawn between the transportation of slaves and that of other property, but this was on account of their intelligence as human beings.

We were asked to extend the same rule to other animals when transported. But the same reasons do not apply. The former partake of the character of passengers, while the latter are purely freight. There may be a reason in one respect, for drawing a distinction between animals and inanimate freight, and that is where the animal is of such a disposition, that he cannot be safely transported in a boat, and where no prudent man would intrust him in such a conveyance. In such case, should the animal be lost in consequence of such disposition, when every precaution had been taken in the construction and management of the boat, and in the arrangement of the freight, I should be inclined to hold, that the loss might be attributed to the misconduct of the owner, in improperly putting such an animal on board a boat. But there is no pretence that this horse was of such a disposition. There were no guard chains or bars across the ends of the boat, and the testimony shows, what every man's own judgment would dictate, that the boat would have been much safer, had it been thus provided. Had this reasonable precaution been taken, in all human probability, this accident would never have happened. Indeed, it is matter of surprise, that all ferry boats are not provided with such safe guards, and it is equally surprising, that more accidents do not occur for the want of them. If ferrymen were more generally aware of the nature and extent of their liabilities, it is most likely that ferry boats

would more commonly be provided with bars or chains, at the ends, to protect teams from getting into the river.

The instructions given to the jury, held the defendant liable as a common carrier, and without reviewing them particularly, we are satisfied that the law was properly laid down by the court.

During the trial, evidence was given by the defendant tending to show, that Kuhn, who was driving the plaintiff's horse at the time and who at the request of one of the ferrymen, was holding the horse by the head, was requested by those having charge of the boat, to unhitch the horse from the carriage, to which he made no reply, and did not do so. Kuhn swears he has no recollection of having heard any such direction, and one of the ferrymen says he thinks he must have heard it, although he says there was a strong wind blowing at the time, and that Kuhn was to the windward of the person giving the direction. This testimony, the jury were instructed to disregard, and in this we think there was no error. Even if Kuhn had heard the direction, he was not bound to obey it. The horse and carriage were in the possession and control of the ferrymen, and Kuhn was under no more legal obligation to unhitch the horse, than he was to assist in propelling the boat. It was strictly the business of the ferrymen, to do all that was needful for the safe transportation of the property intrusted to their care. This evidence did not tend to show that Kuhn did anything improper, which contributed in any degree to bring about the accident, but only that he omitted to do that which he was not bound to do, even if he had heard the direction.

We think the defendant cannot complain of the qualification to the sixth instruction. Kuhn was holding the horse at the request of the ferryman, and in doing this he was acting as his agent, and while he acted in good faith and to the best of his abilities, the latter was responsible for the ultimate consequences. The sixth instruction, as qualified and given, laid down a rule even more favorable for the defendant than this, for the court held that if Kuhn so held the horse or pulled the reins, as to cause the horse to get off of the boat, and if he would not have backed off if Kuhn had not touched him, they should find for the defendant. This, at the very most, was all that the defendant could ask. Certainly he ought not to claim any advan-

tage, because Kuhn obeyed in good faith the directions given him to hold the horse, more than he would have done, had the man disobeyed him, especially when the result, as the qualification supposes, was not changed by what he did. In the first place, the defendant seeks to avoid responsibility, because Kuhn did not obey orders, which most likely he never heard, to unhitch the horse, and next because he did obey orders, to hold the horse. It is more than likely, that if Kuhn had heard and obeyed the order to disengage the horse from the carriage, the same accident would have happened, while he was thus engaged, and then with the same propriety the defendant might have urged, that Kuhn did not proceed with sufficient presence of mind or dispatch ; or if he had not left the horse's head, he would not have backed off the boat. We are well satisfied, that if either party failed to do that which it was his duty to do, it was the ferryman, and not Kuhn, but if the former did all they could and were guilty of no negligence whatever, still as a common carrier, the defendant is just as liable in point of law, as if there had been negligence.

The judgment of the circuit court must be affirmed.

Judgment affirmed.

TRUMBULL, J., dissented.

GEORGE A. CROOK, Appellant, *v.* GEORGE H. TAYLOR, Appellee.

APPEAL FROM PEORIA.

A partner who is not joined as a defendant, may be called as a witness by the plaintiff, to prove the cause of action against the partner sued.

This suit was brought by Taylor against Crook on three promissory notes payable to Taylor, and signed "George A. Crook per George Spurck." Crook pleaded the general issue and denied the execution of the notes under oath.

George Spurck, who had executed the notes for Crook, was called as a witness by the plaintiff, and being objected to as in-

competent, was sworn touching his interest. He testified, that he signed the notes for Crook, and had authority so to do. That at the time of signing the notes he was a partner of Crook, in buying and selling merchandise, and in part for town lots in Peoria. He was objected to as incompetent. Objection was overruled. Spurck was then sworn in chief, and testified in substance to the same facts as above stated.

The cause was heard before Kellogg, Judge, and a jury, at August term, 1850. Verdict, and judgment for plaintiff in the circuit court. A motion for a new trial was made and overruled, and an appeal taken by Crook. Appellant assigned for error the permitting of Spurck to be sworn as a witness in the case, and the denial of a motion for a new trial.

N. H. PURPLE, for Appellant.

H. O. MERRIMAN, for Appellee.

The witness, Spurck, signed the notes in suit, as by procuration; and although a partner, he was a competent witness to testify for the plaintiff below, to prove the acts of the firm, whether he was competent to testify to the fact of partnership or not. Collier on Partnership, p. 457; 2 Philip's Ev., 108, and cases there cited.

The question of competency as a witness, for any purpose, here arises. No exception is taken to any of the evidence given in chief, consequently, if competent to prove the execution of the notes, the court properly admitted his evidence.

The question of partnership is not in issue, as no plea of abatement is filed.

Spurck was a dormant partner, and pretended to act by procuration, and as to third persons he was an agent, and not necessarily made a party to the suit. 2 Phil. Ev., 128., and cases cited.

An agent is competent to prove his agency and acts, from whatever source that agency is derived, from partnership or otherwise.

TREAT, C. J. This action was brought by Taylor against Crook, to recover the amount of three promissory notes, signed

"George A. Crook per George Spurck." The defendant pleaded *non est factum*, verified by affidavit. The plaintiff, to prove the execution of the notes, offered Spurck as a witness, who being sworn touching his interest, stated, that the notes were signed by him in the name of Crook, and that he had authority so to do; that Crook and himself were partners in buying and selling merchandise and real estate, and the notes were given for merchandise and town lots; that the business of the partnership was transacted in the name of George A. Crook, and witness was in the habit of using the name of Crook in the same way, and Crook had recognized his acts. The defendant objected to the competency of the witness, but the court overruled the objection, and permitted him to testify. That decision is now complained of.

It is well settled by the authorities, that a partner who is not joined as a defendant, may be called as a witness by the plaintiff, to prove the cause of an action against the partner sued. Hudson *v.* Robinson, 4 Maule & Selwyn, 475; Blackett *v.* Weir, 5 Barnwall & Cresswell, 385; Hall *v.* Curyon, 9 ibid, 646; Brooks *v.* McKinney, 4 Scammon, 309. He is interested in defeating the action, for if it succeeds, the defendant may compel him to contribute. He has no interest in sustaining the action, for if it fails and he is sued and made liable for the whole debt, he may enforce contribution from his partner. In any point of view, the witness was clearly competent.(*a*)

The judgment is affirmed.

Judgment affirmed.

JOHN F. GILPATRICK, for the use of JOSEPH COWGILL, Pltff in Error, *v.* GEORGE FOSTER, Deft in Error.

ERROR TO JO DAVIESS.

An endorsement upon a note is like a receipt, subject to explanation, and where wholly uncertain, unless explained, must be rejected as a nullity.

This was an action originally commenced before a justice of the peace. From his decision, an appeal was taken to the circuit court of Jo Daviess, and came on for trial, without the interven-

(*a*) See Laws 1867 p. 183.

tion of a jury, before Sheldon, Judge, at the March term, 1850, of said court. An issue was found for appellant, and a judgment was rendered against Foster, for the sum of thirty-three dollars, and seventy-three cents. A motion for a new trial was overruled.

The bill of exceptions shows a note executed by Foster to Gilpatrick, as follows: "one day after date I promise to pay John F. Gilpatrick or bearer, ninety-seven dollars and 17-100, for value received," dated 3d January, 1848, which was the only evidence offered by the plaintiff. The defendant insisted upon the allowance of certain sums endorsed upon the note as credits; wh ich endorsements are as follows:

'May 17, 1848. Received on the within 14 70 cents."

"August the 4th, 1848. Received on the within, 50."

"April 18. Received on the within, 5,00."

The plaintiff asked leave of the circuit court to amend the endorsement on the note, which reads, "Received on the within 50," so as to make it read fifty cents; which was denied. All the endorsements were read by the defendant, which was all the testimony offered. The error assigned was the allowance of a credit of fifty dollars by the circuit court upon the strength of the endorsement made on 4th August, 1848.

HIGGINS & STROTHER, for Pltff in Error.

The note constituted a good cause of action for the amount. The endorsements thereon were in the nature of receipts, and if there was any ambiguity whatever in the case, it was on the part of the defence.

The endorsement was no part of the note. 21 Vermont, 222; McDaniels *v.* Lapham, 1 Aiken, 311; 2 Mass., 397; 5 Iredell, 276.

The endorsement is in the nature of a receipt and is ambiguous. 15 Verm., 215; 1 D. Chip. R., 227.

T. CAMPBELL & E. S. LELAND, for Deft in Error.

TRUMBULL, J. This was an action originally commenced before a justice of the peace, on a promissory note for ninety-seven dollars and seventeen cents. The only question in the

case arises out of an endorsement on the back of the note which is as follows: "August the 4th, 1848. Received on the within, 50." There is no dot or mark of any kind either before or after the "50" to determine whether it means fifty dollars, fifty cents, or fifty something else. (*a*)

There were some other credits upon the note, but not in any manner connected with the one in question, so as to afford the least clue to its meaning. The only evidence in the case was the note with its endorsements, and the circuit court held the endorsement in question to mean a credit of fifty dollars, which still left a balance due to the plaintiff, after deducting the other credits about which there was no controversy. Nothing can be more uncertain than a credit of "50" on the back of a note. It may mean fifty pounds, fifty bushels, or fifty anything else, though it was most probably intended for fifty dollars or fifty cents, but which, if either, we cannot tell, and because it is wholly uncertain, the credit, unless explained, must be rejected as a nullity. "If an agreement be so vague and indefinite, that it is not possible to collect the full intention of the parties, it is void; for neither the court nor jury can make an agreement for the parties." Chitty on Contracts, 73; Wainwright *v.* Straw, 15 Vt., 219.

An endorsement of a credit upon the back of a note, is no part of the note itself. The plaintiff's cause of action, was made out by the production of the note, and though the defendant was entitled to the benefit of the credits endorsed upon it, if intelligible, yet it was no part of the plaintiff's case to explain them for the benefit of the defendant.

The endorsement of the credit upon the note being in the nature of a receipt for money, is subject to explanation by parol, and if the defendant can explain what it means, he will be entitled to the benefit of it, otherwise, it must be rejected as a nullity.

Judgment reversed and cause remanded.

Judgment reversed.

(*a*) Lawrence vs. Fast, 20 Ill. R. 341; Church vs. Noble, 24 Ill. R. 292.

MARSHALL B. PIERCE, Appellant, *v.* CHARLES G. CARLETON, *et al.*, Appellees.

APPEAL FROM JO DAVIESS.

A garnishee may inquire into the legality and regularity of the previous proceedings against a defendant in attachment; because if such proceedings are unauthorized and void, he would not be protected in the payment of an unauthorized judgment.

If the record in an attachment case, shows that the notice was published in time, it may be shown by parol, in aid of the publication, the place and manner of it, and this court will presume, that the necessary proof was made on the Circuit.

Surplus money made on execution in the hands of an officer, belonging to the defendant, may be garnisheed in the hands of an officer.

The answer of a garnishee until disproved or contradicted, must be considered as true. If judgment is asked upon the answer of a garnishee, unless his answer clearly makes him chargable, he should be discharged.

Carleton & Co. commenced their action in assumpsit, in the Jo Daviess Circuit Court, by attachment against George Cribb, a non-resident. The writ issued against several persons, (among others, the present appellant) as garnishees. Pierce was a deputy under the U. S. Marshal, for the District of Illinois. As such deputy he had levied upon divers goods, &c., as the property of Cribb. Pierce returned to the Court the list of the goods upon which he had levied. One Robinson and others, by interpleader, claimed the goods garnisheed in the hands of Pierce and which he had attached as deputy marshal. The case on interpleader was heard, and the decision was against the claimants Pierce, in answer to interrogatories propounded to him as garnishee, responded, that he had no money in his hands belonging, to Cribb, except as follows : That as deputy Marshal of the U., S. Circuit Court, he had two executions from said Court against Cribb, by virtue of which he had levied upon certain goods as belonging to Cribb, which were sold, and the proceeds exceeded amount of executions about $249.07, which sum was in his hands at the time of the service of the garnishee process. That he, Pierce, had been directed by the marshal to return this excess, with the executions, to the Clerk of the U. S. Circuit Court. That he, Pierce, had the excess of $249.07 in his hands, which he held, subject to the order of the circuit court of Jo Daviess, if he was, under the circumstances, bound to pay that sum as garnishee, to Carleton & Co.

A judgment was rendered in favor of Carleton & Co., against Cribb, in the Jo Daviess Court, at May term, 1850. At the

October term, following a judgment was rendered against Pierce as garnishee, condemning him to pay to Carleton & Co., the said sum of $249.07.

The proceedings were had before Sheldon, Judge.

The notice of publication for bringing the defendant, Cribb, into court at the suit of Carleton & Co., had the following certificate annexed: "We hereby certify that the annexed advertisement was published in the North Western Gazette, four consecutive weeks, the first of which publications, was on the (20) twentieth day of March, (1850,) eighteen hundred and fifty.

HOUGHTON & SPRINGER."

E. S. LELAND, with whom was M. Y. JOHNSON, for Appellant.

There being no proper proof of publication as to the affidavit in attachment, the garnishee may avail himself of this irregularity. Being a trustee, he is to see that the proceedings against the defendant in attachment are regular, otherwise he will not be protected by the attachment, in case of a suit against him. 2 Howard, 649 ; 1 Binn., 25.

The money in the hands of Pierce, could not be reached by the garnishee process, because it was in the custody of the law. 4 East, 510 ; 9 East, 48 ; 9 Miss., 382 ; 3 Scam., 451 ; 1 Cranch, 117 ; 1 Dallas, 354 ; 1 Ham., 275.

Courts will exercise a control over surplus moneys in the hands of their officers. 1 Wend., 87 ; 7 Wend., 259 ; 3 Caine's R., 84 ; 5 John. R., 167.

The garnishee in this case, could only have been charged on the facts in his answer. If there was not enough stated to show an indebtedness, the plaintiffs in this attachment should have propounded further interrogatories.

The facts stated in the garnishee's answer, render it uncertain whether the surplus money belonged to Cribb or not. Before he should have been charged, there should have been an issue made, to settle whether the property sold on the execution, from the U. S. Circuit Court, was Cribb's, and whether he alone was entitled to the surplus. The fact of indebtedness by the said Pierce, to the said Cribb, not appearing clearly to exist, the garnishee should have been discharged. 1 Supp. U. S. Digest, p.

14, sections 118, 120, 121, 152, 164, 216 ; 3 S. & M., 296 ; 4 Gil., 355.

There must be an indebtedness shown from Pierce to Cribb. If the garnishee was liable to Cribb, his liability was in tort ; there was no indebtedness. Although Cribb might waive the tort, and sue in assumpsit, it is a personal privilege, to which the creditor is not entitled. Sewell on Sheriffs, 254 ; 1 Supp. U. S. Digest, p. 14, §117.

R. S. BLACKWELL, for the Appellee.

A garnishee upon writ of error, cannot question the regularity of the proceedings against the principal debtor in the attachment suit. If the court has jurisdiction, he will be protected in all payments under the order of the court, however irregular the proceedings may be. Though the proceedings may be reversible on error brought by the principal, they cannot be impeached collaterally by any one. 4 S. & M., 704 ; 12 ibid., 475 ; 9 Missouri, 421; Lawrence *v.* Lane, 4 Gil., 361-2; Sessions *v.* Stevens, 1 Branch, 233 ; Tubb *v.* Madding, Minor's Rep., 129 ; Stebbins *v.* Finch, 1 Stewart, 180.

In this case the court acquired jurisdiction by the seizure of the property, and service of the process upon the garnishees. The neglect of the clerk to make publication, was a mere irregularity, which cannot operate to defeat that jurisdiction, which had already attached by the seizure, &c. The jurisdiction in no wise depends upon publication. Paine *v.* Moreland, 15 Ohio, 435 ; R. S., 66, § 13, 14. If publication is essential in order to confer jurisdiction, it is sufficiently made out in this case by recital and presumption. The record recites that due proof of publication was made, which is at least *prima facie* evidence of that fact. Barbour *v.* Winslow, 12 Wend., 102 ; Selin *v.* Snyder, 7 Serg. & Rawle, 166 ; Raborg *v.* Hammond, 2 Harr. & Gill, 42 ; Rust *v.* Frothingham, Breese, 258.

A party, in making proof of publication, is not confined to the mode pointed out by the statute. He may resort to the common law mode, and this court will presume, that such proof was made, to the satisfaction of the court below. R. S., 47, § 1 ; Broome's Maxims, 427.

The principal question in the case is, whether a surplus of

money remaining in the hands of a deputy marshal, after satisfying the several executions directed to him, can be reached by the process of garnishment, as the money of the defendant in execution? The words of our statute are broad and comprehensive, and differ widely from the statutes of other States. The statute provides that the sheriff shall "summons all persons, &c., whom the creditor shall designate as having any property, effects, or choses in action, in their possession or power, belonging to the defendant, or who are in any wise indebted to such defendant,&c." R. S. 66, §12. This is a remedial statute, intended to enlarge the right and power of the creditor, to reach the effects and credits of his debtors and should be liberally construed. It is the policy of our laws to subject the entire estate of the debtor, whether in possession, or action, to the payment of his debts, and such a construction should be placed upon this statute as will advance that policy.

The cases relied upon by the counsel for the appellant may be classed as follows :

1. Where the defendant in execution attached the money while in the hands of the officer under pretence of a debt due him by the plaintiff in the execution ; such were the cases of Reddick *v.* Smith, 3 Scam., 451 ; Wilder *v.* Bailey, 3 Mass., 289; Dawson *v.* Holcombe, 1 Ohio, 275 ; Ross *v.* Clark, 1 Dallas, 354.

2. Where the officer sought to apply moneys which he had collected under process, upon executions in his hands against the creditor for whom he received the money ; this was the detail of facts in First *v.* Miller, 4 Bibb, 311 ; Conant *v.* Bicknell, 1 Chipman, 50 ; Turner *v.* Fendell, 1 Cranch, 117 ; Thompson *v.* Brown, 17 Pick., 462.

3. Where the money was collected by the Sheriff under execution, remained in his hands, and was attached by another officer as the money of the execution creditor. Marvin *v.* Hawley, 9 Missouri R., 382. It will be perceived that in each one of these cases, the money was seized or garnisheed as the money of the creditor, while it remained in the hands of the officer who collected it. The reasons assigned for these decisions are, that the money was in the custody of the law ; that the creditor had no property in the specific money collected, until it was paid over to him ; that it would lead to delay in the execution of judgments, and bring different judicial tribunals into collision with

each other. These reasons are unanswerable, when applied to that class of cases, and are all founded upon the plain and imperative mandate of the writ, which commands the officer to levy a specific sum of money, and bring into court on a day therein mentioned. 2 Lilly's entries, 581 ; 2 Harris' Entries, 426.

The case at bar is clearly distinguishable from the cases cited. The writ does not command him to bring the surplus into court ; in fact the law does not contemplate that there will be a surplus. He must levy the precise sum named in the writ. 2 T. R., 157. And this at his peril, if the levy is insufficient, he is liable to the plaintiff for the residue of the debt. If he levy more than is called for by the writ, though he will not be liable as a trespasser unless the levy is grossly excessive, yet in selling the goods he is bound to stop the moment the money, named in the writ, is raised. If he sells more, he is liable in trover, at the suit of the defendant, for the excess. Sewell on Sheriffs, 254 ; Cook *v.* Palmer, 13 E. C. L. R., 305. He must not return the surplus money into court, but retain it in his hands. Sewell, 254. And it is his duty to pay it over to the defendant immediately. Fieldhouse *v.* Croft, 4 East., 510. In no sense, then, can this surplus be regarded as money in the custody of the law. Even if brought into court by the officer, it cannot be reached by a creditor of the debtor upon motion. 4 East, 510. And it is to all intents and purposes the property of the defendant, and he may have an action for money had and received against the officer.

The right to reach this surplus, by the process of garnishment, is fully sustained by the following authorities. Jaquets *v.* Patmer, 2 Harrington, Del. R., 144 ; King *v.* Moore, 6 Ala., 160 ; Tucker *v.* Atkinson, 1 Humph., 300 ; Watson *v.* Todd, 5 Mass., 271 ; Crane *v.* Freese, 1 Harrison, 305 ; Hurlbut *v.* Hicks, 17 Vermont, 193 ; Woodbridge *v.* Morse, 5 N. H. R., 519. There can be no collision between this and the Federal Courts, for the latter has no jurisdiction over the surplus. No execution is delayed by this proceeding ; nor can any litigation be expected to follow a judgment in favor of the appellee.

It is said, however, that if trover lies at the suit of Cribb against the marshal for an excessive sale, we have no right to waive for him the tort, and treat the surplus as money had and received for his use, and thus subject it to garnishment. To which we answer the money is "effects" belonging to Cribb, and

whether it came to the possession of the officer by contract or tortiously, our right to the money is not impaired. It might be different under the Massachusetts statute, which requires the money to be "*intrusted and deposited*," before the holder can be summoned as a trustee. Besides this, if Cribb should sue the marshal in trover, the recovery in this case would be allowed in mitigation of damages, if not as an effectual bar to the suit.

TREAT, C. J. The first question arising on this record is, whether a garnishee, who sues out a writ of error to reverse a judgment rendered against him, may inquire into the legality and regularity of the previous proceedings against the defendant in attachment. In one respect, he unquestionably can. In a suit by attachment, the court must acquire jurisdiction, and proceed to enter a judgment against the defendant, before it can pronounce any judgment against a party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. He would not be protected in the payment of a judgment obtained under such circumstances. It would be regarded as a voluntary and not a compulsory payment, and the defendant might compel him to pay a second time. It is clear, therefore, that a garnishee should be permitted to inquire into the validity of the previous proceedings in the case. If such proceedings are void, the judgment against the garnishee may for that cause be reversed on error. But, if the court had jurisdiction, its errors and irregularities can only be called in question by the defendant, and that too in a direct proceeding for the purpose. They affect him only, aad he may waive or insist on them. The garnishee has no cause to complain, for he will be protected in the payment of the judgment. Whithead *v.* Henderson, 4 Smedes & Marshall, 704; Matheny *v.* Galloway, 12 *ibid*, 475; Insurance Co. *v.* Cohen, 9 Missouri, 421.(*a*)

In this case, the garnishee assigns for error, that no notice of the pendency of the attachment was given to the defendant. Waiving any discussion of the question whether the publication of notice is necessary to confer jurisdiction on the court in proceedings by attachment, it is enough for the decision of this case, that it sufficiently appears from the record that the requisite notice was given. The record states that the plaintiffs filed

(*a*) Lawrence vs. Lane, 4 Gil. R. 361.

proof of publication, and then follows a notice in due form, with a certificate of Houghton & Springer attached, in which they state that the notice was published in the North Western Gazette, for four weeks consecutively, the first publication being on the 20th of March, 1850. The judgment against the defendant was entered on the 20th of May, so that sixty days intervened between the first insertion of the notice and the date of the judgment. It is true that Houghton & Springer do not describe themselves in the certificate as publishers or printers of the Gazette, nor do they state where the paper was published. But it was clearly competent for the plaintiffs to prove by parol, that the paper was published in the State, and that Houghton & Springer were the publishers thereof. The presumption should be indulged, that this was done to the satisfaction of the court.(*a*)

The record also presents the question, whether moneys remaining in the hands of an officer after the satisfaction of the execution against the defendant in attachment, can be reached by the process of garnishment. The statute is very broad in its provisions. It provides that the lands, tenements, goods, chattels, rights, credits, moneys and effects of the debtor, of every kind in whosoever hands or possession the same may be found, may be reached by attachment. This court decided in the case of Reddick *v.* Smith, 3 Scam., 451, that money in the hands of a Sheriff, collected on execution, cannot be attached as the property of the plaintiff in the execution, because the money is in the custody of the law, and subject to the control of the court from which the execution emanates ; and because to allow it to be done, might bring different tribunals into collision, and cause much embarrassment to officers concerned in the execution of final process. We adhere to that decision, but we are not inclined to extend the rule to cases like the present.(*b*)The same reasons do not apply to a case where an execution has been satisfied, and there is a surplus in the hands of the officer belonging to the defendant. The command of the writ does not require the officer to bring the surplus into court. When the amount due on the judgment is returned into court, or paid over to the plaintiff, the execution has accomplished its office, and if there is any surplus it is the duty of the officer to pay it over to the defendant. It is not strictly in the custody of the law, but the officer holds it as so much money had and received to the use of the defendant.

(*a*) Pile vs. McBeatney, 15 Ill. R. 318 and notes.
(*b*) Mullison vs. Fisk, 43 Ills. R. 117.

Courts do not resume any control over a surplus, except under peculiar circumstances, as in the case of Vanitest *v.* Yeomans, 1 Wendell, 87, where, on a sale of real estate under a senior execution, the Court directed the Sheriff to pay the surplus to a junior judgment creditor having a lien on the same property. See Fieldhouse *v.* Croft, 4 East., 510; Jacquet's Admrs *v.* Palmer, 2 Harrington, 144. (*a*)

The remaining question relates to the correctness of the judgment against the garnishee. The answer of a garnishee until disproved or contradicted, must be considered as true. If the plaintiff declines to put it in issue, but asks for judgment thereon, the answer ought clearly to disclose a state of facts on which the garnishee is chargeable. In such case, if the answer leaves it doubtful whether the garnishee is indebted to the defendant, he should be discharged. Judgment should not be entered against him, where there is reason to believe that he may be compelled to pay the same demand to another party.

It is insisted, that the answer of the garnishee did not authorize a judgment against him. He states in substance, that, as deputy marshal, he received two executions against the defendant, and levied the same on a lot of merchandise in the possession of Campbell; that the goods were claimed by Robinson, and on a trial of the right of property, a verdict was returned against the claimant, on the ground that the executions were a lien on the goods before they came to the possession of the claimant; that he thereupon proceeded to sell so much of the goods as he supposed would be sufficient to discharge the executions, but there was found to be a surplus in his hands, which is the foundation of the judgment in question. It might, perhaps, be inferred from the answer, that Robinson was entitled to the surplus. The case however, shows that the residue of the goods levied on by the garnishee, were attached in this case as the property of the defendant; that Robinson interpleaded claiming them as his, and that the right of property was adjudged against him. The case further shows that Robinson, subsequently came into court, and released on the record, all claim to the goods attached and their proceeds. It is evident from the whole case, that his claim, whatever it was, was the same as to all of the goods. The right of property, as well in the goods sold by the marshal, as those levied on in this case, was determined against him; and if he

(*a*) Lightner vs. Steinagle, 32 Ill. R. 516; Walsh vs. Horine, 36 Ill. R. 243; Millison vs. Fisk, 43 Ill. R. 117; Weaver vs. Davis. 47 Ill. R.

was not entitled to the goods as against the attaching creditor, he certainly was not entitled to the surplus, for that was but the proceeds of a portion of the same goods.

The judgment is affirmed.

Judgment affirmed.

RICHARD C. ROSS, *et al.*, Appellants, *v.* THE CITY OF CHICAGO.

APPEAL FROM COOK.

A plaintiff has no right to a nonsuit after a case has been submitted to a jury.

This was an action of covenant, brought by the City of Chicago on a bond given by Ross, who had been elected Marshal of the City of Chicago, as principal, and the other defendants as his sureties. The declaration alleged a breach of the covenant, in two several counts. Several pleas were filed, upon which issue was joined. At the November term, 1849, of the Cook circuit court, the cause was tried before H. T. Dickey, Judge, and a jury; when all of the issues were found for the defendants, and a judgment was entered, that the defendants do have and recover of the said plaintiff their costs and charges, by them about their defence in this behalf expended, and have execution therefor. A motion for a new trial was made, and overruled. A motion was subsequently made by the plaintiff, to set aside the verdict of the jury entered in the cause, and for leave to submit to a nonsuit; which motion was sustained by the court. To this decision the defendants in the circuit court excepted, and prayed this appeal. The errors assigned, complain of the decision of the circuit court in setting aside the verdict after judgment, to enable the plaintiff to submit to a nonsuit.

N. B. JUDD and MANNIERE & MEEKER, for Appellants, made the following points:

The 29th section of the Revised Laws of 1845, entitled Practice, provides: That every person desirous of suffering a nonsuit

on trial, shall be barred therefrom, unless he do so before the jury retire from the bar.

The power of the Judge to grant new trials is a discretionary one, growing out of some injustice done by the jury on the merits, and is never granted except in the plainest cases. That no injustice was done in this case, is manifest from the fact, that a new trial was refused on the merits.

This judgment involves a palpable evasion of the statute, and in effect a repeal of it ; since, if a nonsuit may be obtained after verdict, in a case where a party should have suffered nonsuit before the jury retired, then he is not barred as the statute declares he shall be.

CHICKERING & LULL for Appellee.

Courts at their discretion may allow a nonsuit, where a plaintiff cannot claim it as a right. Haskell *v.* Whitney, 12 Mass. Reports, 47 ; Lock *v.* Wood, 16 *ibid*, 307.

The Practice act is confined to proceedings " on trial ; " that is, that the plaintiff, when such case is " on trial," shall not be permitted to suffer a nonsuit as of right, unless he do so before the jury retires ; thus confining its provisions to the particular trial, and not extending them to subsequent proceedings, where for any cause there has been a mistrial, or an erroneous verdict. For the exercise of such a discretion, error cannot be assigned.

TREAT, C. J. This was an action of covenant brought by The City of Chicago against Dyer and others. The defendants pleaded several pleas, on which issues of fact were formed. The jury returned a verdict for the defendants, on all of the issues. A motion for a new trial was made and refused. The Court then sustained an application to set aside the verdict, and permit the plaintiff to submit to a nonsuit. That decision is assigned for error.

There was a trial on the merits, and a finding in favor of the defendants on all of the issues. No error had intervened to the prejudice of the plaintiff, and a motion for a new trial was denied. In this state of case, the defendants were clearly entitled to a judgment on the verdict—a judgment conclusive of the matters submitted to the jury. Instead of entering such a judgment, the

Court sustained an application to set aside the verdict, and allow the plaintiff to suffer a nonsuit; thereby depriving the defendants of their right to a final judgment, and leaving the whole subject matter of the suit open and undetermined. This action of the Court cannot be considered as a reconsideration and allowance of the motion for a new trial. It was not the understanding of the parties, nor the design of the Court. The verdict was vacated for the sole purpose of enabling the plaintiff to suffer a nonsuit. It was in effect permitting the plaintiff to dismiss the case after verdict. A plaintiff has no right to a nonsuit after the case has been submitted to a jury. The statute provides, that "Every person desirous of suffering a nonsuit on trial, shall be barred therefrom, unless he do so before the jury retire from the bar." R. S., ch. 83, § 29. But it is insisted, that it is within the discretion of the Court to permit a plaintiff to become nonsuit after verdict. The Court possesses no such discretion. In the case of Price *v.* Parker, 1 Salkeld, 178, it is said: "Upon a motion to discontinue upon payment of costs, the Court held, that after a general verdict there can be no leave to discontinue; for that would be having as many new trials as the plaintiff pleases; but that after a special verdict there may, because that is not complete and final; but in that case it is a great favor." In the case of the Judge of Probate *v.* Abbot, 13 New Hampshire, 21, where the authorities on this question are collected and considered, the court came to the conclusion that a plaintiff could not become nonsuit after verdict. (*a*)

The judgment is reversed, and the cause remanded, with directions to the court to enter final judgment for the defendants on the verdict.

Judgment reversed.

(*a*) Berry vs. Savage, 2 Scam. R. 262.

EBER B. WARD, *et al.*, Appellants, *v.* ONEY SALISBURY, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

In an action of assumpsit, brought to recover wages due for sailing a vessel by a captain, it was held that the defendants in such an action, for the purpose of mitigating damages, might introduce the testimony of a Harbor Master, although he was not skilled as a navigator, to show any fact within his knowledge respecting the management of the vessel, and to give his opinion whether the management was skillful or unskillful.

This was an action of assumpsit on the common counts, for work and labor, brought by appellee against appellants, to recover wages due him for sailing the steamer Pacific, as Captain. During the progress of the trial, the defendants in the court below, introduced the Harbor Master of the port of Chicago, as a witness to show that the plaintiff managed the vessel unskillfully, in order to reduce the amount claimed. The facts of the case, upon which the opinion is based, are sufficiently stated in it.

The cause was tried before Spring, Judge of the Cook County court of common pleas, at the October special term, 1850, of that court.

Several questions were presented in argument, which, not being referred to in the opinion of the court, are not noticed here.

H. G. SHUMWAY, for Appellants.

The interrogatory propounded to Durfee the Harbor Master calls for facts in reference to the management of the Pacific. A witness not a professionel man, may give his opinion in evidence, with the facts on which this opinion is founded. 17 Vermont, 499 ; 7 ibid, 158.

J. H. COLLINS & I. N. ARNOLD, for Appellee.

TREAT, C. J. This was an action of assumpsit brought by Salisbury against the owners of the steamer Pacific, to recover compensation for services performed as master of the vessel It appeared in evidence that he commanded the boat during the year 1848. From May until October, she ran between Detroit and Buffalo ; during the months of October and November,

between Chicago, St. Joseph and Milwaukee. The defendants attempted to show in mitigation of damages, that the plaintiff exhibited a want of skill in conducting the vessel. A witness testified, that he did not manage the boat well, particulraly in going in and out of harbors. The defendant called a witness, who testified, that he was harbor master of the port of Chicago during the year 1848; that he had a good deal of knowledge of vessels, and knew something of sailing them, but did not understand the science of navigation, and was not a practical sailor. They then asked him, "How did the plaintiff manage the Pacific, in coming in and going out of the Chicago harbor?" The plaintiff objected to the question, on the ground that the witness was incompetent from the want of knowledge of navigation. The court sustained the objection, and the defendants excepted.

The mode in which the plaintiff managed the boat, was a material inquiry on the trial. The value of his services depended chiefly on the manner in which he discharged his duties as master. Any evidence, therefore, that tended to show negligence or unskillfulness on his part, was properly admissible in mitigation of damages. In this point of view, the court erred in excluding the testimony of the harbor master. The interrogatory did not necessarily call for the opinion of the witness. It was clearly competent for him to state any facts within his knowledge respecting the management of the vessel. And, we think, his opinion, in connection with such facts, was admissible. He was charged with the execution of the habor regulations. In the exercise of his duties, he necessarily became familiar with the character and condition of the habor, and the manner in which vessels were brought into and taken out of port. His position would enable him to detect any want of skill in the management of a particular vessel. If he witnessed the operations of the Pacific, while entering and departing from the habor, his opinion might go as far to enlighten the jury, as that of a professional seaman founded upon the facts entailed by witnesses.(*a*) It might, indeed, from the circumstances in which he was placed, be entitled to greater weight, than the mere opinion of an experienced navigator having no personal knowledge of the facts. He should have been permitted to state the facts that came under his notice respecting the management of the vessel, and his opinion whether that management was skilful or unskillful.

(*a*) Frink *et al.* vs. Potter, 17 Ill. R. 408.

The question was relevant to a material issue in the case, and the answer might have had a controlling influence on the verdict. The ruling of the Court was erroneous,and, as it may have operated to the prejudice of the defendants, the judgment will be reversed, and the cause remanded.

Judgment reversed.

Dissenting Opinion of Justice Trumbull. In my judgment, the question propounded to the witness was incompetent for two reasons. First, Because it assumed, that the witness had seen the Pacific coming in and going out of Chicago harbor, when there is no evidence in the record, that he ever saw the Pacific enter or leave that harbor. No proper foundation was laid for the question. The fact that the counsel objected to it for a wrong reason, would not prevent the Court from excluding it for a right one. The judgment is not surely to be reversed, because the Court below refused to permit an improper question to be asked, although the attorney may have urged a wrong reason for his objection.

Secondly. I am of opinion, that the question was improper for the reason assigned by the counsel. The object of the question clearly was, to draw out the opinion of the witness, as to how the plaintiff managed the boat.

The witness had shown by his previous testimony, that he did not understand the science of navigation; and I am not aware that it is any part of the duty of a harbor master, to take steamers in and out of port, or that he must necessarily have any knowledge upon that subject.

As a general rule, the opinions of witnesses are not admissible in evidence ; and when they are admitted, it is upon the principle, that the witness from his profession or business, is supposed to possess some peculiar knowledge or skill in reference to the matter, about which his opinion is sought. The witness in this case, is not only not shown to have possessed any such knowledge, but it is negatively shown that he did not possess it.

THOMAS BELL *et al.*, Pftffs in Error, *v.* HENRY SHELDON *et al.*, Defts in Error.

ERROR TO McHENRY.

It is erroneous to enter final judgment against a defendant, when the issue presented by a plea has not been tried.

This was an action of assumpsit brought by the defendants in error in the McHenry circuit court. Several pleas in addition to the general issue, were filed by the defandants ; to the special pleas, demurrers were filed, which were sustained by the court, and the defendants standing by their pleas, judgment was rendered for the plaintiffs for the sum of $530.42, without any notice of the issue joined upon the plea of non-assumpsit.

The cause was heard before Henderson, Judge, at April term, 1851.

C. McCLURE, for Pltffs in Error.

J. LOOP, for Defts in Error.

TREAT, C. J. This judgment must be reversed. After sustaining a demurrer into several special pleas,the Court proceeded to render a final judgment against the defendants, without noticing a plea of non-assumpsit.

The issue presented by that plea had to be tried and found against the defendants, before the plaintiffs were entitled to judgment.(*a*)

The judgment is reversed, and the cause remanded.

Judgment reversed.

(*a*) Keeler vs. Campbell, 24 Ill. R. 288. Post 373.

Dow *v.* Rattle.

JOHN E. DOW, impleaded with WILLIAM DOW, Pltff in Error, *v.* SAMUEL RATTLE, Deft in Error.

ERROR TO McHENRY.

It is error to enter a final judgment, before disposing of the issue tendered by a plea. (*a*)
It is error to enter a judgment against one of several defendants, without disposing of the case as to the others.
Where there are several defendants before the Court, the case has to be tried as to all, before any final judgment can be properly entered.

This was an action of assumpsit, brought by Rattle in the circuit court of McHenry county. The declaration contained a count upon an endorsed note, and the common counts. The process issued against John E. Dow, and William Dow. The return showed service on John E. Dow, William Dow not being found.

A demurrer was filed to the first count of the declaration, averring, "And the said defendant comes and defends and says," &c., and that the "plaintiff ought not to have his action against them, and that they are not bound," &c., signed C. McClure, Defts. Atty. Plea of the general issue was filed by both defendants, to the remainder of the declaration. Issue was joined to the demurrer and plea. The demurrer was overruled. The defendants stood by their demurrer, and the Clerk assessed the damages of plaintiff at two hundred and twenty-eight dollars and thirty-nine cents, and judgment was rendered against John E. Dow, for that amount. No notice was taken of the other defendant or of the plea of the general issue.

John E. Dow, sued out this writ of error, and assigns the following grounds of error. The overruling of the demurrer. The rendition of the judgment against John E. Dow, on the demurrer, when the demurrer had been filed by the defendants jointly. The rendition of the final judgment, without disposing of the plea of the general issue.

C. McCLURE, for Pltff in Error.

JAMES LOOP, for Defts in Error.

TREAT, C. J. Assumpsit against two; one only served with process. The defendants demurred to the first count, and pleaded non-assumpsit to the second. The court overruled the demurrer, and without noticing the plea, rendered judgment

(*a*) Ante. 372.

against the defendant served with process. That judgment must be reversed on two grounds. It was error to enter final judgment for the plaintiff, before disposing of the issue tendered by the plea. It was also error to enter judgment against one of the defendants without disposing of the case as to the other. Both were before the court and the case had to be tried as to both, before any final judgment could properly be entered.(*a*)

The judgment is reversed, and the cause remanded.

Judgment reversed.

JONATHAN WELDON, Pltff in Error, *v.* WILLIAM BURCH *et al.*, Defts in Error.

ERROR TO WINNEBAGO.

When an offence, as against a witness who was an accomplice, is barred by the statute of limitations, he is bound to testify.

A witness will not be excused from testifying to a fact, material to the issue, because his testimony might subject him to disgrace or reproach.

This was an action of trespass, brought by the plaintiff against the defendants in the Winnebago circuit court. The declaration alleges, that the defendants forcibly entered the house of the plaintiff, and carried him therefrom, maltreated in many respects and finally covered him with tar and feathers.

To this declaration, the plea of not guilty was interposed and issue was joined. Pleas, setting up statute of limitations of two years, as to some of the counts in the declaration were also interposed, and issue joined thereon.

The case came on for trial, at the April term, 1845, before Mr. Justice T. C. Browne, and a jury. On the trial, several witnesses were called and sworn, on the part of the plaintiff, who declined to answer the interrogatories propounded, because their answers might implicate them in the transaction for which the suit was brought and subject them, moreover, to indictment and punishment. To which it was answered by the counsul for the plaintiff, that the statute of limitations had run upon the offence. The court decided that this did not take away the privilege of the witness, as the court could not judge whether all prosecutions

(*a*) Barbour vs. White, 37 Ill. R. 165.

were barred. And that the witness could not be compelled to ive evidence, which would tend to implicate them in the transactions in question. The jury found for the defendants. The plaintiff excepted to the ruling of the Court, and brings his cause to this Court, by writ of error, and assigns for error, the allowing of the privilege claimed for the witnesses.

E. S. Leland, for Plaintiff in Error.

Where the offence, in relation to which the witness refuses to answer questions, is barred by the statute of limitations, the witness cannot claim the privilege, because he cannot be punished for the offence. Close *v.* Olney, 1 Denio, 319; The People *v.* Mather, 4 Wend., 255 ; U. S. *v.* Smith, 4 Day, 121 ; Parkhurst *v.* Lawton 1 Merivale, 400 ; Henry *v.* Salina Bank, 1 Comstock, 83.

When the question requires an answer, which would be dif rectly material to the issue, and is not asked for the purpose oe impeaching the witness only, the witness must answer, if the answer would not render him liable to punishment, though ho would thereby be degraded morally. Cowen & Hills' notes ty Phillips, Ev. part 1. N. 521 to p. 279 ; Candell *v.* Pratt, 1 Mood- & Maikin, 108 ; King *v.* Edwards, 4 T. R., 440 ; Harris *v.* Tippet, 2 Camp., 638, Peake's Ev., 129, 1 Starkie's Ev., 168 ; Lohman *v.* People, 1 Comstock, 385 ; 1 Green., Ev., §454, Swift's Ev., 90.

Although a witness may not be bound to answer a question, the answer to which would directly show his moral turpitude, he is bound to answer all questions in relation to the subject, which only tend to show it, but do not require him directly to admit it. People *v.* Mather, 4 Wend., 250 ; Parkhurst v. Lawton, 1 Merivale, 400 ; McBride v. McBride, 2 Esp., 242.

J. Marsh, for Defts in Error.

Treat, C. J. This was an action of trespass for an assault and battery. It was tried in April, 1845. It appeared in evidence, that, on the night of the 26th of February, 1842, the plaintiff was forcibly taken from his house, by some ten or twelve persons in disguise, and carried some distance, and much

maltreated. For the purpose of identifying the defendants with the commission of the outrage, the plaintiff called in succession several witnesses, who resided in the neighborhood where the occurrence transpired, and still continued to reside there, and asked them whether they had seen any of the defendants on the night in question. The witnesses declined to answer, on the ground that they could not do so, without subjecting themselves to indictment and punishment. The plaintiff insisted that the offence was barred by the statute of limitations. The Court decided that the witnesses were not bound to answer, and the plaintiff was deprived of the benefit of their testimony.

The witnesses were not exempt from testifying. Any criminal offence growing out of the transaction in question, was clearly barred by the statute of limitations. If a riot, as it probably was, the offence was barred in eighteen months; if the graver offence of burglary, as suggested by counsel, it was barred in three years. The statute operated as a complete bar in either case. More than three years intervened between the commission of the act, and the time of trial. The witnesses were not within the exception in the statute, for they had not fled from justice. See R. S., ch. 30, §200. Lapse of time had secured them a perfect defence to any attempt to prosecute them criminally. The reason of the rule, that a party shall not be compelled to give testimony that may tend to subject him to a criminal prosecution, had no application to these witnesses. They could not, therefore, claim the benefit of the rule. They would not have incurred the least hazard by testifying. The cases of Close *v* Olney, 1 Denio, 319; the People *v.* Mather, 4 Wend., 229, and the U. S. *v* Smith, 4 Day, 121, fully support the position, that the witnesses were not privileged.

But, it is contended, that they were not bound to answer, because their testimony might have had a direct tendency to degrade their character. The authorities all agree, where the question is asked respecting a matter collateral to the issue, or with a view to impair the credibility of the witness, that he is not bound to give testimony that will directly tend to disgrace him. There is, however, much conflict of opinion on the point, whether he is bound to testify concerning a matter material to the issue. Such being the case, we are at liberty to adopt the rule that may best promote the rights of parties, and subserve the ends of jus-

tice. The views of Mr Greenleaf on this subject, are so forcible and sound, as to justify a quotation at some length. He says: "On this point, there has been a great diversity of opinion, and the law still remains not perfectly settled by authorities. But the conflict of opinions may be somwhat reconciled by a distinction, which has been very properly taken, between cases where the testimony is relevant and material to the issue, and cases where the question is not strictly relevant, but is collateral and is asked only under the latitude allowed in a cross examination. In the former case, there seems great absurdity in excluding the testimony of a witness, merely because it will tend to degrade himself, when others have a direct interest in that testimony, and it is essential to the establishment of their rights of property, of liberty or even of life; or to the course of public justice. Upon such a rule, one who has been convicted and punished for an offence, when called as a witness against an accomplice, would be excused from testifying in any of the transactions, in which he participated with the accused, and thus the guilty might escape. And, accordingly, the better opinion seems to be, that where the transaction forms any part of the issue to be tried, the witness will be obliged to give evidence, however strongly it may reflect on his chatacter." Greenlf on Ev. §454 (4). We have no hesitation in adopting the rule thus laid down. A party ought not to be deprived of the benefit of testimony material to the issue in the case, nor ought the course of public justice to be defeated, merely because a witness may subject himself to disgrace or reproach. The privilege of the witness ought not to be considered as superior to the rights of individuals or the demands of public justice. He is required to speak of a transaction in which he voluntarily participated. If he sustains a loss of reputation in consequence of his disclosures, it is but the result of his own wrong. In the present case, the testimony sought was clearly material to the issue on trial. In either point of view, the witnesses were bound to testify, and the Court erred in excusing them.

The judgment is reversed, and the cause remanded.

Judgment reversed.

REUBEN VOSE, *et al.*, Pltffs in Error, *v.* JAMES HART, Deft in Error.

ERROR TO LAKE.

The plea of *non cepit*, in an action of replevin, only puts in issue the taking of the property, and does not authorize a judgment of *retorno habendo*.

This was an action of replevin in the Lake Circuit Court, brought by plaintiffs in error and tried before Dickey, Judge, and a jury, at October term, 1850 ; and a verdict and judgment for the defendant. Damages for $15.85 with costs, and a return of the property repleived were awarded by the judgment. A motion for a new trial was overruled, and a bill of exceptions taken. The only plea filed, denied the taking of the goods in the said declaration mentioned, or any of them, in manner and form, as the said plaintiff alleged. Issue was joined on this plea.

T. S. DICKEY & H. W. BLODGETT, for Pltffs in Error.

The judgment of the circuit court was erroneous in awarding a return of the property, upon the finding of the issue of *non cepit*, in favor of the defendant. Anderson et al. *v.* Talcott, 1 Gill., 371 ; 2 Starkie's Ev., 715 ; 1st Williams' Saunders, 347 ; 1 Chitty's Pl., 537 ; Johnson *v.* Howe, 2 Gill., 342 ; 2 Saunders Pl. and Ev., 287 ; 2 Greenleaf's Ev., sec. 562, p 532.

The plea of *non cepit* admits the property in the plaintiff, and only puts the taking in issue. 8 Monroe, 421 ; Selwyn's *Nisi Prius*, 1028 ; 3 Wendell, 671 ; Whitwell *v.* Wells, 24 Pick, 28.

FERRY & SEARLS, for Defts in Error.

TREAT, C. J. Declaration in replevin. Plea *non cepit*. Verdict for the defendant. Judgment that he recover his costs, and have a return of the goods replevied. The judgment cannot be sustained. It is broader than the issue. The defendant was only entitled to a judgment for costs, the right of property not being in issue. The plea of *non cepit* admitted the right of property to be in the plaintiffs, and merely put in issue the taking of the goods. If the defendant desired a return of the goods, he

should have put the right of property in issue, by formally traversing the plaintiff's allegation of right, or by pleading specially that the right was in some other person. In one of these ways only, could he controvert the plaintiffs' claim, and impose on them the burden of showing that the goods replevied were their property. As the case stood, the jury had only to pass on the matter of the caption by the defendant. Anderson *v.* Talcott, 1 Gilman, 365. The court erred, therefore, in awarding a writ of *retorno habendo*(*a*)The judgment will be reversed,and the cause remanded, with leave to the defendant to put the right of property in the goods in issue, by the filing of additional pleas.

Judgment reversed.

LESTER M. MAGHER, survivor, &c., Pltff in Error, *v.* CALVIN W. HOWE *et al.*, Defts in Error.

ERROR TO McHENRY.

A warrant of attorney to confess a judgment is no part of the record, nor is an affidavit, showing the death of one of the makers of it; to make them such, they should be embodied in a bil of exceptions.

This was a judgment by confession, entered at the April term, 1850, of the McHenry Circuit Court, Henderson, Judge, presiding.

The plaintiffs in the Court below, produced a note signed L. H. Magher, and N. W. Birge, with a warrant of attorney, authorizing a judgment to be confessed thereon; upon this note a declaration was filed, and a plea confessing, &c., the affidavit proving the signatures to the warrant of attorney, states that Noah W. Birge has, since the making of the said note and power of attorney, departed this life. Magher sued out this writ of error, assigning, that it was error in the Circuit Conrt, to enter the judgment by confession, upon the warrant of attorney, signed by Birge after his decease.

LOOP & HURLBUT, for Pltff in Error.

(*a*) Hanford vs. Obrecht, 28 Ill. R. 494.

Warrants of attorney are special powers, and to be strictly pursued. 18 Johns., 363 ; 13 Johns., 307. Joint and several warrant of attorney, one dies, judgment against survivor, held to be without authority. Hunt *v.* Chamberlain, 3 Halsted, N. J. R., 336 ; cited 7 Am. Com. Law Cases, 395. To the same point. 15 East, 592 ; 7 Taunt., 453 ; 1 Chitt., 322 ; cited Graham's Prac., 771.

FULLER & BURGESS, for Defts in Error.

There is nothing in the record proper, in this cause, upon which the errors assigned can be brought before the court.

The warrant of attorney and affidavit are no part of the record. They are papers upon which the motion for judgment is founded. See forms of records upon judgment by confession. Arch. Forms, 331, and Tidd's Prac., 500 ; 2 East, 136, where the rule adopted, requiring them to be filed.

The proper mode of taking advantage of want of authority in an attorney to appear for a party, is by motion in the court below. Ranson v. Jones, 1 Scam., 293. Then the matter comes up on bill of exceptions, embodying papers filed in the cause.

The court below can give such relief in cases of this sort, as to justice belongs. Lynn v. Boilvin, 2 Gil., 635 ; 6 Johns., 300.

The warrant is sufficient authority. It is a covenant or agreement under seal, see 11 Ills., 622, by makers of note with the plaintiffs below,(executed at the same time and on the same sheet of paper as the note,)that a judgment by confession may be entered on note, when due, if not paid. It is therefore under our statute, 299, §3, several as well as joint, and remains good as to the survivor, in all its parts and powers.

The death of Birge happened during the term, and after the first day. Judgment might have been entered against both, at any time during that term. Tidd's Practice, 496 ; 6 T. R., 368, 7 T. R., 21 ; 2 Strange, 882, 1081.

TREAT, C. J. This record presents this state of case. A declaration against Magher, as survivor of Birge, on a promissory note, made by Magher and Birge. A plea confessing the cause of action, and consenting that judgment may be entered. Then follows an order of the court, which recites the production and

proof of a warrant of attorney, authorizing a confession of judgment against the defendant, and proceeds to enter a judgment accordingly. It is now insisted, that it was irregular and erroneous to enter up a judgment against the survivor on a warrant of attorney, executed by the debtors jointly. It is contended, that a warrant of attorney to confess a judgment, is a special power that must be strictly pursued, and several English cases are referred to, which seem to susta in the position. But this question is not legitimately presented by the record, and it is, therefore, useless to enter upon its discussion. The warrant of attorney is not properly in the record. We do not judicially know that it was executed by both of the makers of the note. The conclusion that it was executed by Magher after the death of Birge, is perfectly consistent with the statements of the record. The clerk has copied into the transcript a warrant of attorney, purporting to be executed by both of the debtors, and an affidavit showing the death of Birge, on a subsequent day. But these papers do not thereby become a part of the record. They constituted the evidence on which the court acted in entering the judgment, and, like any other evidence produced during the progress of a case, form no portion of the record, unless introduced into it by a bill of exceptions. If the defendant desired to present the question, he should have tendered a bill of exceptions to the decision of the court, and in that way have incorporated the papers into the record of the case. Saunders *v.* McCollins, 4 Scam., 419 ; Corey *v.* Russell, 3 Cil., 376 ; Petty *v.* Scott, 5 *ibid*, 209. The judgment is affirmed.

Judgment affirmed.

REZIN WILCOXON, Appellant, *v.* THOMAS MCGHEE, Appellee.

APPEAL FROM STEPHENSON.

A settler upon the public lands, cannot overflow other public lands by dams, or otherwise obstructing a stream, running through lands he may eventually purchase; he does not acquire this right by a subsequent purchase of the land, such a privilege not having been contemplated in making the grant.

The subject matter of the grant, is the land, having a fixed and definite description, nothing passes as parcel of the granted premises, beyond what is included within the boundaries expressed in the patent, or such as is necessarily and naturally annexed to the land.

The right to overflow adjoining lands, is not an appurtenance agreeing in na-

ture or quality with land itself; but such an easement more properly appertains to something that has been put upon the land.

Where a mill and its appurtenances are conveyed, the mill being the subject matter of the grant, the right to continue to overflow the lands of the grantor will continue to the same extent, as when the grant was made. But this rule does not apply to grants of land from the government.

McGhee sued Wilcoxon in the Stephenson circuit court, in an action on the case. The declaration contained three counts The first count charge the defendant with having maintained. kept up and continued a mill dam across Richland Creek since the first day of October, A. D. 1846, causing the water to overflow the plaintiff's land, describing it. The second count charged the defendant with having obstructed the water of Richland Creek, causing it to overflow the plaintiff's land. The third count charged the defendant with having erected a mill dam on his own land across said creek on the 1st day of October, A. D. 1846, and with having continued it, therby obstructing the natural course of the water of said creek, causing it to overflow the plaintiff's land.

To this declaration the defendant filed the general issue, and three special pleas. The first special plea avers a purchase from the U. S. on the tenth day of July, A. D. 1844, of the land upon which the mill and dam are situated. That the dam and mill were erected before his purchase, and that the plaintiff purchased his land subsequently; and that the land purchased by the plaintiff as well as that purchased by the defendant, was overflowed at the time of the purchase.

The second special plea avers that on, and for a long time previous to the tenth day of July, 1844, there was and had been erected on the land of the defendant, a saw mill, and a mill dam across the said creek, which caused the water of said creek to flow the land of the defendant and also the land of the plaintiff, and that the water raised by the dam was used to carry the said saw mill; that on the 10th day of July, A. D. 1844, the defendant purchased of the U. S. the tract of land on which the mill and dam stood, with all the rights, privileges, immunities, and appurtenances thereto belonging; that at the time he purchased the land, the U. S. owned the land of the plaintiff, and that the plaintiff purchased of the U. S. with notice of the above facts, and subsequent to the purchase of the defendant.

The third plea is substantially the same as the second, with

the additional averment that the mill and dam had been lawfully erected, &c., and also averring that the tracts of land covered by the mill pond had been surveyed and platted by the U. S. as a mill pond.

A demurrer was filed by the plaintiff to the special pleas of the defendant, which was sustained by the court.

A trial was had upon the general issue, and a verdict and judgment for the plaintiff for the sum of $12 59. There was a motion for a new trial, and in arrest of judgment, which were denied. The cause was heard before Sheldon, Judge, and a jury, at November term, 1849.

The appellant assigns for error, the sustaining the demurrer of the appellee to the special pleas of the appellant, and in overruling the motions in arrest of judgment and for a new trial.

M. P. Sweet, made the following points, and cited the following authorities in support thereof:

The defendant, by his patent from the U. S., acquired all the title of the government to the mill and dam, as well as the soil, and with the mill and dam, all things appurtenant to them. Angell on Water Courses, pp. 1, 2, 3, 4, 39, 44, 45; New Ipswich Woolen factory *v.* Batchelder, 3 N. H. 190; 5 S. & Rawle, Pa. Rep., 107, 169; 2 Hill, 620; 2 Black. Com., 16, 17; 10 Pick. 138, 141; 17 *ibid*, 23; Co. Litt., 307; 1 Sum. U. C. C. R., 492.

The pond was appurtenant to the mill. In legal parlance, the term appurtenance is used to signify something belonging to another thing as principal, and which passes as an incident to the principal thing. Bouvier's Law Dict., 119; 10 Peters, 25; Angell on Water Courses, 43; 1 Serg. & Rawle, 169; 3 Saunders, 401. The defendant, as the grantee of the government, had the right to enjoy the property granted, in the same condition in which it was, at the time of the grant. 5 Wend., 523.

The government sustains to its grantees, the same relation as grantor, that private persons do. 2 U. S. Dig., 926; 2 Hill, 620; Angell on Wat. C., 1, 2. It matters not what the intention of the grantor may have been, if by the term of his deed, the right is conveyed. 6 Cowen, 518; Angell on W. C., 4.

Where a right is granted by a riparian proprietor, to abut a mill-dam on his shore, the grantee has *prima facie* a right to all

the water raised by the erection of the dam. Bliss *v.* Rice, 17 Pick., 23. A mill includes not merely the building in which the business is carried on, but includes the dam and other things annexed to the freehold and necessary for its beneficial enjoyment. Whitney *v.* Olney et al., 3 Mason's C. C. Rep., 280.

The principle that an incorporeal right appurtenant to land, without an express grant of such incorporeal right or of the privileges and appurtenances, will pass by a deed of the land, is well established. Angell on W. C., 39 ; Co. Litt, 307, (*a*) ; 10 Pick., 138 ; 21 Wend., 290.

On the sale of the public lands, the patent transfers to the purchaser the entire legal estate and sezin, to the same extent the government held them. Cook *et al.*, *v.* Foster, 2 Gil., 652 to 656.

In the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its enjoyment, in common intendment, is included in it, and passes to the grantee. 3 Mason, 272, 284. If after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if alterations thus made are palpable and manifest, that a purchaser should take the grant burthened or benefitted as the case may be, by the qualities which the previous owner had given to it. 8 Penn., 383.

Thos. J. Turner, for Appellee.

The plea of the appellant which alleges that the U. S. were the owners of the W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ S. 11, T. 27, R. 7, and the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ S. 10, T. 27, R. 7, and that they had a mill and dam on the W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ S. 11, aforesaid, which caused the water to flow back upon the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ S. 10 aforesaid, is no answer to that part of the declaration, which charges the appellant with flowing other lands of the appellee than the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ S. 10 aforesaid. 3 Scam., 510 ; 5 Gil., 543.

All the rights of the grantor pass to the grantee, as well the right to remove injuries, as to recover rights, and the remedy lies to the grantee of the party first injured as well as against the grantee of the party first injuring. Angell on W. C., 148.

The government of the U. S. selling to the appellee the W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ S. 11, T. 27, R. 7, conveyed no right to continue to drown the E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ S. 10, nor any other land than the tract sold. 1 Sum. 492 ; 10 Peters, 25 ; 2 U. S. Dig., Sup., 926.

Wilcoxon *v.* McGhee.

Under the land system of the U. S., the government selling to an individual, conveys the naked title to the tract sold, and no appurtenances pass by such sale except those attached to the soil of the particular tract. 2 U. S. Dig., Sup., 926. The U. S. cannot build saw mills, nor mill dams, within the limits of a state, nor sell mills, dams, or water power within a state without express authority from the State. 2 Public Land Laws, p. 5, No. 7.

The purchaser of a tract of land from the U. S, is entitled to the land free from all incumbrance; and the grantee of the U. S. acquires the right of action, to recover damages, for the continuance of a nuisance erected previous to his purchase from the U. S. The building of the dam mentioned in the declaration, was a trespass upon the domain of the U. S, and a grantee of the U. S. acquires the right of action for continuing the dam, against the person who continues it. The purchasers of government land take the streams in common. Pub. Land Laws, Part 1, p. 54, §9, p. 56, §6.

Appurtenances only pass by grant, by a common person; if the government grants, they do not pass. 4 Bac. Ab., 534; Plow, 251. The government cannot sell except under a law and a sale adverse to the law is void. Vattel's Law of Nations, 116. A reservation of a mill site, reserves the soil for the site. 6 Cowen, 677; 2 Caines' Cases, 87; 4 Bac. Ab, 535. So of a sale of a mill site. Land is not appurtenant to land.

TRUMBULL, J. This case presents the single question, of the right of a purchaser of a tract of public land, having upon it at the time of a purchase, a mill and dam, which cause the water of a stream running through it to flow back upon other public lands, to continue the dam so as to overflow such other lands after they have been entered by individuals. (*a*)

It does not appear from the record, that the person entering the land upon which the mill stood, paid anything additional on account of the mill, or for the privilege of flooding other lands; but he made the entry and received a patent in the usual form. The manner in which the public lands are disposed of, the character of the parties to the grant, and its subject matter, are all circumstances proper for consideration in arriving at the intention of the parties; and when we look to these circumstances, there can be little difficulty in determining what rights are

(*a*) See Laney vs. Jasper, 39 Ill. R. 47.

acquired by a patentee of public land, especially when it is recollected that grants by the government are construed favorably for the grantor, and pass nothing by implication. 2 Bl. Com , 347; 5 Cruise's Digest, Tit. King's grant, § 25 *et sequeter* ; United States v. Arredondo, 6 Peters, 738 ; Charles River Warren Bridge, 11 Peters, 545.

Although the general government in its liberality permits a person to enter upon and subsequently to purchase a tract of public land at the minimum price, yet it could never have been its intention in granting this favor, to bestow also upon the setter, the privilege perpetually to inundate and render valueless, other tracts of public land, by damming up a stream running through the one which he might eventually purchase. The purchaser under such circumstances, pays nothing for the privilege of overflowing other lands, it is not a right necessarily or naturally appertaining to the land he purchases, and could never be presumed to have entered into the contemplation of the government in making the grant.

The subject matter of the grant, is the *land*, having a fixed and definite description, and nothing passes as parcel of the granted premises, but what is included within the boundaries expressed in the patent, or is naturally or necessarily annexed to the land. Grant v. Chase, 17 Mass, 443 ; Manning v. Smith, 6 Con., 289.

Regularly "nothing can be appendant or appurtenant unless it agree in nature and quality with the thing whereunto it is appendant or appurtenant." Bac. Ab., Tit. Grants, 1, 4. The right to overflow adjoining lands, is not an appurtenance agreeing in nature or quality with land itself, and though perhaps a convenience, is not absolutely necessary, to the enjoyment of the land ; but such an easement more properly appertains to something that has been put upon the land, as in this instance, to the mill.

In the case of the conveyance of a mill and its appurtenances, and where the subject matter of the conveyance and principal thing granted is the mill, the right to continue to overflow the lands of the grantor, to the same extent as when the grant was made, would pass with the mill, as necessary to its use and enjoyment ; but here, the subject matter of the grant was the *land*, and the right to overflow adjoining lands belonging to the gov-

(*a*) Hadden vs. Shoultz, 15 Ill. R. 582.

ernment, was not an appurtenance annexed to it by any natural or legal necessity.

Let the judgment be affirmed.

Judgment affirmed.

ROBERT J. CASSELL, Appellant, *v.* ELISHA WILLIAMS, Appellee.

APPEAL FROM WOODFORD.

A trial of right of property which results in a verdict against the claimant, does not establish or confirm a right to the property in the defendant in execution. The case of Arenz *v.* Rehil *et al.*, 1 Scammon, 340, examined and explained. In an action against an officer to recover three times the value of property sold upon execution, which is exempted by law, the plaintiff must be the owner of the property sold.

If an officer levies upon property, as the property of the defendant, he is not therefore estopped from subsequently denying that it is his property; his return of the levy, is only *prima facie* against him.

If a party transfers his property fraudulently before, or in good faith, after execution issued, he cannot claim the property as his own, and recover of the officer selling it, upon the ground that it was exempt from execution.

This was an action of trespass originally brought by appellee against the appellant before a justice of the peace, to recover a penalty under the statute for taking property under an execution against the appellee, which was exempt from execution.

The case was taken into the Circuit Court of Woodford, by appeal, and a trial by the court, Davis, Judge, presiding, without a jury, and a judgment rendered against said appellant for $99.00 and costs, at April term, 1851.

The appellee proved the judgment, upon which execution issued to appellant, the execution, delivery thereof to appellant, a constable, and levy upon a mare and sale thereof; that the property was claimed by George Kingston, that a trial of the right of property was had, and the property found to be subject to the execution; that he had only about $25 worth of property, besides the mare, except some little kitchen and household property, scarcely sufficient for the appellee's family; that he was a householder, living with his family; that he was present at said trial of the right of property, and then, and previous thereto, denied that he owned the mare, and after said trial, and before sale, he notified the constable that he claimed the property as exempt from execution.

The execution was dated January 24, 1850. The levy was made March 11, 1850. The trial of the right of property, March 16, 1850. The sale was made March 28, 1850. The mare worth $33.00.

The appellant proved, by George Kingston, the claimant of the property, that he supposed himself to be the owner of the property; he had a mortgage on it, and it was forfeited and given up to him, but he let it remain with appellee; and previous to said trial of the right of property, appellee told witness that the mare was levied upon; that he, appellee, admited and declared the mare was not his property.

The mare sold for $11.60, above the execution, which was paid to appellee by appellant, and he received it under a stipulation that it should not affect this suit.

The court rendered judgment against appellee, from which he appealed to this court, and in the court below filed his bill of exceptions.

The appellant assigns for error the decision of the court below, in rendering said judgment.

H. O. Merriman, for Appellant. Refers to Cook *v.* Scott, 1 Gil., 333; McClusky *v.* McNeely, ibid, 579.

N. H. Purple, for Appellee. Refers to Arenz *v.* Reihle, 1 Scam., 341.

Trumbull, J. Williams sued Cassell, in trespass, to recover three-fold the value of a mare, taken by the latter, as constable, on an execution against the former.

The record shows that the execution was issued and came to the hands of Cassell, on the 24th of January, eighteen hundred and fifty; that he made a levy upon the mare in controversy, as the property of Williams, on the eleventh of March following; that he, Kingston, claimed the mare as his property, whereupon a trial of the right of property was had, which resulted in a judgment against the claimant; that the mare was in the possession of Kingston, to whom she had been given up by Williams on a forfeited mortgage, at the time of the levy, though he permitted Williams to use her when he pleased; that previous to the trial of the right of property, Williams disclaimed all

ownership of the mare, and said that she belonged to Kingston ; that Williams was the head of a family, residing with the same, at the time of the levy and sale, and had not, exclusive of the necessary household furniture and the mare in controversy, which was valued at thirty-three dollars, exceeding twenty-five dollars worth of property ; that he gave notice to Cassel, some three or four days after the trial of the right of property, and before the sale, that he claimed the mare as exempt from execution, but that Cassel disregarding the notice, proceeded to sell the mare on the execution.

Upon this state of facts the Circuit Court found the defendant guilty, and gave judgment against him for three times the value of the mare.

This finding and judgment was cleary erroneous. The evidence showed that Williams had no such title to the mare, as would authorize him to maintain this action. As between the plaintiff in the execution, and Kingston, the right of property was found against the latter, but it by no means followed, that it belonged to the execution debtor. When property levied upon is claimed by a third person, the question to be tried, is " whether the right of such property be in such claimant or not." R. S. ch. 91, §1. The judgment is conclusive only upon parties and privies. It does not determine that the property belongs to the defendant in the execution, for it often happens, that property not his own at the time, is liable to be taken in satisfaction of an execution against him.

The case of Arenz *v.* Reihle, 1 Scam., 340, has been referred to, as deciding that a judgment against a claimant upon the trial of a right of property, is conclusive evidence, that the property levied upon belongs to the defendant in the execution, but such is not the point decided in that case, though the language of the court would, at first view, seem to justify such an inference. The question in that case, was whether the record of a trial of the right of property, wherein judgment had been given against the claimant, was admissible in evidence against Arenz, who had received the property from such claimant, after it had been attached, and a bond given to the Sheriff for its return, in case a return should be adjudged, for the purpose of showing that the property belonged to the defendant in the attachment, so far as to be liable thereto ; and the court very properly held it admis-

sible for that purpose upon the principle, that Arenz was privy to the judgment upon the trial of the right of propety, and bound by it.

The court said, "it is true that the record was not only the best evidence, but conclusive," that the property belonged to the defendant in the attachment. This language must, however, be understood in reference to the case then under consideration, and means no more than that, in the case then before the court, it was conclusive, as against Arenz, that the property was subject to the attachment.

It was insisted upon the argument, that Cassel having levied upon the mare, as the property of Williams, is estopped from subsequently denying that fact. If this argument be correct, then he would have been liable to Williams, even had the right of property been found for the claimant, and in all cases where an officer, by mistake, levies upon the property of a stranger, he will become twice liable; first, to the owner, whose goods he wrongfully seizes, and secondly, to the defendant, whose goods he has admitted by his return, that he seized, though he never took them. Such cannot surely be the law.(*a*)

The endorsement of the constable, is at most, in this action, but prima facie evidence against him, that Williams owned the property, and that he did not in fact own it, is clearly established by proof of his own declaration, as well as the other evidence in the case.

If a party fraudulently transfers his property for the purpose of avoiding the payment of his debts, or even sells it for a valuable consideration, after it has become subject to the lien of an execution against him, he cannot afterwards claim the property as his, and recover from the officer selling it, three times its value, upon the ground that it was exempt from execution against him.

Let the judgment be reversed and the cause be remanded.

Judgment reversed.

(*a*) Ice vs. McLain, 14 Ill. R. 64; Cook vs. Scott, 1 Gil. R. 344.

THE PEOPLE *ex relatione* WILLIAM K. STEPHENSON *v.* SAMUEL S. MARSHALL, Judge of the Twelfth Judicial Circuit.

APPLICATION FOR MANDAMUS.

The legislature cannot abolish counties, and form the territory of which they were composed into one or more counties, without submitting the act to a vote of the inhabitants affected by the change.

A county seat cannot be removed without the affirmative vote of the inhabitants of the count.

Territory cannot be taken from one county and added to another, except by the vote of a majority of the inhabitants of the counties to be changed.

This was an application to the Supreme Court for a preemptory mandamus. The petition of William K. Stephenson, sets out, That by an act of the General Assembly, approved February 25th, 1847, the county of Gallatin was divided, and that the county of Saline, forming a part of it, was organized, and a county seat established at Raleigh, in said county. That the petitioner was a resident of, and voter in, the county of Saline. That said county of Saline has been recognized as a county, and that by law, Circuit Courts were held in Saline county, on the next Monday after they were held in Gallatin county; the county of Saline, being one of the counties composing the third Judicial Circuit. That afterwards by virtue of an act of the General assembly, the county of Saline was made a part of the twelfth Judicial Circuit, the Courts therein to be held at Raleigh, on the Mondays following the sitting of the courts in Hamilton county. That by virtue of an act of the General Assembly, entitled "An act to create the county of Gallatin out of the counties of Gallatin and Saline," approved February 11th, 1851, it was enacted, that the said counties of Gallatin and Saline be abolished, and that all the territory therein embraced, should compose one new county, to be styled and known as the county of Gallatin, and that the county seat of said new county of Gallatin, should be permanently located at Equality. That said act further provided for the election of county officers for said new county of Gallatin, and the permanent organization thereof, which said elections have been held, and the officers have been elected, qualified and commissioned, and are discharging their duties. That Samuel S. Marshall, presiding Judge of the said twelfth Judicial Circuit, has organized his court in Gallatin, pursuant to the last above mentioned law, and is proceeding with the business

thereof, in violation of the Constitution of the State. That there is criminal and civil business pending, and undetermined, in the Circuit Court, in Saline county, and that the time for holding the Circuit Court therein has arrived. That the County Court of Saline county, regarding the last named law as unconstitutional and void, have notified and requested the Judge, to hold and convene a regular term of the Circuit Court, at Raleigh, in Saline county, without regard to the last named law, which the Judge has refused to do. Praying a mandamus ordering the Judge to hold the Court in Saline county, &c. To this petition, Judge Marshall answers, that it had been presented to him on the 26th day of May, 1851, at the sitting of the Gallatin Circuit Court at Equality, and with a view to a speedy adjudication of the question, enters his appearance thereto, waives an alternative mandamus, or other process, and all technical objection. That he does not deny any matters of fact alleged in the petition, but admits them to be true. That he has refused to hold Court at Raleigh, in Saline county. That he will regard the provisions of the law, uniting the two counties of Gallatin and Saline, as constitutional and directory to him, until, by the order and judgment of the Supreme Court, he should be otherwise commanded.

After hearing of the cause, a peremptory mandamus was awarded.

A. Lincoln & R. Wingate, for the Relator.

A. G. Caldwell & H. B. Montgomery, for the Respondent.

Caton, J. The Legislature, undoubtedly, was competent to pass this law, unless the exercise of such a power is clearly inhibited by the constitution. The first section of the seventh article of the constitution, provides, that "No new county shall be formed or established by the General Assembly, which will reduce the county or counties, or either of them, from which it shall be taken to less contents than four hundred square miles, nor shall any county be formed of less contents; nor shall any line thereof pass within less than ten miles of any county seat of the county or counties proposed to be divided." The second section provides, that "No county shall be divided, or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of all the legal

voters of a county voting on the question, shall vote for the same." The fourth section provides, that "There shall be no territory stricken from any county, unless a majority of the voters living in such territory, shall petition for such division; and no territory shall be added to any county, without the consent of the majority of the voters of the county to which it is proposed to be added." Section five provides, that "No county seat shall be removed, until the point to which it is proposed to be removed, shall be fixed by law, and a majority of the voters of the county shall have voted in favor of its removal to such point." These are all the provisions of the constitution which it is supposed, inhibited the passage of the law under consideration. The first section quoted certainly is not offended by the passage of this law, either in letter or spirit. The object of that section is to prevent the reduction of large counties to small ones, or the creation of small counties, and also to prevent the running of new county lines too near county seats, already established. The effect on the law in question, would be to secure a larger county, instead of smaller counties, and hence the design of the convention, in framing the first section, is not disappointed. That section makes no provision for a vote of the people on the subject, and but for subsequent provisions, we think no question could be made, as to the validity of this law. This element, however, is introduced into the next section. That section, expressly inhibits the division of a county, or the taking any part therefrom, without an affirmative vote of the people of the county. The fourth section forbids, substantially, the same thing, unless a majority of the voters, in the territory, which, it is proposed, shall be detached from one county and added to another, petition for the change; and then before the act can take effect, a majority of the voters of the county to which the territory is proposed to be attached, must consent thereto. By force of these two sections, territory cannot be changed from one county to another, without, in the first place, a petition of a majority of voters in the territory, and then the separate affirmative vote of both counties to be affected by the change. No rational mind can doubt, after the perusal of these provisions, that it was the unequivocal intention of the convention, that county lines already established, should not be changed, except by the deliberate vote of the people who might be affected thereby. To secure this right, and to prohibit all such changes of county lines,

against the wishes of the people, was manifestly a cherished object of the convention, on framing the constitution, and of the people in adopting it.

What then are the provisions, what the object, and what the effect, of the law under consideration? It provides for the abolition of the counties of Gallatin and Saline, and for the creation from their territory of the county of Gallatin. Its object and effect was to unite the two counties into one—to attach one county to the other, without the approbation of the people of the two counties. The design of the constitution is to prohibit things, not names. It is to forbid results and effects, and not the form of expression to be used in accomplishing them. A substance was sought after, and not a shadow. A real power was designed to be reserved to the people, and not to their hope of right

We were asked if the legislature may not abolish a county. organization, and then, from very necessity, attach the disorganized territory to another county, or form a new one? We answer unhesitatingly, that the legislature may not destroy a county, if the object, or necessary result, is to accomplish an unconstitutional purpose. Should the time ever arrive when any county in this State becomes entirely depopulated, then the legislature might repeal the law of its organization; or, should we acquire new territory, from that a new county might well be organized by the legislature alone, but to disturb county lines, already established, without a vote of the people, would be doing that which the constitution has forbidden in terms which, it seems to us, cannot be mistaken. The legislature cannot do indirectly, that which it is forbidden to do directly. This is a rule dictated by reason, and supported by the highest authority. Craig *v.* The State of Missouri, 4 Peters, 410. To be sure, it should n ot be applied, unless the end proposed to be accomplished is manifestly the very thing forbidden, but when that is clearly the case, no circumlocution can give validity to the forbidden act. Should this act be sustained, let it once be established, that the legislature may destroy old counties as it pleases, and from their territory create new ones, and every conceivable change of county lines may be effected, and that too, without any reference to a vote of the people, if the new county is of the requisite size.

The same legislature which passed this act, also passed an act creating the county of Kankakee, out of territory to be taken

from the counties of Will and Iroquois, and whence the necessity of submitting that act to a vote of the people of those counties, when, if this act is constitutional, the same thing could have been accomplished by abolishing the counties of Will and Iroquois, and then from their territory organizing three new counties, giving to each precisely the same boundaries which they now have. So, too, in the same way might the county of Oregon have been created out of territory taken from the counties of Morgan, Sangamon and Macoupin, without a vote of the people of those counties. Nothing was requisite but to abolish those three counties and to create four new ones, and the desired end would be accomplished at once, and yet this same legislature, no doubt, in obedience to the provisions of the constitution, thought proper to submit the act creating the county of Oregon, to a saparate vote of the people of the three counties, from which the territory of the new county was to be taken. Suppose the legislature had passed an act, simply providing that the territory of the county of Saline, should thereafter be attached to, and form a part of the county of Gallatin. Would it be pretended that such a law would be valid, without a vote of the people, simply because it transferred the whole county, instead of a part of it?

The object and effect of the law under consideration, is precisely the same as the one supposed. What possible difference is there, whether two counties be abolished or annihilated, and of the same territory a new one formed, or one county is attached to the other? If the legislature cannot do the one, then it is prohibited from doing the other. No change of county lines can be made without, in effect, abolishing the old county organization, and creating a new one, so far as the territory transferred is concerned; and no additional authority is acquired, by affecting to do indirectly, what they must of necessity do, substantially, in all cases of the kind. This right of abolition or annihilation of county organizations, and the consequent results, if admitted as claimed in this case, would utterly destroy every provision of the constitution, the object of which, is to secure to the people interested, a direct control over legislative action affecting existing county organizations. If the constitution is still to be regarded as an instrument of that sacred character which has hitherto always been attributed to all American constitutions,—if it is still to be considered as a law to the law makers, as well

as to the citizens, a law which cannot be compassed or evaded, then, it is our duty to see that its material and substantial provisions are not frittered away by establishing a rule, which will in every instance, allow its provisions to be disregarded, which will permit the legislature to do the precise and identical thing which the constitution, in most express and unequivocal terms, has declared shall not be done, without the vote of the people interested.

There is, no doubt, a certain degree of plausibility in the course of argument, by which this law is attempted to be sustained. It is truly said that the constitution is a restraint upon legislative powers, and there is no doubt but this law might be passed unless prohibited by the constitution. From this it is argued that, as there is no express prohibition to abolish counties, it is within the power of the legislature to do so, and from necessity, there must be authority to organize the disorganized territory. But this reasoning is more specious than sound. As we have before seen, it leads inevitably to the overthrow of the paramount law of the State. No means can be constitutional, which effect an unconstitutional object. While we would not extend the prohibitions of the constitution, so as to embrace measures and objects, not manifestly and clearly within the design of its framers, yet where that is undeniably the case, then by no means whatever, should it be allowed to be evaded. We cannot doubt that the objects designed to be accomplished by this act, cannot be effected without the affirmative vote of the people of the counties of Saline and Gallatin; and for the reason that no provision is made for such a vote, we think it is in derogation of the constitution, and that it must continue inoperative, till an election shall have been provided for by law, and an affirmative vote obtained from the voters of each of the counties affected by the law.

The act in question, not only attempts to unite the county of Saline with the county of Gallatin, without the constitutional sanction of the people, but in effect, it also provides for the change of the county seat of Gallatin county without the vote provided for in the fifth section of the seventh article of the constitution. This section, which I have quoted, forbids the removal of a county seat without a vote of the people of the county. This law, practically undertakes to remove a county seat by legislative action alone. For the reason, then, that no provision is made for taking

a vote of the people upon the removal of the county seat from Shawneetown to Equality, the law is also incomplete. The act in question, remaining inoperative as it does, the old county organizations continue, and it is the duty of the Circuit Judge to hold circuit courts in both counties, the same as if it had not been passed, and a peremptory mandamus must be awarded according to the agreed case.

Mandamus awarded.

JAMES DUFIELD, Appellant, *v.* ELISHA A. CROSS, Appellee.

APPEAL FROM McHENRY.

It is erroneous to instruct a jury in such language, as assumes that a settlement can only be proved by the admissions of the plaintiff in the suit.

The declarations of a party are admissible in evidence against him and are to be received and considered by the jury. Although such declarations are not made deliberately, the jury must determine what weight shall be given them.

The right of action for service rendered by a minor, is in the parent or guardian. (*a*)

This action was brought in the McHenry circuit court, by Cross against Dufield; and was tried before Henderson, Judge, and a jury, at April term, 1850; and resulted in a verdict and judgment in favor of Cross, for the sum of $160.00.

The facts necessary to a full understanding of the opinion of the Court, are set forth in it.

T. L. DICKEY and STRODE & McCLURE, for Appellant.

LOOP & HURLBUT, for Appellee.

TREAT, C. J. This was an action of assumpsit for work and labor. It appeared from the evidence, that, in 1838, the plaintiff was placed by his mother with the defendant, to remain until he should become of age. He continued with the defendant until the spring of 1849, when he received a horse of the value of $140, and went to Wisconsin. He afterwards returned, and performed some further service. He became of age in the latter part of 1848. While with the defendant, he was treated as a member of his family. The plaintiff introduced evidence of the value of his services, as well before, as after he attained his majority. The defendant proved some payments, and also

(*a*) Parmellee vs. Smith, 21 Ill. R. 620.

admissions of the plaintiff, made on several occasions and under different circumstances, to the effect that a settlement had taken place, and that he was to wait on the defendant for the balance found due him until the fall of 1851. At the request of the plaintiff, the Court instructed the jury, "that unless they believed from evidence, that the plaintiff in this suit deliberately and distinctly admitted, that he had settled up with defendant all matters involved in this case, which settlement was agreed at the time to be in full of all demands, then the plaintiff is not cut off from recovering for his work and labor, not included in the settlement, such amount as the jury considers proved."

The instruction was erroneous, and calculated to mislead the jury. It is subject to several exceptions. It assumed that a settlement could only be proved by the admissions of the plaintiff. But as the evidence tending to show a settlement consisted mainly of the declarations of the plaintiff, this branch of the instruction may not have prejudiced the defendant. Again: the instruction applied an improper test to the admissions. It in effect wholly excluded them from the jury, unless they were deliberately and distinctly made. The declarations of a party are admissable in evidence against him, on the principle, that what he says against his interests may be considered as true. They are, indeed, often of an inconclusive and unsatisfactory character, depending very much on the circumstances under which they are made. But they are to be received and considered by the jury, in connection with the other evidence in the case. (*a*) It is the province of the jury to determine what weight shall be given them. If the jury are satisfied that the declarations are true, then they are bound to regard the facts as proved, and decide accordingly. The true test in this case was whether the admissions satisfied the minds of the jury that a settlement had been made, and not whether the admissions themselves were made in a particular manner. There is another objection to the instruction. It left the jury at liberty, in the event they came to the conclusion that there had been no final settlement, to take into consideration the services of the plaintiff while a minor. The plaintiff had no legal claim to compensation for those services. The right of action, if any existed, was in the mother, who was entitled to the labor of her son, and who put him in the service of the defendant. From the amount of

(*a*) Young vs. Fonte, 43 Ill. R. 39.

the verdict, it is very evident that something was allowed the plaintiff on account of services performed before he was of full age

The judgment is reversed, and the cause remanded.

Judgment reversed.

JAMES DUNLAP, Appellant, *v.* DAVID A. SMITH, *et al.*,, Assignees of the Bank of Illinois, Appellees.

APPEAL FROM SANGAMON.

A debtor of the Bank of Illinois is authorized to discharge his indebtedness in the notes and certificates of the Bank ; unless it shall appear, that the indebtedness arose as a subscription for bank stock.

The term stock notes has not a technical meaning.

The facts of this case, and the judgment rendered upon it, will be found, ante page 184.

After the decision in this court had been returned to the Sangamon Circuit, Dunlap entered his motion, that satisfaction of said judgment be entered, to the extent of twenty-eight thousand one hundred and twenty-seven dollars and thirty-five cents, or such part thereof as he may be entitled to a credit for, and in support of said motion, filled an agreement of the parties, made since the rendition of said judgment ; whereupon the plaintiff, in resistance of said motion, produced in evidence the record of said judgment, with the previous agreed case (see ante 184) and all the papers and entries in the cause ; and after argument, the Circuit Court, Davis, Judge, presiding, at March term, 1851, overruled the motion and gave costs against Dunlap. And thereupon, on motion of Dunlap, an appeal was granted. The bill of exceptions taken on the motion, in addition to the agreed case, (ante 184,) states, that it is agreed that since the rendition of said judgment, to wit on the 13th day of January, 1851, the plaintiffs have received on account of said judgment, of and from the defendant, in the notes of the Bank of Illinois, $10,311.00. and in the certificates of said Bank, is substance and form as provided in the sixteenth section of the act concerning said Bank, passed February 15th, 1843, $17,816.35 ; and that said defendant (Dunlap) claims the right to pay said judgment in the notes

and certificates of said Bank, at par, which claim the plaintiffs deny; that said defendant shall enter a motion in the court aforesaid, to have satisfaction of said judgment entered, to the extent of the notes and certificates received, or either of them as aforesaid; that when the court decides said motion, the losing party may take the case to the Supreme court, sitting at Ottawa in June [then] next, by writ of error or appeal, without bond or security; that if the Supreme Court decide that said motion should be sustained, so it is to be; and if it decide that said motion should be overruled, the said plaintiffs are to hold said notes and certificates, subject to the order of said defendant.

S. A. Douglas, S. T. Logan and J. A. McClernand, for Appellant.

A. Lincoln, for Appellees.

Trumbull, J. This same case came before the court at its last term at Springfield, and the amount of Dunlap's liability was fixed by the decision made at that time.

He now claims the right to discharge the judgment then entered against him in the notes and certificates of the Bank, which is the only question now involved in the case. In determining this question, it becomes important to look to the nature and origin of Dunlap's indebtedness, and also to the laws in force at the time it was incurred.

On the 22d of December, 1842, the Legislature passed "An act in relation to the State Bank of Illinois and Bank of Illinois," which declares, "That all debts and demands due, by note or otherwise, unto the president, directors, and company of the Bank of Illinois, or to the State Bank of Illinois, or that may hereafter become due unto either of said banks, may after or before suit brought thereon, be discharged and paid in the notes and bills of said banks respectively, to which said debt or demand may be due, whether the same be in the possession of said bank or banks or assigned or transferred to any corporation, person or persons,"

The contract which was the foundation of the judgment against Dunlap, bore date February 20, 1843, nearly two months after the foregoing act was passed; and he would clearly have the

right to discharge it according to the provisions of that act, unless there was something in the character of the contract, to make it an exception to the general provisions of the law. Such it is insisted is the case, from the fact that the contract is described in the transfer of the assets of the bank, as a stock note. All the information we have upon that subject, is what is contained in the agreed case upon which the judgment was rendered. That agreement states, that the president, directors, and company of the Bank of Illinois, on the tenth day of April, 1845, pursuant to an act of the Legislature passed "Feb. 28, 1845, under their corporate seal and the signature of their president [the said Dunlap] and cashiers, assigned said note as a stock note" to the assignees of said Bank. Admitting that by the assignment thus made, Dunlap is estopped from denying that the note was a stock note, and the question arises. How does it change his right to discharge the amount due upon it, in the notes of the bank?

It will be borne in mind, that the record is wholly silent as to the consideration of the note, or the circumstances under which it was given. All we know is, that it was assigned as a stock note. The record does not even contain a copy of the note, and whether it was given on account of an original subscription for stock, or on a purchase of stock which the bank may have been authorized to sell, does not appear.

If it could be gathered from the record that it was given on account of a subscription to the stock of the bank, made previous to the passage of the law of Dec. 22, 1842, and upon the faith of which bill had been issued and liabilities incurred by the bank, which still remain unpaid, we should have on hesitation in holding that it was not a debt or demand within the purview of the act of Dec. 22, 1842, and which the debtor could discharge in the notes of the bank. The stock of a bank paid in and subscribed for, consitutes a fund for the payment of the liabilites of the bank. To allow a stockholder, who at the time of his subscription was required by the charter of the bank to pay for his stock in specie, subsequently to discharge that subscription, after the bank had become insolvent, in its depreciated bills, would be equivalent to allowing him to withdraw a part of that fund upon the faith of which the bills had been issued, and would be manifestly unjust, as well to stockholders who were

not in debt for their subscriptions, as to the creditors of the bank. To such a case much of the reasoning in the case of King *v.* Elliott, 5 Smedes & Marshall, 428, would be applicable.

The record before us, however, discloses no such case, and it is not for the Court to make a case for the plaintiff. The term stock note has no technical meaning, and may as well apply to a note given on the sale of stock which the bank had purchased or taken in the payment of doubtful debts, as to a note given on account of an original subscription to stock.

Here the record not only fails to show, that the consideration of the note was an indebtedness for stock, existing prior to the passage of the act of Dec. 22, 1842; but in the absence of all evidence, the presumption is, that the consideration was a liability incurred for the first time, at the date of the note. If so, the law under which the contract was made became part of it, and Dunlap's right to discharge it according to the provisions of that law, is unquestionable.

On the 25th day of February, 1843, five days after the date of the note given by Dunlap, and before it became due, an act was passed for putting the Bank of Illinois into liquidation; which provides, among other things, for paying out the specie of the bank then on hand *pro rata*, among its creditors, and for issuing certificates for the balances due; which certificates, the act declares, shall be received in payment for any debt due or to become due the bank. By this act, certificates are placed upon the same footing as notes in the payment of debts; in fact there is now no difference between them, certificates having the same market value as notes.

The judgment against Dunlap comes directly within the terms of the acts authorizing the debtors of the bank to discharge their liabilities in its notes and certificates; and as has been already shown, there is nothing in the nature of the judgment or the contract upon which it is founded, as disclosed by the record, to distinguish it, so far as relates to the mode of payment, from the ordinary debts due the bank.

The case of King *v.* Elliott is distinguishable from this, in several particulars. In that case, the delinquent stockholder was garnisheed by a creditor of the bank, before the passage of the act providing that garnishees who were indebted to it should have the right to discharge their indebtedness in the notes of

the bank ; moreover, it did not appear in that case, that the garnishee held the notes of the bank, when he was garnisheed ; and as the claim was then transferred by law, no offset subsequently acquired could avail him.

It is to be regretted that, in so important a case as this, the parties have not thought proper to bring before the Court the whole transaction out of which Dunlap's indebtedness arose. Had this been done, it is possible that the Court might be called upon to pronounce a different judgment ; but as the case is presented in the record, by which alone the Court must be governed, Dunlap's right to discharge the judgment in the notes and certificates of the bank, is clear.

The judgment of the Circuit Court is reversed, and the cause remanded.

Judgment reversed.

THE TRUSTEES of the Illinois and Michigan Canal *et al.*, Pltffs in Error, *v.* THE CITY OF CHICAGO, Defts in Error.

ERROR TO COOK.

It is error, in a proceeding for opening a street in the city of Chicago, to include the costs in the assessment.

The real estate, belonging to the Trustees of the Illinois and Michigan Canal, is liable to assessments, for opening streets and other improvements of a like character.

Assessments for improvements, are not a charge upon an estate which reduces its value, and are distinguishable from taxes.

The State cannot now be considered as the owner of the Canal lands, the trustees are invested with the legal title, but the State has such a beneficial interest in the Canal and Canal property, as may give her the right to insist that the trustees shall faithfully execute the purposes of the trust.

This was a proceeding by petition, on the part of the city of Chicago, for the purpose of widening an alley into a street eighty feet in width. The prayer of the petition was allowed and commissioners were named to examine and report upon the necessity of the appropriation, the value of the land to be condemned, and the injury to the owner or owners thereof, and to assess and apportion the damages and expenses of the improvement on real

estate, which they might deem benefitted thereby, apportioning injury and benefits, &c. A portion of the property claimed by the Canal Trustees, was included in the assessment of the commissioners.

At the May term, 1849, Dickey, Judge, presiding, the report of the commissioners, recommending the enlargement of the alley, and including the assessments for improvements, &c., was accepted, and the order for enlarging the street was entered of record. The costs of assessing, &c., were included in the report, which was confirmed. Several errors were assigned, which are not noticed in the opinion of the Court.

The errors discussed by the Court are, that the costs of the proceeding, consisting of attorneys', clerks' fees, &c., were assessed upon the property in violation of law. The Canal Trustees assign for error, that the canal lots and lands are by law exempt from taxes and assessments, and the proceeding against them was therefore illegal and void.

I. N. Arnold, for Pltffs in Error.

S. S. Hayes, for Deft in Error.

We concede that the judgment of the Court below must be reversed, for the reason that the costs of the proceeding are included with the expenses of the improvement, that being the point decided in Morris *v.* Chicago, 11 Illinois R., 650.

We desire, however, a decision on the question of the liability of canal lands to be assessed for local improvements.

The general power is given the city to assess on all the property benefitted. Chicago Incorporation Act, 1837, §38.

The Canal Trustees are a corporation. The property of corporations is included, though not specially mentioned. 11 Wheat. R., 392; 15 Johns., 382.

The canal lands lying between North and South Water streets, are expressly exempted, showing the intention to charge the rest. Act '37, §38.

The words "of every description," give no greater extent to the word "taxation" in § 13, Canal Law, '43, than it would have without. See R. S., p. 27, do. 437.

This is only an exemption from taxes, which are burdens im-

posed by legislative authority for the public good, not from assessments, made on real estate of the value added to it by an improvement for local convenience and advantage. 3 Tomlin's Law Dic. Tit. Tax; Matter of Corporation of New York, 11 Johns., 77; Bleecker *v.* Ballou, 3 Wend., 263; Sharp et al. *v.* Speir, 4 Hill's R., 76; Northern Liberties *v.* St. John's Church, 13 Penn. State R., 105; Ross *v.* Mayor of New York, 3 Wend., 333.

There is nothing in the nature and objects of the incorporation, in the fact that the State is remotely interested, to distinguish the present case. The fee simple is not in the State.

It does not alter the case, that the State has a reversionary interest, instance escheats, or that she may pay off the debt and take the canal, instance any railroad charter, where this power is reserved, or (if it were so) that the means of the State may be lessened by the assessment, instance where a State is a joint owner in a bank, the property of which is taxable.

This is land belonging to a commercial corporation. Canal Law, '43, §16. As such, it is not covered by the prerogative of the State, though the State be the beneficial owner. McCulloch *v.* State of Maryland, 4 Wheaton, 316; Bank U. S. *v.* Planter's Bank of Georgia, 9 Wheaton, 904; Bank S. Carolina *v.* Gibbs, 3 McCord, 377.

Treat, C. J This proceeding was instituted for the purpose of opening a street in the city of Chicago. Commissioners were appointed to report as to the necessity of the measure, and the value of the ground to be appropriated; and also to assess and apportion the expenses of the improvement, against the real estate to be benefitted thereby. They reported in favor of opening the street, and included in their assessment of the expenses, the costs of the proceeding, amounting to $120. The report was approved. This Court held, in the case of Morris *v.* The City of Chicago, 11 Illinois, 650, that it was error to include the costs of the proceeding in the assessment. For this error, the judgment must be reversed.

The case presents the question, whether the real estate belonging to the trustees of the Illinois and Michigan Canal is liable to assessment of this character, and, as both parties are desirous that the question may be settled, I shall proceed briefly to state the conclusions of the Court on the subject. The 13th section

of the act, by virtue of which the canal lands were granted to the trustees, declares, that "the said lands and lots shall be exempt from taxation of every description, by and under the laws of this State, until after the same shall have been sold and conveyed by the said trustees, as aforesaid" It is contended, that the assessment in question, falls within this exemption. In our opinion, the exemption must be held to apply only to taxes levied for state, county and municipal purposes. A tax is imposed for some general or public object. It is an exaction made for the purpose of carrying on the government directly, or through the medium of municipal corporations, which are but parts of the machinery employed in conducting the operations of the government. It is a charge on an estate that lessens its value. In the proportion in which the owner is required to pay, is his pecuniary ability diminished. This is the sense in which the term taxation is used and understood. A reference to two or three adjudged cases will not be inappropriate. In the matter of the Mayor of New York, 11 Johnson, 77, an exemption in favor of churches from being "taxed by any law of the State," was held to refer only to general taxes for the benefit of a town, county, or the State at large, and not to extend to special assessments on the property of churches, for benefits resulting thereto by the opening, enlarging, or improving of streets. In Bleecker *v.* Ballou, 3 Wendell, 263, a covenant on the part of a lessee to pay "all taxes" on the demised premises, was held not to embrace a special assessment for pitching and paving a street in front of the property. In the case of the Northern Liberties *v.* St. John's church, 13 Penn. State Rep.. 104, a general law exempting churches, from all and every county, road, city, and school tax," was construed not to extend to an assessment for laying water pipes along the grounds of a church deemed to be benefitted thereby. Those cases cannot be distinguished in principle from the one before us. The assessment in question has none of the distinctive features of a tax. It is imposed for a special purpose, and not for a general or public object. It is not a charge on the estate which reduces it in value. It substracts nothing from the means or resources of the canal. The improvement is made for the convenience of a particular district, and the property there situated is required to bear the expense in the proportion in which it is benefitted. The assessment is precisely in

the ratio of the advantages accruing to the property in consequence of the improvement. It is but an equivalent or compensation for the increased value the property derived from the opening of the street.(*a*)

It is insisted, however, that canal lands are to be regarded as the property of the state, and therefore exempt from the payment of the assessment. This position cannot be maintained. The state, for a valuable consideration, has granted these lands to the board of trustees. The latter are invested with the legal title to the lands, with the full power to alien and convey the same, and apply the proceeds to the payment of the loan of $1,600,000, made for the purpose of completing the canal, and, when that is discharged, in the extinguishment of the debts previously incurred in the construction of the canal. The State cannot now be considered as the owner of the lands. She cannot resume the grant, without the payment of the indebtedness, for which the canal and its resources stand pledged. Until this indebtedness is discharged, the property is beyond the control of the State. She has, indeed, a beneficial interest in the canal and canal property, and in its management by the trustees; and that interest may give her the right to insist that the trustees shall faithfully carry out the purposes of the trust. But her rights of property are subordinate to those of the trustees, and the subscribers to the loan.

The judgment is reversed, and the cause remanded.

Judgment reversed.

WILLIAM HUDSON, Appellant, *v.* CHARLES M. DICKINSON, Appellee.

APPEAL FROM LEE.

A party wishing to raise an issue on the assignment of a note, in a trial before a justice of the peace, must file an affidavit.

This action was commenced before a justice of the peace, and appealed to the Circuit. At the trial in the Circuit Court, before Sheldon, Judge, at September term, 1850, a jury being waived,

(*a*) Higgins vs. Chicago, 18 Ill. R. 405; Ottawa vs. Trustees, &c., 20 Ill. R. 224; Peoria vs. Kidder, 26 Ill. R. 351; Chicago vs. Larned, 34 Ill. R. 271; Ottawa vs. Spencer, 40 Ill. R. 211; Chicago vs. Beer, 41 Ill. R. 306; Scammon vs. Chicago, 42 Ill. R. 197; Wright vs. Chicago, 46 Ill. R. 44.

the appellee, plaintiff below, offered an assigned note in evidence, which was objected to, on the ground that it was assigned after it became due, and because is was a partnership transaction, for which one of the partners had given a receipt, which would defeat the assignment.

GLOVER & COOK, for Appellant.

T. L. DICKEY, for Appellee.

CATON, J. All that is necessary to be decided in this case, was settled in the case of Archer *v.* Bogue. There it was decided that the act of 2d March, 1839, entitled "An act to amend the several laws in relation to practice in courts of law," is applicable to proceedings before justices of the peace.(*a*)In that case as in this, the suit was brought by the assignee of a promissory note against the maker, and there was no affidavit filed questioning the genuineness of the assignment. This Court said, "Upon the first assignment of error, we do not deem it necessary to look into the testimony admitted, relative to the note, as the question of assignment was not in issue." If no issue is formed upon the assignment, without the affidavit, of course the evidence offered on that subject was immaterial, and we cannot examine its sufficiency, in this case, any more than the Court could in that. (*b*) It was the duty of the defendant, if he intended to dispute the assignment, to notifiy that fact to the Court and the opposite party, in the mode pointed out by the statute. In the absence of the affidavit, the plaintiff would not have been justified in subpœnaing witnesses to prove the assignment, and he is protected from a surprise at the trial by evidence tending to question the assignment. The Circuit Court decided correctly, and its judgment is affirmed.

Judgment affirmed.

(*a*) Evans vs. Fisher, 5 Gil. R. 570—3 Scam. R. 528.
(*b*) Goodrich vs. Reynolds &c., 31 Ill. R. 497; Foy vs. Blackstone, 31 Ill. R. 542; *contra* Lochridge vs. Nuckols, 25 Ill. R. 180.

JOHN SPELLMAN *et al.*, Pltffs in Error, *v.* ALFRED G. CURTENIUS, Deft in Error.

ERROR TO PEORIA.

A regular tax deed, founded upon a valid precept and judgment, is *prima facie* evidence of every fact necessary to authorize a recovery upon it. Some of the facts evidenced by such a deed shall only be controverted by a person who first shows, that he or the person under whom he claims title, had title to the land at the time it was sold for taxes, or that title was obtained from the United States, or this State, after it was sold, or that all taxes due have been paid.

Other facts of which the deed is *prima facie* evidence may be controverted by any person.

If the judgment, describing the lands to be sold for taxes, against which it is entered, shows the year for which the taxes are due, it is sufficient; it need not show the name of the patentee, or present owner, nor the valuation, nor the county in which it lies.

The statute, requiring each tract of land to be listed and valued separately, does not require that such listing shall be upon the smallest legal subdivisions of land, but that two or more disconnected tracts shall not be listed and valued together.

To give the Court jurisdiction, the collector should make a report and give notice of the application for judgment, substantially as required; if either of these is defective, the *prima facie* case made by the deed is rebutted.

The amount of costs on a tax sale, cannot be made a question, when the judgment comes collaterally in issue.

The land sold for taxes, is to be taken off the east side of the entire tract as it was sold.

The intention of the law is, that when less than the whole tract is sold for taxes, that the quantity sold, shall be taken from the eastern part of the tract, and a line is to be drawn, due north and south, far enough west of the most eastern point of the tract, to make the requisite quantity.

Limitation of twenty years possession, will not commence running, until after the land is purchased from the United States.

A certificate, showing that a party proved himself entitled to a pre-emption, does not constitute such a title or claim, or color of title, as can be made the foundation of a seven years position, as against a party who subsequently entered the land under another pre-emption. (*a*)

This action of ejectment was tried at the March term, 1850, of the Peoria Circuit Court, before Kellogg, Judge, and a jury, and resulted in a verdict and judgment for the plaintiff below. The defendants below, sued out this writ of error. The lot sought to be recovered, was number four, in block fifty, of Bigelow and Underhill's Addition to Peoria.

The judgment against the land for taxes is in the following form:

"Whereas Julius A. Johnson, collector of said county, returned to the circuit court of said county, on the 26th day of May, A. D. 1845, the following tracts or parts or tracts of land as having been assessed by the assessor of the said county of Peoria, for the year 1843, and that the taxes thereon remain due and unpaid, on the day of the date of the said collector's return, and that the

(*a*) Post. 416.

respective owner or owners, have no goods or chattels, within this county, on which the said collector can levy for the taxes, interest and costs due on the following described lands, to wit:

DESCRIPTION.	No. of acres.	Tax.	Costs
S. W. & S. E. 9, T. 8 N., 8 E.	150	$21.00	.40

And whereas due notice has been given of the intended application for a judgment against said lands, for the taxes, interest and costs due and unpaid thereon, for the year herein set forth; therefore it is considered by the court, that a judgment be, and is hereby entered against the aforesaid tracts of land, and parts of tracts, in the name of the state of Illinois, for the sum annexed to each tract or parcel of land being the amount of taxes, interest, and costs due severally thereon; and it is ordered by the court, that the said several tracts of land, or so much thereof as shall be sufficient of each of them to satisfy the amount of taxes interest, and costs annexed to them, severall y be sold as the law directs."

All other facts necessary to a full understanding of this case, are contained in the opinion of the court.

C. Ballance, for plaintiffs in Error.

N. H. Purple & E. N. Powell, for Defts in Error.

Trumbull, J. This was an action of ejectment brought to recover the possession of lot number four, in block number fifty-one, in Bigelow and Underhill's Addition to the Town of Peoria.

Curtenius who was plaintiff in the court below, gave in evidence, a certificate of the register of the land office at Quincy, showing the entry by John L. Bogardus, on the fifteenth of November, 1837, of the south-east fractional quarter of section number nine, in township number eight north, of range number eight east of the fourth principal meridan, proved the laying off of said fractional quarter into town lots, that the defendants were in possession of the premises sued for at the commencement of the suit and traced title thereto by a regular chain of conveyances from Bogardus to himself.

To meet this *prima facie* case, the defendants below, who were tenants of Charles Ballance, sought to set up an outstanding title

in their landlord, derived from a sale of the premises in question, for the tax of 1843. In support of this title they offered in evidence, a judgment of the Circuit Court of Peoria county, rendered at the May term, 1845, against the following tract of land, for the taxes of 1843, to wit:

DESCRIPTION.	No. of acres.	Tax.	Costs.
S. W. & S. E. 9, T. 8 N., 8. E.	150	$21 00	.40"

Also a precept in the usual form in which the land is described in the same manner as in the judgment, and a tax deed conveying to said Ballance "one acre of land off the east side of the south-west and south-east fractional quarters of section number nine, of township eight north, in range eight east, situated in the county of Peoria."

The Court excluded this deed from the jury, and the plaintiff had judgment for the premises in question.

A regular tax deed, founded upon a valid judgment and precept, is made by the statute *prima facie* evidence of every fact necessary to authorize a recovery upon it; but as it is only *prima facie* evidence, it follows, that there must be some way of contesting the case made by the deed else it would be conclusive of those facts of which the statute expressly declares it shall be *prima facie* evidence merely. The law provides that some facts, of which the deed is *prima facie* evidence, shall only be controverted by a person who first shows that he or the person under whom he claims title, had title to the land at the time it was sold for taxes, or that the title was obtained from the United States, or this State, after the sale, and that all taxes due upon the land have been paid. Other facts of which the deed is merely *prima facie* evidence, may be controverted by any one. The plaintiff below, did not put himself in a position to defeat the tax title by proof of any one of those facts which the owner of the land who shows that all taxes upon it have been paid, is alone permitted to establish, for although he showed title in himself at the time of the sale, he did not show that no taxes were due from the land at the time of the trial. Curry *v.* Hinman, 11 Ills., 429. The facts which he attempted to prove, viz., that the lot was not subject to taxation as land, and that the taxes upon it for the year for which it was sold, had been paid, he was not in a condition to show, and it is therefore unnecessary to determine what effect that evidence might otherwise have had upon the case.

The only objections to the tax title, which it is important to notice, are such as any and all persons claiming adversely thereto are permitted to make. These objections, are either on account of some defect apparent upon the face of the judgment, precept, or collector's deed; or they may arise from the want of such a report and notice, as would give the court jurisdiction to enter the judgment, or from showing, either that the land was not advertised for sale as required by law, that it was not sold for taxes as stated in the deed, that the grantee in the deed was not the purchaser, or that the sale was not conducted according to law, either of which facts, any person is at liberty to show, for the purpose of excluding the deed from the jury, without first showing that he owned the land at the time of the sale, and that no taxes were due upon it.(*a*)

The objections taken to the judgment are, that it does not state either the name of the patentee or present owner of the land, its valuation, the county in which it lies, nor the year for which the taxes were due. It is admitted that neither of these facts appears in that part of the judgment, describing the lands against which it is entered, but the preceding part of the order shows the year for which the taxes were due, and the law does not require either of the other omitted facts to be stated in the judgment.

It is also objected that the judgment is against two separate and distinct tracts of land, and therefore void. This objection arises from a misapprehension in point of fact. The judgment is not as has been supposed, against two separate parcels of land, but against one entire tract, including within its boundaries, it is true, what might very conveniently have been described in two separate parcels. Such also is the case, when a quarter section is listed as one tract and judgment pronounced against it as such, and yet who ever supposed a judgment against an entire quarter section void, because it embraced within its boundaries, what might have been described by legal subdivisions, as four tracts? If one hundred and sixty acres can be assessed and sold for taxes, as one tract, cannot one hundred and fifty, or one hundred and twenty acres? In describing the last mentioned quantity, by legal subdivisions, it would be impossible to avoid what, if taken separately would be a forty and an eighty acre ract, yet if the description included three-fourths of the same

(*a*) Rickett vs. Hartsock 15 Ill. R. 282 and notes; Dukes vs. Rowley, 24 Ill. R. 221; Bailea vs. Doolittle, 24 Ill. R. 279.

quarter section, the quantity of which was given as one entire tract; the whole one hundred and twenty acres would no more constitute two separate tracts of land, than it would if described by metes and bounds. The statute requiring each tract of land to be listed and valued separately, does not mean that an entire tract must be subdivided into the smallest legal subdivisions of which it is susceptible, but simply that two or more tracts disconnected from each other, so as not to be embraced within the same general description, shall not be valued together. In this case, had the hundred and fifty acres been described by metes and bounds, or as the south fractional half of section nine, no one would have thought the judgment void, because within the description of the land, two fractional quarters were embraced. In the judgment, and all the previous proceeding, the whole one hundred and fifty acres is treaed as one entire tract. The quantity of land in both quarters is stated together, and there are no means of ascertaining, from the record, the number of acres which each fractional quarter separately contains. It was just as proper, to enter judgment against the south-east and south-west fractional quarters of section nine, embracing one hundred and fifty acres, as it would be to enter judgment against an entire quarter section. (*a*)

No objections were made to the precept, except such as have already been noticed, as applying to the judgment, nor was any attempt made in the Court below, to show either that the land was not advertised for sale, as required by law, that it was not sold for taxes, as stated in the deed, that Ballance was not the purchaser, or that the sale was not conducted according to law. If, therefore, the Court had jurisdiction to render the judgment, and the deed was regular upon its face, it was improperly excluded from the jury.

To give the Court jurisdiction, it is essential that the collector should make a report, and give notice of the application for judgment, substantially, as required by the statute. The report and notice, are the foundation of the whole proceeding, and without them, the Court would have no authority to enter judgment; and although the deed is itself *prima facie* evidence, that the proper notice was given and report made, yet when the party, as was done in this case, gives the notice and report in evidence, the *prima facie* case made by the deed, will be destroyed if either is essentially defective.

(*a*) Pitkin vs. Yaw, 13 Ill. R. 253.

No exceptions have been taken to the notice, and the report though not in the precise form required by the statute, contains all that is essential to give the Court jurisdiction. It is headed, "List of lands, and other real estate, situated in the county of Peoria, and State of Illinois, on which taxes remained due and unpaid for the year 1843." Then follows a description of the land, with the amount of tax due upon it, the same as in the judgment, and at the foot of the report, is a statement that the costs upon each tract of land and town lot then accrued, was ten cents, when the Court has before it a collector's report, properly headed, giving a description of the land, the amount of tax due upon it, and for what year, a case is presented authorizing the Court to act, if the proper notice has been given. All these facts were before the Court which rendered the judgment under consideraion. Some objection was made, that the amount of costs was not correctly stated in the report and judgment. This is immaterial, as it does not go to the jurisdiction of the Court to enter a judgment.(*a*) It might be cause for reversing it on a direct proceeding by appeal or writ of error, but cannot be made a question, when the judgment comes collaterally in issue.

It is undoubtedly the duty of all officers charged with the execution of the revenue law, to follow the forms prescribed, and a failure to do so, might often be fatal to a judgment in a direct proceeding to reverse it, but it was held in the case of Chesnut *v.* Marsh, *ante* 173, that a failure to follow the forms prescribed, was not fatal to a judgment in a suit for taxes coming collaterally in question, provided the Court had jurisdiction of the case.

Some objections have been taken to the deed, which it is proper to notice. The law is, that a person offering to pay the taxes and cost upon a tract of land exposed at a sale for taxes, for the least quantity, shall be the purchaser of such quantity which shall be taken off the east side of such tract, and it has been supposed that, in as much as the deed to Ballance is for one acre, off the east side of the south-west and south-east fractional quarter of section nine, that the acre must be taken from two tracts, and is therefore void. This objection is of the same character as one which was made to the judgment, and must receive the same answer.

It is founded upon a misapprehension in fact upon the mis-

(*a*) Merritt vs. Thompson, 13 Ill. R. 723.

taken idea, that one hundred and fifty acres of land cannot be described as one tract. That the description adopted, was intended to, and does in fact, include the whole quantity in one entire tract, has already been shown, and it is not to be subdivided for the purpose of giving the tax purchaser a part of his acre off of the east side of each subdivision, but the whole acre is to be taken off of the east side of the entire tract as it was sold.

Another difficulty has been suggested, that the south-east and south-west fractional quarters run to a point on the east, and have no eastern side. The intention of the law is, when less than the whole tract is sold for taxes, that the quantity sold should be taken from the eastern part of the tract, and a line is to be drawn due north and south, far enough west of the most eastern point of the tract of land sold, to make the repuisite quantity. The law must have a practical effect, and because a tract of land does not happen to be in a form, so as to have, strictly speaking, an east side, it is not to be presumed that the legislature intended such tract to be exempt from this general provision of the revenue law. To give it such a construction, would be emphatically sticking in the bark.

Some other questions were raised, in this case, which it is proper to notice, as they would again arise upon another trial.

The defendants attempted to prove twenty years' possession of the premises in question, also seven years' possession under claim of title, and, as the foundation of title, proposed to give in evidence, various certificates, showing that different persons had proved a right of pre-emption to the land in dispute, before it was entered by Bogardus, also, that an award had at one time been made in reference to the land by which the lot in question, through mistake, was allotted to the parties through whom the plaintiff derived title, when in fact, it was designed by the arbitrators to have been awarded to said Ballance. All this mass of evidence was properly rejected by the Court.

The defendants could not rely upon a possession of twenty years, because the record shows that the land was not purchased of the United States, till 1837 ; till then, therefore, the statute would not begin to run, and since that time, twenty years have not elapsed.

A certificate of a land officer, showing that a party, at one

time, proved himself entitled to a pre-emption, when the record shows that the same land was subsequently entered by another individual, under a different pre-emption claim, does not constitute such a title, or claim, or color of title, as can be made the foundation of a seven years' possession, under the statute.

The award, offered in evidence, showed no shadow of title in Ballance, and the attempt to reform it by parol evidence, on the trial of an action of ejectment, so as to make it the foundation of an equitable title upon which to base a seven years' possession, was wholly inadmissible.

The judgment must be reversed, for the reason that the Court below excluded the tax title deed from the consideration of the jury. Judgment reversed and cause remanded.

Judgment reversed.

CHARLES BALLANCE, Pltff in Error, *v.* ALFRED G. CURTENIUS *et al.*, Deft in Error.

ERROR TO PEORIA.

The ruling of the Court in the case of Spellman *v.* Curtenius, *ante* 409, reaffirmed.

This cause was heard before Kellogg, Judge, and a jury, at May term, 1851, of the Peoria Circuit Court, verdict and judgment for the defendants in the Court below.

Plaintiff below, brings the cause to this Court.

C. BALLANCE, *pro se.*

E. N. POWELL, for Defts in Error.

TRUMBULL, J. The plaintiff sued the defendants in ejectment, to recover one acre of land off the east side of the south west and south-east fractional quarters of section nine, in township eight, north of range eight east, situated in the county of Peoria, and State of Illinois.

Plea, not guilty. Jury trial and verdict for the defendants.

The plaintiff, to support the issue on his part, proved the defendants in possession of part of the premises sued for at the

commencement of the action, and offered in evidence, the same tax title which has already been passed upon in the case of Spellman *v.* Curtenius, *ante*, 409.

The Court excluded the tax deed from the consideration of the jury, and in so doing committed an error, as has been already decided in the case alluded to. No objections were made to the tax title in this case, which were not urged in that, and reference is made to the opinion in that case, for the reasons of our decision in this.

Judgment reversed, and cause remanded.

Judgment reversed.

PETER SCHUTTLER, Appellant, *v.* WILLIAM PIATT, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

If a note and assignment are made in this State, the rights and liabilities of the parties, must be governed by the laws of the State.

An assignor of a note is liable, if the assignee uses due diligence in prosecuting the maker to insolvency, or if the institution of a suit against him would have been unavailing, and if the maker of the note has absconded or left the State when the note falls due.

If the maker of a note is beyond the limits of the State when the note matures, so that he cannot be subjected to our jurisdiction, the liability of the assignor becomes fixed.

The assignee of a note is not bound to pursue the debtor into a foreign jurisdiction, but he may at once resort to his assignor for payment; the fact that the maker of the note resided in another State, when he gave the note, though known to the assignee, does not vary the liability.

This was an action of assumpsit in the Cook County Court of Common Pleas, brought by Schuttler against Piatt, to recover from the latter the amount of a promissory note given by one Armstrong, to him or order, and indorsed by Piatt to Schuttler. At February term, 1851, of the Court, Spring, Judge, presiding, the cause was submitted to him, without the intervention of a jury, and a verdict and judgment was entered for the defendant. Schuttler thereupon appealed to this Court. The bill of exceptions, shows that Schuttler introduced the following note, which was read in evidence.

"Fifty days after date, I promise to pay William Piatt, or order, one hundred dollars for value received.

JOHN ARMSTRONG, Jr.

Chicago, 19 Oct., 1848."

Endorsed, " Pay Peter Schuttler, or order. Wm. Piatt."

Two other notes of a like character were also introduced by Schuttler. A witness was sworn, who stated that the notes were given for a buggy and a pair of horses that Piatt sold Armstrong, that a few days afterwards, Armstrong left for his home in Wisconsin. That Piatt lived in Indiana, and before his return home sold the notes to Schuttler for some wagons. That Schuttler asked the witness if the notes were good, witness replied that Piatt was good if Armstrong was not. And that when the notes were indorsed, it was stated by Piatt and others, that Armstrong lived in the state of Wisconsin, up in the pinery. That, soon after the trade, Armstrong took the horses and buggy and left for Wisconsin, since when, witness had not seen him, nor has Armstrong, to the knowledge of witness, been in Chicago since. That the notes were endorsed within two weeks after they were given. That it was understood by all the parties, that Armstrong lived in Wisconsin.

Another witness stated, that he had known Armstrong since 1842, and that he did not know of his having any property since 1844 or 1845.

JUDD & WILLSON, for Appellant.

J. H. COLLINS, for Appellee.

TREAT, C. J. This was an action of assumpsit, brought by Schuttler, the assignee of certain promissory notes, against Piatt, the payee and assignor. The declaration contained two classes of counts; the one alleging the insolvency of the maker, the other his departure from the State, before the maturity of the notes. It appeared, in evidence, that the notes were made in Chicago, and were there assigned in the usual form, before they became due. The maker resided in Wisconsin, and returned home shortly after the execution of the notes, and had not since been within this State. The plaintiff was informed of his residence, when he received the notes. The payee was a resident of Indiana. Some evidence was given, tending to show the sol-

vency of the maker, but in the view we are inclined to take of the case, it need not be further noticed. The Court rendered judgment for the defendant.

The note and assignment having been made in this State, the rights and liabilities of the parties must be governed and determined by our laws. The statute, after providing that the assignor shall be liable to the assignee, if the latter shall use due diligence by suit against the maker, proceeds as follows : "Provided, that if the institution of such suit would have been unavailing, or the maker or makers had absconded, or left the State, when such assigned note, bond, bill or other instrument in writing became due, such assignee or assignees, or his or her executors or administrators, may recover against the assignor or assignors, or against his or their heirs, executors or administrators, as if due diligence by suit had been used." There are three contingencies in which the assignor may be made liable. First, where the assignee, by the exercise of due diligence, prosecutes the matter to insolvency. Second, where the institution of a suit would be unavailing. Third, where the maker has absconded or left the state, when the note falls due. The assignor, by a general indorsement of the note, binds himself to pay it on the happening of either of these contingencies. The provisions of the statute enter into and form a part of the contract of the parties. If the maker is beyond the limits of the state when the note matures, so that he cannot be subjected to our jurisdiction, the liability of the assignor becomes fixed. (*a*) The assignee is not bound to pursue the debtor into a foreign jurisdiction, but he may at once resort to his assignor for payment. The circumstance that the maker resided in another state, and that this was known to the plaintiff when he received the notes, does not vary the liability of the defendant. His indorsement was general, and he must abide the consequences of a statutory assignment. If the parties had intended otherwise, the indorsement would have been special, restricting the responsibility of the assignor.

The ruling of the Circuit Court was clearly erroneous, and its judgment must be reversed, and the cause remanded.

Judgment reversed.

(*a*) Hilborn vs. Artus, 3 Scam. R. 345 and note ; Bledsoe vs. Graves, 4 Scam. R. 206; Pierce vs. Short, 14 Ill. R. 144 ; Crouch vs. Hall, 15 Ill. R. 263.

CHARLES BALLANCE, Appellant, *v.* JOHN RANKIN, Appellee.

APPEAL FROM PEORIA.

In an action of ejectment, the plaintiff is bound by his allegations in his declaration, and must recover according to the case made by it.
He cannot recover a different estate, than that claimed by his declaration.
But if he declares for the whole premises, he may recover a distinct part; or he may, if he declares for an undivided share, recover that share in any part of the premises.
If he declares for the whole of certain premises, he cannot recover an undivided interest therein.

This was an action of ejectment, brought in the Peoria Circuit Court, and tried before Kellogg, Judge, and a jury, at May term, 1851, of that Court. The jury found Ballance guilty of withholding possession of the undivided one-fourth of the lands and tenements described in the declaration, and that the title of the plaintiff to that undivided fourth part is a fee simple title. The plaintiff, by his declaration, claimed title in fee to the entire tract and premises described in his declaration. On the trial, Ballance, the defendant, requested the Court to instruct the jury, "That the plaintiff having brought suit to recover the whole premises covered by the patent from the United States to the legal representatives of Simon Roi, and not showing by his proof a right to recover more than the one-fourth part of said premises, and not claiming the property as a tenant in common with the defendant, but by a paramount title; he cannot in this action recover an undivided interest, the deed to plaintiff not being for a specific part of said premises, by metes and bounds.

"That the plaintiff having declared for the whole premises covered by the patent from the United States to the legal representatives of Simon Roi, as described in the declaration, and not for an undivided part of said premises; and only showing by his proof, a right to recover an undivided fourth part of the premises described in the declaration, he cannot recover such undivided part, where he claims the whole." Which the Court refused to do.

Ballance appealed, and among other errors, assigns the refusal of the Court below to give the foregoing instructions.

C. BALLANCE, for himself.

N. H. PURPLE, for Appellee.

Ballance *v.* Rankin.

TREAT, C. J. This was an action of ejectment brought by Rankin against Ballance, for the recovery of a lot of ground in the city of Peoria, covered by French claim twenty-nine. The plaintiff in his declaration claimed the whole lot in fee. On the trial, the defendant asked the Court to charge the jury, that the plaintiff having declared for the whole premises, could not recover an individed interest therein. The instruction was refused, and the defendant excepted. The plaintiff obtained a verdict and judgment, for one undivided fourth part of the premises claimed.

Did the Court err in refusing to charge the jury as requested? The answer must depend upon the construction to be given to the 36th chapter of the Revised Statutes. The 7th section, after prescribing the general form of the declaration in ejectment, declares: "If such plaintiff claims any undivided share or interest in any premise, he shall state the same particularly in such declaration." The 8th section provides: "If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower, as widow of her husband, naming him. In every other case the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, specifying such life or the duration of such term." It was evidently the design of the Legislature, to require the plaintiff in ejectment to set forth specially in his declaration, the nature and extent of the estate claimed to be recovered. The language of the statute is plain and explicit. It admits of but a single meaning. It is imperative, and not directory. These provisions were made for some subtantial and practical purpose. And they are founded on very good reasons. The declarations apprises the defendant of the precise character of the estate sought to be recovered against him. If he finds that he cannot successfully resist the claim, he may let judgment pass by default, aud thus save the expense and trouble of further litigation. Or, if he chooses to make a defence, he has only to come prepared to meet and resist a particular and not a general claim. But, if the statute is to be regarded as directory merely, and the plaintiff is not bound by the averments in his declaration, these provisions will become

wholly inoperative, and cease to answer any useful or practical purpose. The plaintiff will declare generally in all cases, and a contest will be unavoidable, whenever he is not entitled to an estate in fee in the whole of the premises described in the declaration. We hold that the plaintiff is bound by his allegations. He must recover according to the case made in his declaration. He cannot recover a different estate than the one he claims. If he claims an estate in fee, he cannot recover a less estate. If he claims an estate for life, he cannot recover an estate in fee, or for years. If he claims an estate for years, he cannot recover an estate for life, or in fee. If he demands the whole of the premises, he cannot recover an undivided interest therein. If he demands an undivided share, he cannot recover a different share. But, if he declares for the whole premises, he may recover any distinct part or parcel thereof. And, if he declares for an undivided share, he may recover the same share in any part, of the premises. This construction will give effect to all of the provisions of the statute, and, as we believe, carry out the clear intentions of the Legislature. Nor can any inconvenience or injustice result to the parties. The plaintiff may provide against any variance between the allegations and the proofs, by inserting several counts in his declaration. This is expressly authorized by the 9th section. He may thus anticipate any state of case likely to arise on the trial, and avoid the effects of a variance. And the defendant may put in issue one or all of the counts of the declaration.

Our statute concerning ejectment is substantially a transcript of the New York statute on the same subject, which has been in force in that state for many years. It is a safe rule in the interpretation of statutes, that where one state adopts a statute of another state, which has already received a known and definite construction in its courts, it is presumed to adopt the construction thus given. It was contended on the argument, that this principle is strictly applicable to this statute. But the position is not sustainable. The New York statute has not as yet received any fixed and uniform construction. The opinions of her Courts on the question now under consideration, have been fluctuating and conflicting ; and we are, therefore, left to settle the question upon the statute itself, without the aid of judicial exposition. This will be very apparent from a brief reference

to the decisions in New York, bearing on this subject. In Harrison *v.* Stevens, 12 Wendell, 170, the Court held that the plaintiff might recover an undivided share, although in his declaration he claimed the whole of the premises. In Holmes *v.* Seeley, 17 Wendell, 75, the case of Harrison *v.* Stevens is questioned; and the Court intimate the true rule to be, that where the plaintiff claims the whole premises, he cannot recover an undivided interest; and so where he claims an undivided half, he cannot recover an undivided third, or fourth, or the whole. In Hinman *v.* Booth, 21 Wendell, 267, the Court held, that where the declaration is for a moiety, and the verdict for a fourth, the plaintiff may amend his declaration to correspond with the proof. In Gillet *v.* Stanley, 1 Hill, 121, the Court lay down the rule that, under a declaration claiming the entire interest in certain premises, the plaintiff cannot recover an undivided share. In Cole *v.* Irvin, 6 Hill, 634, where the declaration was for an undivided half, and the proof showed that the plaintiff was entitled to but two-sevenths, it was considered a fatal variance. In Truare *v.* Thorn, 2 Barbour's S. C. R., 156, the Court refused to set aside a verdict for the plaintiff for an undivided third part of premises, on a declaration claiming four undivided ninths. The cases seem to agree that, under the peculiar system of amendments in that state, the plaintiff may avoid the effects of a variance, by amending his declaration after verdict, so as to correspond with the proof on the trial. But the doctrine of amendments has never been carried to such an extent in this state. It is proper to add, that the point in question remains wholly undetermined by the highest tribunal in New York—the Court of Appeals. (*a*)

The judgment is reversed, and the cause remanded.

Judgment reversed.

(*a*) Rawlins vs. Bailey, 15 Ill. R. 178; Dougherty vs. Purdy, 18 Ill. R. 206; Dawley vs. Vancourt, 21 Ill. R. 464; Murphy vs. Orr, 32 Ill. R. 492; Lyon vs. Kain, 36 Ill. R. 373.

Holmes *v.* Field.

VIVIAN B. HOLMES, Pltff in Error, *v.* AMELIA D. FIELD, by B. S. PRETTYMAN, her next friend, Deft in Error.

ERROR TO MASON.

A., the testator, by his will, appointed his wife guardian to his infant daughter, "so long as she should remain his widow." After his decease, his widow took out letters of guardianship for the daughter, from the Probate Court of the proper county.

The widow subsequently married, and a payment on account of the estate of the ward, was then made to her husband. Held:

That the appointment of the Probate court was void, for want of jurisdiction.

The authority of the father to name a guardian for his children, is greater than that conferred upon the Probate Court; and when the former has exercised the right, the latter cannot act.

That the limitation in the will is strictly legal and must be enforced, and the guardianship of the widow was terminated by her marriage.

That a person makes payments at his peril, and is bound to know whether the payee is authorized to receive his money. The true test as to the validity of the payment, is whether or not, the payor could successfully resist a suit instituted by the payee.

That the husband of a guardian has no right to possess or control the estate of the ward, and a payment to him on account of such estate is void, unless with the express sanction or direction of the guardian.

That an infant is not always bound to appear in a Court of Chancery by a guardian, although one may be in existence. The bill may be filed by her next friend, and if objection is made in proper time, it rests in the sound discretion of the Court, whether the suit shall so proceed, or in the name of the guardian.

This was a bill in chancery, filed in the Mason Circuit Court by defendant in error, and alleges in substance, that in the year 1835, Drury S. Field, father of complainant, then residing in Fayette County, Tennessee, entered into an agreement with Holmes, the plaintiff in error, to furnish him with $12,500.00, to be expended in entering land in Illinois; Holmes to enter the lands, and bear his own expenses; and after the entering thereof, the lands to be divided—one-fourth to go to Holmes, and the other three-fourths to Field. That Holmes, in pursuance of this agreement, did enter in Field's name ten thousand acres of land. That in 1836, Field loaned Holmes eight hundred and seventy dollars, for which he took notes. That a part of the lands entered were divided between Field and Holmes; but that Field held a part of the lands undivided, as security for the money loaned.

That Field died in April, 1839, leaving as survivors his widow Amelia E. Field and children. That Field made his will, appointing Albert J. Field his executor, by which will he divided his property between his wife and children, giving to his "very and much beloved wife, Amelia E. Field, during the time she shall

remain my lawful widow, and during her natural life, the mansion house in which we now dwell, with four hundred acres of land, with all my stock of horses, cattle, farming utensils, &c. And further, that my executor, during the time of her widowhood, should annually pay over to her one hundred and fifty dollars; but should she marry and become the wife of another, she shall immediately forfeit her dower of every description, and have no further claim upon my estate; the land and other things which I have given her, to be in that event given to my infant daughter, Amelia D. Field," &c. Makes Albert D. Field guardian of several of his children named in the will, &c.; and then, by the will, it is declared: "And I further appoint my beloved wife, Amelia E. Field, guardian for my infant daughter, Amelia D. Field, so long as she remains my widow."

Holmes, by his answer, admits generally the allegations in the bill. Alleges, that Amelia E. Field was duly appointed guardain for her daughter, Amelia D. Field, by the probate court of Sangamon county. That said Court had complete power and authority to make said appointment. That afterwards said Amelia E. Field married Shapley Lester; and that he [Holmes] did in October, 1840, pay to Lester, in the presence of his wife, for her use as guardain of the complainant, the sum of $430.12, which was endrosed on the note, &c. That he paid said money in good faith, while the letters of guardianship were in full force, &c. That Mrs. Lester had possession of the note at the time of payment as guardian, and threatened to sue. That the ward was living from home at the time, and needed the money; and the payment was urged for this reason. Denies any knowledge that Mrs. Lester had no authority, &c., and of the contents of the will.

The other defendants disclaim, &c. There was no replication to the answer, nor any proof taken.

At May term, 1851, Minshall, Judge, entered a decree against Holmes, refusing to allow him the $430.12 paid to Mrs. Lester.

By consent, the writ of error was returned to the Court held in the Third Division. The question raised was the validity of the payment by Holmes to Lester.

R. S. Blackwell, for Plts in Error.

The payment made by Holmes to Lester and wife, on the 9th October, 1840, was valid, and operates *pro tanto* to discharge his indebtedness to the complainant. 1. Because Mrs. Lester was the guardian of the complainant, under and by virtue of the will of her former husband, notwithstanding the condition in the will, that her guardianship should cease upon marriage. This condition being in restraint of marriage, and there being no disposition over of the custody of the ward, is to be regarded as *in terrorem* merely. 1 Story's Eq., sec. 287 : Parson *v.* Winslow, 6 Mass. Rep., 170 ; Marples *v.* Brain, 1 & 2 Madd. Ch. R., 317 ; 2. Because she was guardian by appointment of the probate court ; and as long as those letters of guardianship remain in full force, a payment to her on account of her ward, is valid. Allen *v.* Dundas, 3 T. R., 125 ; Moore *v.* Tanner, 5 Munroe, R. 45. 3. Because she was guardain *de facto ;* at all events, had possession of the note, and a colorable right to receive the money. A payment under such circumstances, must be regarded as valid. 2 Kinne's Comp., 463 ; Poth. Obl., 299 ; R. S., 266, sec. 7 ; 268 sec. 20 ; Baldwin *v.* Kellogg, 1 Day, 4 ; Kelly *v.* Cowing, 4 Hill, 266. This payment must be sustained, upon principles of natural equity, upon the ground that Holmes paid the money to Mrs. Lester in good faith, without any knowledge of the circumstances by which her authority was put an end to. Morton *v.* Fox, 4 Bibb, 392.

Merrimans & Johnson, for Deft in Error.

Caton, J. The only important question presented in this case is, as to the validity of the payment by Holmes, of four hundred and thirty dollars and twelve cents, made on the ninth of October, 1840, to Shapley Lester, in the presence of his wife, former guardian of the complainant. This payment was disallowed by the circuit court ; and after the most mature examination and reflection, we are satisfied with that decision. By his last will and testament, Drury S. Field appointed Amelia E., his wife, guardian to his infant daughter, the complainant, so long as she should remain his widow. She subsequently married Lester, still retaining possession of the note against Holmes, which belonged to the estate of the complainant. After the death of Field, and before her marriage to Lester, she took out letters of

guardianship for the complainant, from the Probate Court of the proper county.

No additional authority was conferred upon the mother of the complainant, by the appointment by the Probate Court. She was already, by the will of the testator, appointed guardian to the complainant; and that appointment was as perfect, as complete, and as absolute, during the time prescribed by the will, as it could be made; and the appointment by the Probate Court, as if by way of compliment to the will, was an act of supererogation, and entirely nugatory. The action of that Court conferred no more authority upon the testamentary guardian, than it would upon a stranger, in derogation of the rights of the guardian appointed by the will; and the appointment of a stranger, no one will doubt, would have been utterly void. The Court acted upon a case over which it had no jurisdiction. Robinson *v.* Zollinger, 9 Watts, 169. It is this want of jurisdiction that makes the act utterly nugatory. It is only by virtue of the statute that the Probate Court could appoint a guardian in any case; and, of course, it is only in the particular cases authorized by the statute, that the Court has any jurisdiction to act. By our statute, which confers upon the parent broader powers than that of 12 Charles 2d, the father is authorized, by deed or will, to appoint a guardian to his children till they shall arrive of age, or for any less term: "*provided*, That the rights, powers, duties, and obligations of such person or persons, may be restrained and regulated by the person making such deed or last will as aforesaid." Here, the father is vested with authority to dispense with provisions of the statute, which must in all cases apply to and govern guardians appointed by the Probate Court; so that the authority conferred upon the father is greater than that conferred upon the Court; and when the right has been exercised by the former, there is no room left for the Court to act. The Probate Court might as well have appointed a guardian for an adult. The ward was already furnished with a guardian appointed by a superior power, the father of the infant, who was properly amenable to the Circuit Court under the twentieth section of our act, or to the Court of Chancery under its general and well-known jurisdiction. Had the appointment been made by a Court having jurisdiction to act in the premises, although it might have acted erroneously, still its order would

have been valid and binding, until reversed or set aside, and a very different case would have been presented. The appointment being good till reversed, the authority of the guardian to act could not be questioned collaterally. But here there was no jurisdiction, and the appointment was void. I shall, therefore, lay out of view entirely the appointment by the Probate Court, and consider the authority of the guardian as derived solely under the will.

That authority, by the terms of the will itself, terminated upon the subsequent marriage of the guardian with Lester. But that clause of limitation, it was insisted, was *in terrorem*, and void as being in restraint of marriage; and in support of this a class of cases is referred to, where a similar clause had been so held, when attached to a devise of property, and where no devise over is made. But the cases are not alike. The appointment of a guardian bears no resemblance to a devise of property. The former is the conferring of a power, and the delegation of a personal trust; and that too, without any interest in, or benefit to the person appointed; the latter is the grant of an estate or interest, solely for the benefit of the devisee. The motives or considerations which would conduce to the selection of the one, might have no influence in the choice of the other. The object in the selection of a guardian, is to promote the well being, and for the sole benefit of the ward; and qualifications which will best promote these ends, are sought after in the guardian, it may be, irrespective of obligation or affection; while these last almost entirely control, in the case of a devise. Nothing may have been more judicious, so far as the ward's interests were concerned, than this limitation in the appointment of the guardian. While the mother, during her widowhood, may have been the most fit person to have the control of the infant, and the management of her estate, it would by no means follow, that they would be equally safe in her hands, after she should become subject to the influence and control of a second husband, a stepfather to the child. This must be so perfectly apparent to every one, that it is unnecessary to enlarge upon the subject. We can see sufficient reasons, from a regard for the interests of the child alone, to justify this limitation, without attributing it to any other motive. We therefore consider this limitation, not only perfectly legal, but entirely proper; and the will of the testator,

in that respect, must be faithfully observed, and strictly enforced.

At the time this payment was made to Lester, the authority of his wife to receive the money, as guardian to the complainant, had ceased; as completely so, as if she had been removed by a court of competent jurisdiction, or as if the ward had arrived at her majority. She had no more authority to receive the money, than if she had never been appointed guardian. Holmes alleges in his answer, that he paid the money in good faith, and that he did not know of the provisions of the will, so far as it relates to the said guardianship. As no replication was filed to the answer, its statements must be taken to be true in fact. But his ignorance that she had ceased to be guardian, cannot help him. He made the payment at his peril, and was bound to know whether the persons to whom the payment was made, was authorized to receive the money or not. The question is, whether he, or the infant, shall suffer the consequences of his negligence. He says he made the payment under the threat of a prosecution. Had such prosecution been instituted, he could have resisted it successfully. And this is indeed the true test, by which to determine whether he shall be protected in making the payment, as will be seen by a reference to the authorities cited by the counsel on the argument. In the case of Allen *v.* Dundas, 3 T. R., 125, administration had been obtained from the ecclesiastical court, upon a forged will, and letters testamentary issued to the executor named; and it was held, that a payment made to him in that capacity, before the letters were revoked, would protect the debtor; and the decision is placed expressly on the ground, that he could not have successfully defended a suit brought against him by the executor. The supposed testator was actually dead, and the ecclesiastical court had jurisdiction, to take proof of the will, and grant administration upon his estate; and having had jurisdiction, its order was valid until revoked by a proceeding instituted for that purpose, and could not be questioned collaterally. Had the man still been living, the ecclesiastical court would have had no jurisdiction, and its order would have conferred no authority to collect or receive the money, and the payment would not have discharged the debtor, althongh made in the utmost good faith, and under the sanction of a court having a parent authority to act. Ash-

hurst, J., commences his opinion in that case, thus: "I am of opinion, that the plaintiff has no right to call on the defendant to pay this money a second time, which was paid to a person who had at that time a legal authority to receive it. It is admitted, that if he had made this payment under the coercion of a suit in a court of law, he would have been protected against any other demands for it; but I think that makes no difference. For, as the party to whom the payment was made had such authority as could not be questioned at the time, and such as a court of law would have been bound to enforce, the defendant was not obliged to wait for a suit, when he knew no defense could be made to it. This, therefore, cannot be called a voluntary payment." This case, we see, is expressly put upon the ground, that the debtor could not have resisted the payment which he had made; and it would have been very hard indeed, if the court would not have protected the party in making a payment without coercion, which they would have compelled him to make. The case of Moore v. Towers' adm'r, 5 Monroe, 45, is, in all its principles, and nearly all its features, precisely like the former; and was decided in the same way, and for the same reasons, although no reference is made to it.

Suppose in this case, the ward had arrived at her majority, before this payment was made, would Holmes have been protected in a payment to the late guardian, because the debter was ignorant of that fact? And yet she would have had the same authority to receive the money in that case, that she had in this. In that case, his ignorance would have been much more excusable than in this, for here he had the means of ascertaining precisely the nature and extent of the guardian's authority, for the will had been upon the public records ever since 1838, and in the same office where he found the void appointment of her as guardian, by the probate court, which probably misled him. The question is one of legal authority on the part of the supposed guardian, to receive the money, and not of good faith on the part of the debtor. If the authority of the guardian has ceased, either by limitation or removal, ignorance of that fact cannot protect the debtor. If he could have successfully resisted the payment as against the guardian, then the ward may successfully resist it as against him.

I have hitherto examined this case, as if the payment had been

made to Mrs Lester. That, however, the defendant admits in his answer, was not the case. He states that he paid the money to Mr. Lester, in the presence of Mrs. Lester, and he does not pretend that she in any way sanctioned the payment, even by her silence, or that the money ever came to her hands, or was under her control, or was ever applied to the benefit of the ward. The only thing in the answer, from which we might infer that the payment was made with her approbation, is that she had threatened to sue him, if he did not pay the whole or a part of the note. Surely Holmes cannot insist that he was ignorant of the fact that Lester was not guardian, and had no right to receive the money. Even if the authority of the guardian had still continued, the payment to Lester without her express sanction or direction would have been void. As the husband of the guardian, he would have no right to possess or control the estate of the ward.

In every point of view, we are satisfied that this payment was not valid as against the ward.

Another objection was taken upon the argument, which should be noticed. Previous to the filing of this bill, another guardian had been appointed by the probate court, and this bill was filed, not by that guardian, but by the next friend of the complainant, and to this the objection is raised. An infant is not always bound to appear in a court of chancery by a guardian, although one may be in existence. She may file her bill by her next friend, and if an objection is taken in proper time, that there is a guardian by whom the bill should have been filed, it may be that the Court, in the exercise of a sound discretion, may determine whether the suit shall proceed as it was commenced, or in the name of the guardian. The fourth section of our Chancery Act says, "Suits in chancery may be commenced and prosecuted by infants, either by guardian on next friend." It is frequently necessary for the infant to file a bill against the guardian; and when that is not the case, there may be reasons for fearing that the guardian is not acting judiciously, or in good faith, in relation to the subject of the suit. It is the business of the court of chancery, to see that no one stands between the infant and a just protection of her rights, and for this purpose, the court may appoint a person to prosecute or defend for the

infant. So far as appears, this objection is now raised for the first time. It is now too late even to be inquired into.

The decree of the Circuit Court must be affirmed, with costs.

Decree affirmed.

THE TRUSTEES of Schools, Pltffs in Error, *v.* JOHN S. WRIGHT *et al.*, Defts in Error.

ERROR TO LA SALLE.

In equity, a defendant cannot avail himself of the statute of a fraud or limitations, unless he relies thereon in some proper pleading; and a defence of a kindred charaeter, arising from length of time, will be subject to the same rule.

If a commissioner has sold school land, the law requiring him to take a mortgage as security for the purchase money, which he omits to do, the lien upon the land is not lost, and may be enforced against subsequent purchasers with notice, if proceedings for that purpose are instituted within a reasonable time.

This case was decided at Ottawa, at June term, 1850, and was reported in the 11th Illinois, p. 603 ; at the succeeding June term of the Court, in 1851, a petition for a rehearing ; the case having been decided on the last day of the preceeding term was presented, and the prayer was allowed. At that term, the case was again argued and the following opinion was pronounced.

A. HOES & H. G. COTTON, for Pltffs in Error.

The lien of the vendor for the unpaid purchase money will be enforced against the vendee, and subsequent purchasers with notice, unless waived, or an intention appear on the part of the vendor not to rely upon the lien.

The respondents John S. Wright, Amesa Wright, Frederick Deming, and Hosea Webster, had, at the time they respectively purchased, notice that the consideration money was unpaid.

The lien in this case was not waived, nor does it appear that there was any intention, on the part of the vendor, not to rely upon the lien. The law required a mortgage in addition to the personal security, and the taking of the personal security cannot raise a presumption of any intent to waive the lien. The school commissioner was not authorized to waive it.

The acts under which the sale was made were public acts, and all the parties are chargeable with notice of the provisions of the same.

School Trustees *v.* John S. Wright *et al.*

This was a bill filed to enforce a vendor's lien for the purchase money upon school lands, sold by David Letts, school commissioner of La Salle county, to John T. Temple, on the first day of May, A. D. 1835, upon a credit of 1, 2, and 3 years. Notes, with personal security were taken, but no mortgage was executed.

The bill was taken "*pro confesso*" against all of the defendants, except John S. Wright, Amasa Wright, Frederick Deming, and Hosea Webster, who filed their answers; to which the complainants filed a general replication.

The case came on to a hearing on bill, answer, replication, and exhibits.

The Circuit Court dismissed the bill, as to all that portion of the land (described in the bill) conveyed by Temple to John S. Wright, and by him to Amasa Wright, Deming, and Webster.

The writ of error is prosecuted to reverse this part of the decree.

In support of the first point made by the plaintiffs in error, it is considered unnecessary to offer any remarks.

The existence of the vendor's lien, under the limitations and restrictions stated, is supported by the authority of numerous decissions in the Courts of United States and England, and is recognized by this Court, in Connoven *v.* Warren, 1 Gil., 498; see also Dyer *v.* Martin, 4 Scam., p. 146, 151; see in addition, the cases cited by Treat, J., in Connoven *v.* Warren, Bradley *v.* Bozley, 1 Barbour C. R., 125, 152; Palmer *et al.*, 1 Douglass' Michigan, 425, 427; 9 Semdes & M., 122; 10 do., 143; 6 B. Monroe, 67, 74; 5 Conn. R., 468, 472; Story, J., 1 Mason, 191; 15 Vesey, Jr., 328; 9 Cowen, 316; Winter *v.* Lord Anson; 3 Russel, 488; 3 Eng. Chan., R.; Hughes *v.* Kearney, 1 Schoales and Lefroy, 132; 3 Sugden on Vendors, 151; 4 Wheaton, 255; 17 Ohio R., 530.

The doctrine has been repeatedly questioned in England and this country, on the ground of inconvenience and impolicy, but is so clearly sustained by the authority, not only of the cases cited, but of many others to which the attention of the Court might have been directed, if it had been deemed necessary, that we submit that objections on the grounds stated, would be more properly addressed to the legislative department.

Notice is clearly made out notwithstanding the apparent denial in the answers.

The patents were not issued until the 21st of May, A. D. 1838.

J. S. Wright, purchased of John T. Temple, and paid the consideration money in May, A. D. 1836.

Webster, Deming, and A. Wright, purchased of John S. Wright, October 31st, 1837; consideration paid "at or before that time." At the time that John S. Wright purchased of Temple, his only evidence of title was the certificate issued to him by the school commissioner, which states on its face, that obligations were taken for the purchase money in pursuance of the advertisement. The same state of facts existed when John S. Wright conveyed to Webster, Deming, and Wright.

If these subsequent purchasers had exercised the ordinary precaution of enquiring of Temple for the evidence of his title, they would have ascertained that he purchased upon a credit sale. The law had fixed the time of credit at 1, 2, and 3 years. It required the commissioner to report to the Auditor and county commissioners' court, and the report to be recorded. That report had been made, and showed a sale upon a credit of 1, 2, and 3 years.

The school commissioner was a public officer of the county, and if further information was required, they had the means of obtaining it.

These inquiries it was their duty to make. Dyer *v.* Martin, 4 Scam., 146; Graham *v.* Day, 4 Gil., 389, 394; Hower *v.* Blackwell, 6 B. Monroe, 67; Thornton *v.* Knox, 6 B. Monroe, 74. They are in any event chargeable with notice of every fact appearing upon the face of the title papers of Temple, under whom they claim. A court of equity will not permit them to close their eyes when the road to the truth lies open and plain before them, and then insist upon immunity from liability as *bona fide* purchasers without notice. Especially when, as in this case, the parties to be injured by their neglect, are beneficiaries of a trust fund, and are to suffer by the misconduct of a public officer, over whose appointment and official acts, after the initiative of a petition for a sale, they had no direct authority or control.

If the subsequent purchasers from Temple, are to be the losers by the enforcement of this lien, the result will be attributable, to say the least, to their own culpable carelessness.

Was this lien waived? When, and under what circumstances

the lien of the vendor will be considered as waived, does not appear to be very clearly defined by the adjudged cases.

It has been frequently held that the taking of distinct and independent security for the whole purchase money, in the absence of other circumstances showing an intention to retain the lien, will be held a waiver. Beyond this we apprehend the rule to be, that each case must stand upon the intentions of the parties, as evidenced by the facts of the case.

The facts of this case present a question, so far as the authority of adjudged cases is concerned, unless 10 S. & M. be an exception somewhat anomalous.

The sale was made under the authority of a public statute, of the provisions of which, all parties are deemed to have been cognizant.

The authority to sell, is no more plainly expressed, than the duty imposed, to take mortgage security upon the land. To hold that the taking of personal security, was in this case a waiver of the lien, is to hold that the commissioner and Temple intended to violate the law to substitute a security, which by law, he was required to take as a cumulative security, as the sole security for the payment of the purchase money. We think such inference unreasonable, but on the contrary, that the fair and reasonable conclusion from the facts of this case is, that the commissioner intended to sell, and Temple intended to purchase, subject to the lien for the purchase money, imposed by the statute, although no mortgage was executed. 10 S. & M., *supra*.

But if the intention of the commissioners was otherwise, if he intended to waive the lien, we deny his right to do so, and the right of Temple, or his grantees with notice, to acquire a title to these lands, under this sale, divested of the lien for the purchase money. Kidder *v.* Trustees, 5 Gilman, 191.

The statute did not vest a discretion in the commissioner to dispense with the mortgage.

An arrangement between Temple and the commissioner to take personal security solely, would have been a fraud upon the inhabitants of the township, and neither Temple nor his grantees with notice, would be allowed to set up such fraudulent arrangement in bar of our equitable claim.

The patents have been issued and delivered, and the legal title is vested in the defendants. People *v.* Auditor, 2 Scam., 567.

They insist in their answer upon their title under the patents. And inasmuch as they purchased with notice of our equity, the plainest principles of justice and equity, require that they should take the lands subject to our lien, for the unpaid balance of the purchase money.

It is objected that if we were entitled to the relief sought, we are barred of our remedy, by limitation. In reply to this, we insist that the question of limitation or laches not having been insisted upon by demurrer, plea, or answer, the same, even if apparent upon the record, comes too late.

That there is nothing in the record to authorize this Court to adjudge that the right and remedy of the complainants are barred either by laches or limitation, if there is any distinction between them.

That the rules of limitation in equity, are not discretionary, but depend either upon analogy to the rules of limitation at law, or in cases where courts of equity have exclusive jurisdiction, and the subject matter is not cognizable at law, upon known and settled rules.

That the ordinary bar of a purely equitable right, when there is no circumstance in the case to avoid the limitation, is twenty years.

That the subject matter of this suit, is the unpaid purchase money, evidenced by the notes of Temple, with Goodrich and Stewart as securities.

That said notes are cognizable at law, and the rule of limitation at law is sixteen years.

That when the subject matter of the demand is such that it can be sued for, either at law or in equity, courts of equity invariably follow and adopt the rule of limitation at law; and if there are two or more remedies at law, and different rules of limitation, courts of equity adopt and enforce only the one which gives to the complainant the longest time.

That tested by the above principles, the rule of limitation applicable to this case cannot, in any point of view in which it can be considered, be less than sixteen years. 19 Vermont, 467.

If this Court has the power arbitrarily, and in their discretion to bar us of our right, this is not a case which calls for the exercise of such discretion.

The time which has elapsed since the last note became due,

and the commencement of the present suit, is only seven years and a few months, not sufficient to bar an ordinary book account.

Intermediate that time, a previous suit had been brought and dismissed without prejudice (See the answers of the defendants.) This is fairly inferrable from the language of the answers, and neglect to plead the former suit in bar. The language of the answers, in this respect, is that of complaint rather than of defence.

Payment was demanded of John S. Wright, as the grantee of Temple, in the winter of 1838 & 9, and his grantees were immediately advised by him that such payment had been demanded. See answers.

Being so notified that we intended to look to the land as security, they have no reason to complain of delay. If they desired to have the incumbrance removed, they could have removed it by paying the balance of the purchase money.

The title papers, although constructively delivered, have always been, and are now actually in our possession.

The circumstances and situation of the immediate parties remain substantially without change. The title is now where it was placed by John S. Wright, in 1837. No actual possession has been taken, or improvement made upon the land. There is no loss of evidence. The case stands upon the bill thus, sworn answers and replication.

John S. Wright claims to be a *bona fide* purchaser, and to avoid our proof of actual notice, he says he purchased and paid for the land in 1836. His deed from Temple bears date in 1840. What price did he pay Temple for the land, and what was the evidence of his title prior to the deed in 1840? He fails to disclose either, and by so doing, has left his conduct, to say the least, open to suspicion.

The insolvency of the sureties is no answer; because if they had paid the money they would clearly have been entitled to the benefit of our lien, as against Temple and his grantees.

The insolvency of Temple is no answer. We had a right to rely upon our lien, and it was their duty, before they purchased, to investigate the title, and takes sufficient security to indemnify them against the lien for the purchase money. The first step in such investigation would have shown them that the purchase money was unpaid.

In support of the above positions, the following legal propositions and authorities are submitted :—Statute of limitations is a good bar to a suit in equity, as it is at law in matters of concurrent jurisdiction. Story's Equity Pleadings, p. 775, 751 ; Humbert *v.* The Rector, &c., of Trinity Church, 7 Paige, 195 ; White *v.* Turner, administrator, 2 Gratten, 502 ; Sheppard *v.* Turpin, 3 Gratten, 374 ; Hughson *v.* Manderville, 4 Desau, 87.

A defendant who has answered, cannot have the benefit of the statute of limitations, at the hearing, unless he has insisted on it in his answer, or demurred or pleaded. Harrison *v.* Bonvell, 16 English Ch. R., 382 ; Story's Equity Pleadings, §484, 760; Pratt *v.* Vatu, 9 Peters, 415 ; Dey *v.* Dunham, 2 Johns. C. R., 182.

If an equitable title is not sued upon until after the time within which a legal title of the same nature ought to be sued upon to prevent a bar by the statute of limitations, courts of equity, acting by analogy to the statute will not entertain it. Story's Equity Pleadings, p. 763, § 757 ; 2 Story's Commentary on Equity, 735.

A vendor's lien can only be barred by lapse of twenty years. Morton *v.* Harrison, 1 Bland, 491 ; Elmendorf *v.* Taylor, 10 Wheaton, 152 : 6 Conn. R., 47 ; Lingan *v.* Henderson, 1 Bland, 236, 282 ; Smith *v.* Ramsay, 1 Gilman, 372.

Every equitable title must be pursued within twenty years after it accrues. Hovenden *v.* Lord Annersley, 2 Schoales & Lefroy, 607 ; Heyer *v.* Pruyn, 7 Paige, 465.

Chancery will not set up lapse of time against a claim, when an action of debt for its recovery would not be barred by the statute of limitations. Forbes *v.* Taylor, 10 Ohio, 104 ; Grafton Bank *v.* Doe and others, 19 Vermont, 463.

As the Court has not legislative power, it cannot limit the time. Smith *v.* Clay, 2 Ambler, 647.

Courts of equity, though not within the words of the statute of limitations, (which apply to particular legal remedies,) are within the spirit and meaning of them. Courts of equity, act not by analogy, but in obedience to the statute of limitations. Hovenden *v.* Lord Annersley, 2 Schoales & Lefroy, 629.

Jas. H. Collins, for Deft in Error.

The record of this case shows that David Letts, as school com-

missioner for La Salle county, on the first of May, 1835, sold under the act of 1829, the school section in the above township, at public sale, pursuant to law. That John T. Temple became the purchaser of certain lots, among which were lots 1, 2, 3, 6, 7 & 8 in the subdivision of said section. That on the purchase of said lots, three sealed notes were executed by said Temple to said commissioner, to secure the purchase money of these and other lots purchased by said Temple at the same sale, in the same section, with Grant Goodrich and Royal Stewart as sureties. Said notes were received by the commissioner and deposited with the treasurer, and divers payments were subsequently made, but no mortgage was executed by Temple as collateral to the notes. The commissioner at the same time executed a certificate of purchase to Temple for these and other lots. The patent subsequently issued to Temple, and is in the hands of the treasurer of the township. Temple failed to pay the notes; and he and his sureties became bankrupt; and the bill prays that the plaintiffs in error, may have a lien upon these lots for their proportion of the balance of the purchase money, secured by said notes, and that the lots may be sold to satisfy the same. John S. Wright in his answer alleges, in substance, that he purchased these lots (1, 2, 3, 6, 7, & 8) of Temple, and paid the consideration for the same in May, 1836, prior to his knowledge, that notes instead of cash had been given on the sale to Temple. That on the 26th of September, 1840, Temple and wife executed a deed to him for said lots. He denies all knowledge or notice that the purchase money was due or unpaid, and avers that the allegations of the bill in that behalf are false, and insists that he is a bona fide purchaser, without any notice of any equities of the plaintiffs in error, or that they had, or pretended to have any lien on the premises, and that he had paid the whole consideration money, before he had any notice of their claim. That on the 31st day of October, 1837, he conveyed to his co-defendants Amasa Wright, Hosea Webster, and Frederick Deming, of New York city, by separate deeds, to each an undivided one-third of said six lots for the consideration of four hundred and fifty dollars paid by each, at and before the date of their respective deeds, and that neither of them had notice that the original purchase money had not been paid.

A. Wright, Webster, and Deming, in their answer, allege

the purchasefrom John S. Wright, each, of an undivided one-third of the lots, and that each paid four hundred and fifty dollars as the consideration, at and before the purchase, and expressly deny all notice of the non-payment of the original purchase money by Temple, before, or at the time of the payment of the consideration money to John S. Wright.

The purchase money having been secured by Temple, by his giving his sealed notes or covenant, with Goodrich and Stewart as sureties, the lien was waived or discharged.

The rule is well settled that if the vendor take a note or bond of the vendee, secured by a third person, it is an extinguishment of the implied lien for the purchase money. 1 Mason's R., p. 214, 215, Brown *v.* Gilliam, 1 Paige R., p. 29 : Fish *v.* Howland, where all the cases are reveiwed, Harding, 48 ; 3 Bibb, 183 ; 4 Pet. Cond. R., p. 457, Brown *v.* Gillman.

The defendant John S. Wright, as well as his grantees, Amasa Wright, Deming, and Webster, being bona fide purchasers, without notice, took the lots divested of any lien, even if such lien had ever existed. 2 Edwards Ch. R., 597 ; 1 Paige, p. 29 ; 6 Binny, 119 ; 1 Teat's 393 ; 5 Pet. Cond. R., p. 231.

It is alleged in the bill, that the consideration of the conveyance from John S. Wright, to Wright, Deming and Webster, was a precedent debt due by John S. Wright to the latter. This is expressly denied, but if the allegations are true, the case last cited (5 Pet. Cond. R.) establishes the principle that a bona fide conveyance to a creditor would defeat the lien.

Treat, C. J. On a former hearing of this case, the decree of the Circuit Court was affirmed. For the fact of the case and the reasons for that conclusion, reference is made to the report of the case, in 11 Illinois, 603. A rehearing has since been allowed, and the case is again submitted for our consideration. The opinion was expressed in the former decision, that an implied lien on land, for the payment of the purchase money, must as against third persons, be enforced by the vendor, within a reasonable time after his right to do so attaches ; and it was by the application of that doctrine to the case, that the decree dismissing the bill was sustained. Upon further reflection, we are still strongly inclined to adhere to the principle then laid down ; but we are likewise well satisfied, that the principle ought not

to be applied to this case, in the condition in which it is presented by the parties. The defendants do not, by their pleadings, assume the position, that the complainants are not entitled to the relief sought because of the lapse of time between the maturity of the notes and the filing of the bill. They claim no advantage by reason of any delay or laches on the part of the complainants. In this respect, the answers are wholly silent. The only questions presented by the answers are, whether the complainants ever had a lien on the land, and, if so, whether the defendants were purchasers with notice thereof. It is a familiar principle of equity, that a defendant cannot avail himself of the benefit of the statute of frauds, or of limitations, unless he specially relies thereon by answer, plea, or demurrer. If he fails thus to claim the protection of the statute, he is to be understood as waiving it. He must give the complainant an opportunity to show by averments and proof, that the case is not within the operation of the statute. In the present case the objection arising from length of time, although not within the statute of limitation, is a defence of a kindred character, and subject to the same rule. The defendants did not raise the objection in their answers, and they must be held to have waived it. If they intended to insist, on the hearing, that the complainants were barred by the lapse of time, from asserting a lien on the lands, they should have interposed the defence in their answers or in some other appropriate mode. The complainants might then have amended their bill, by inserting allegations accounting for the delay, and thereby laying a foundation for the introduction of proof to sustain the case against the objection. As it is, they were not notified that such a defence would be attempted, and consequently they were not called upon to repel or avoid it. It may be, that they could have accounted satisfactorily for the long delay, and have shown that they were still in a situation to enforce the lien. At all events, they ought not to be concluded, until such an opportunity has been afforded them.

We are also well satisfied, that the complainants, once had a lien on the lands for the payment of the purchase money, and that the defendants were chargeable with notice of its existence when they purchased. The statute, under which these lands were sold, required the school commissioner to take notes with personal security, and a mortgage on the premises, to secure the

payment of the purchase money. The lands were sold on a credit of one, two, and three years, and the notes of the purchaser, with sureties, taken for the payment of the several installments, but the commissioner omitted altogether the taking of a mortgage. Under these circumstances, we think the lien was not waived. The purchaser did not acquire the land divested of a lien, which the law expressly provided should be reserved. See Powell *v.* Kettelle, 1 Gilman, 491. In such a case, there can be no doubt of the right of trustees of schools to assert a lein as against a purchaser ; and we think it equally clear, that the same remedy may be pursued against those claiming under him with notice, if proceedings for the purpose are instituted within a reasonable time after the right to do so accrues. The defendants all purchased before the patents issued, and before the last of the notes became due. The certificate of purchase showed on its face, that the original purchaser had given notes for the consideration, and the same fact appeared in the report of the sale to the county court. If the defendants had examined the sources of their title, they would at once have discovered that the lands were sold on a credit which had not then expired, and by inquiring at the proper office, they would have ascertained that the notes were still unpaid. They are chargeable with knowledge of every thing appearing on the face of the title papers, and of the records relating to the sale.

The decree of the Circuit Court dismissing the bill, so far as it seeks to enforce a lien against the lots conveyed by the original purchaser to John S. Wright, is reversed ; and the cause is remanded, with leave to the parties to amend their pleadings.

Decree reversed.

FRANCIS VORIS *et al.*, Pltffs in Error, *v.* JOSEPH J. THOMAS, Deft in Error.

ERROR TO PEORIA.

A party claiming title to land, listed for taxation in his name, does not acquire any greater interest, by purchasing it at a sale for taxes. Nor does a mortgagor defeat the lien of a mortgage he has executed, by a like purchase. (*a*)

Nor can a party avail himself of a title thus acquired by a third person through his default.

(*a*) Choteau vs. Jones, 11 Ill. R. 322 ; Glancy vs. Elliott, 14 Ill. R. 458 ; Morgan vs. Herrick, 21 Ill. R. 481.

Voris *et al.* *v.* Thomas.

This was an action of ejectment commenced by Voris and another, in the Peoria Circuit Court, to recover possession of lot seven, in block twenty-eight, in the city of Peoria. The pleadings are in the usual form. At March term, 1850, Kellogg, Judge, presiding, the cause was tried by a jury, which found the defendent, Thomas, not guilty of the trespass or ejectment laid to his charge. The proof set out in the bill of exceptions, shows that Thomas left Peoria in 1839, and was absent two years; that after his return, he went into possession of the lot in question, and has resided thereon ever since. That Thomas, two or three years after his return, said that he got the lot through the management of George C. Bestor, and that he occupied the same under Bestor. A bond from Voris to Thomas, for the sale of the same lot, dated 18th of November, 1837, for the consideration of $750.00, was also read to the jury. The lot was sold in May, 1840, for the taxes of 1839, and purchased by Laurason Riggs, who conveyed to Bestor on the 28th of April, 1843.

Plaintiffs also proved that while Thomas was absent in 1840, J. C Heyl was called upon by Bestor to appraise some furniture for Thomas, to be paid to Voris, on the purchase of the lot, but that no appraisement or payment was made. That Bestor was the brother-in-law of Thomas, and that Bestor was supposed to be acting as the agent of Thomas.

Evidence of preliminary proceedings of assessment of the lot, judgment, precept, &c., and tax deed, were read to the jury. The Circuit Court refused to allow the plaintiff to read from the book of listed lands, an entry showing that the lot in question was assessed for the year 1839, to the name of Thomas.

H. O. Merriman and R. S. Blackwell, for Pltffs in Error.

The defendant having entered under a contract of purchase from the plaintiff, estopped from setting up the tax title. 3 Peters, 43; 4 J. J. Marshall, 396; 7 *ibid*, 147; Act of 1839, §15.

N. H. Purple, for Deft in Error.

Trumbull, J. Ejectment for a lot of ground in the city of Peoria. The plaintiff gave in evidence a connected title to the premises in question from the government to himself, and the

defendant admitted that he was in possession at the commencement of the suit.

The defendant set up an outstanding tax title in one George C. Bestor, which defeated a recovery by the plaintiff in the Court below. Numerous exceptions were taken to the tax title on the argument, none of which, it is necessary to notice in the view we take of the case, as, be the tax title ever so good, the defendant was not in a position to set it up against the plaintiff.

The record shows that in eighteen hundred and thirty-seven, the defendant entered upon the lot in question under a contract of purchase from the plaintiff, and occupied the same till some time in eighteen hundred and thirty-nine, when he left and was absent about two years. From June, 1841, to May, 1842, the premises were occupied by one Nourse, under Bestor, who is the brother-in-law of the defendant, and who, during his absence in 1840, called upon a witness to appraise some property belonging to defendant, to be paid to the plaintiff on the purchase of the lot, and the witness supposed Bestor at the time to be agent of the defendant. The lot was sold in 1840, for the taxes of 1839, and purchased at the tax sale by one Riggs, who, in June, 1842, procured a collector's deed for the same, and in April, 1843, conveyed to Bestor. It was also proven upon the trial, that the defendant had stated, that he got the lot through the management of Bestor. The court refused to give the jury the following instruction asked by plaintiff, to wit: "That if the defendant went into the lot in question under the bond given in evidence, and by himself, or agents, or tenants, was in such possession at the time of the levy and sale of the lot for the taxes of 1839, the defendant is estopped from setting up the tax title given in evidence as a defence to this suit, and the jury will disregard that title."

It has been decided by this court, that a party who claims title to land which is listed for taxation in his name, acquires no greater interest by permitting it to be sold for taxes, and purchasing it himself; also that a mortgagor cannot defeat the lien of the mortgage he has executed, by purchasing the land at a sale for taxes. Choteau *v.* Jones, 11 Illinois, 322; Frye *v.* Bank of Illinois, *ibid.*, 383. The same principles apply to this case. The defendant acquired the possession under an agreement to purchase, and sustains towards the plaintiff the relation of a *quasi*

tenant. While thus in possession, as shown by the record offered in evidence by the plaintiff, and improperly excluded by the Court, the lot was assessed to him for the taxes of 1839. He failed to pay the taxes, and as is insisted, abandoned the premises, but there is no evidence that he surrendered the possession to the plaintiff; on the contrary, it is apparent from the record that he still retained control over them through his brother-in-law, Bestor, who was taking steps, in 1840, to have certain property, left by defendant, applied on account of the purchase of the lot. The fact that Nourse occupied the premises from 1841 to 1842 under Bestor, does not prove that Bestor was not at that time the agent of the defendant. The presumption is that he was, for he then had no pretence of title to the lot, or right to control it, except as derived from the defendant. The tax title did not mature till some time in 1842, and Bestor did not acquire it from Riggs till 1843. What possible claim had Bestor to the land in 1841, when he rented to Nourse? None surely, except as the agent of his brother-in-law, for whom was he assuming to act so far at least as to take steps toward completing the payment to the plaintiff.

The attempt to show that Bestor was claiming the lot in his own right in 1840 and 1841, was a total failure. The defendant obtained the possession from the plaintiff, admitted that he was in possession at the time this action was commenced, and so far as the record shows, and as between these parties, he is to be presumed as having had the possession from the time he first took it till this suit was brought. In this view of the case he is not to be permitted to set up the outstanding tax title against him from whom he obtained the possession.

The instruction which the Court refused to give, is based upon the supposition, that sooner than let the land be sold for taxes, it was the duty of the party having possession, at the time of the assessment and sale, under a contract of purchase, to pay such taxes, and we think should have been given.

A party under such circumstances has an equitable title to the land, and when it is assessed in his name, the taxes may be collected from him. If he suffers the land to go to sale for the taxes, it is clear that by purchasing it in himself he cannot defeat his vendor's title, and if he cannot avail himself of a title thus

acquired in his own name, no more should he be permitted to do so of a title acquired by a third person through his default.

Judgment reversed and the cause remanded.

Judgment reversed.

MARTIN TUBBS, Pltff in Error, *v.* ABBY VAN KLEEK, Deft in Error.

ERROR TO KENDALL.

In an action for breach of marriage, seduction, if in consequence of the promise, may be given in evidence in aggravation of damages. (*a*)

A party is always entitled to such damages, as are the natural and proximate result of the act complained of.

This was an action of trespass on the case, for breach of promise of marriage.

The plea denied the promise and undertaking.

At the May term, 1850, of the Kendall Circuit Court, the cause was tried before T. L. Dickey, Judge, and a jury, and resulted in a verdict and judgment for $1,000.00.

The evidence set out in the bill of exceptions, clearly proves the promise to marry, the birth of an illegitimate child, and that the father of the defendant in error had also brought an action against the plaintiff in error, to recover damages for the seduction of his daughter, which was pending at the time of the trial of this suit.

S. W. RANDALL, for Pltff in Error.

E. LELAND, for Deft in Error.

TRUMBULL, J. This was an action for a breach of a promise of marriage. Jury trial and verdict of a thousand dollars in favor of the plaintiff below. It was proven, on the trial, that the plaintiff had given birth to a child, and the Court, at her instance, instructed the jury as follows:

"That if the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff, and under the pretence and promise of marriage, seduced and begot the plaintiff with child, that circumstance, and violation of faith, should

(*a*) Fidler vs. McKinley, 21 Ill. R. 313.

be taken into consideration by the jury in estimating the damages."

The giving of this instruction is assigned for error, which is the only question in the case.

There is some conflict in the authorities, as to whether seduction committed under promise of marriage, is admissible in evidence, to aggravate the damages in an action for the breach of such promise, but the weight of authority, as well as the reason of the thing, appear to be decidedly in favor of the admission of such evidence. The only cases, to which reference has been made, as establishing a contrary doctrine, are those of Bucks *v.* Shain, 2 Bibb, 343, and Weaver *v.* Bachert, 2 Pa. State R., 80.

In the first of these cases, the promise to marry was made at a period subsequent to the seduction, and, as was well remarked by the Court, the seduction could not have been the consequence of the promise. In such a case, when an action was brought for the breach of the marriage promise, it would clearly be erroneous, to allow damages on account of an injury inflicted before the promise was made, and which could not have resulted from it. The case of Weaver *v.* Bachert, is based upon that of Bucks *v.* Shain, and so far as it goes, is an authority against the admission of proof of seduction in an action for a breach of marriage promise, but the reasoning of the Court in that case, is by no means satisfactory. The decision is placed upon the ground that illicit intercourse is an act of mutual imprudence, and that *volenti non fit injuria*, also upon the further ground, that the father has a distinct action for the seduction of his daughter, and that to allow the daughter to recover also, would be to subject the seducer to the payment of double damages.

It is possible, but hardly probable, that a case may arise where both parties are equally culpable, but the instruction under consideration, does not suppose such a case. It is based upon the presumption, that the jury believe from the evidence, that the defendant, under pretence of marriage, enticed the plaintiff from the path of rectitude and duty; and in such a case, to say that both parties were equally in fault, would be to confound the innocent with the guilty, and to visit the same condemnation on the party defrauded, as on him committing the fraud; nor is it true, that illicit intercourse is usually an act of mutual imprudence. In a vast majority of cases, the female is imposed upon

and the consequences attending such intercourse are visited upon her with ten fold severity. In this case, the parties are not presumed to be *in pari delicto*, but the instruction pre-supposes a cheat on the part of the man. It is like the case, where a man promised to marry a woman, on condition that she would go to bed with him that night, which she did. It was objected, in an action, by the woman upon this promise, that it was *turpis contractus*, but Lord Mansfield said he thought the objection would not lie, "because the parties were not *in pari delicto*, but this was a cheat on the part of the man." Morton *v.* Fenn., 26, Et. C. L. R., 80. So a bond given to a woman in consideration of past cohabitation, has been held good at law. Turner *v.* Vaughan, 2 Wilson, 339. In answer to the objection, that the bond was given for an immoral consideration, Cline, Justice, said: " I am in a court of law, and not in an ecclesiastical court; if a man has lived with a girl, and afterwards gives her a bond, it is good."

It is also a mistaken notion, to say that a father has a distinct cause of action for the seduction of his daughter. No action lies by the father simply for the seduction, but he may have an action for the loss of service occasioned by the lying-in of his daughter, and it is only by a fiction of law, invented by the Courts, that he is allowed damages in that action for the seduction. The damages, even then, are only such as *he* may have sustained in the disgrace brought upon his family, in his wounded feelings, or otherwise, and nothing is allowed on account of the suffering and disgrace of the daughter. It does not follow, therefore, that the seducer will be made to pay double damages for the same injury. He pays to the father for the injury done him; if the daughter is permitted to recover, it is for the injury done her, and it often happens that by one act, a wrong may be done several persons, for which, each has a right of action. Suppose a female is so unfortunate as to have no father, or person sustaining towards her that relation, which will authorize his bringing a suit for loss of service; according to the doctrine of the Pennsylvania Court, her seducer under promise of marriage, is answerable to no one for the fraud he has practised upon her. Sooner than establish such a principle, it would be well to adopt the language of Chief Justice Wilmot, in the case of Tullidge *v.* Wade, 3 Wilson, 19, which was an action by the father for loss of service, where he said: "The jury

have done right in giving liberal damage; and if A. B. brings another action against defendant, for breach of promise of marriage, so much the better; he ought to be punished twice;" but we are not driven to such extremities, the weight of authority is in harmony with the reason and justice of the case. The courts of Massachusetts, Missouri, Tennessee, and Indiana, have all held, that in an action by a female for a breach of promise of marriage, her seduction by the defendant, under promise of marriage, may be given in evidence in aggravation of damage. Paul *v.* Frazier, 3 Mass, 72; Green *v.* Spencer, 3 Missouri, 318; Conn *v.* Wilson, 2 Overton, 233; Whalen *v.* Layman, 2 Blackf., 194.

The reason for these decisions is manifest. A party is always entitled to such damages, as are the natural and proximate result of the act complained of. 2 Greenleaf's Ev., §256.

Whatever damages, therefore, the plaintiff suffered in consequence of defendant's refusal to marry her, she is legitimately entitled to recover in this action. How are these damages to be estimated, unless we look at the circumstances of the parties, and the situation in which the plaintiff is left, by the defendant's refusal to perform his contract?

All the authorities, not excepting the case in Pennsylvania, admit that parties in this action may show their circumstances, or condition in life, as matter of aggravation or mitigation. Why, then may not a female show the situation in which she is left, by the violation of his promise on the part of a man, who has agreed to marry her? Had he performed his contract, she would have been saved from disgrace, in part at least, and her child legitimated. The direct consequence of his breach of contract is the disgrace and ruin of her, whom, by means of that contract, he has seduced, and upon every principle of right and justice, he should be held responsible for the injury which his own breach of contract has occasioned.

The court in Pennsylvania asks this question: "If, then, a woman cannot make her seduction a ground of recovery directly, how can she make it so indirectly?" The answer to such a question is obvious. It is every day's practice, to give in evidence, by way of aggravating damages, circumstances which would not of themselves, constitute distinct causes of action. Cases of this kind are too common to need illustration. 2 Greenleaf's Ev. §55, 267. The injury done a female by the violation of a contract to

marry her is not the same in all cases, and whenever such contract has been used by the party making it, to inflict the most aggravated of injuries upon the woman, it is right that such injuries should be taken into consideration, by the jury, in estimating the damages which he should pay for the violation of his, promise. A man who under pretence and promise of marriage gains the affections of an innocent girl, seduces and then abandons her, inflicts an injury, for the recompense of which, money is wholly inadequate. Such a man, if he deserves the name, is entitled to no sympathy at the hands of either juries or courts, but should be made to respond in heavy damages, the only recompense which the law allows, for the commission of an act, occasioning to the person injured, more real suffering and distress, and bringing upon her greater disgrace, than any other which man can commit.

Let the judgment be affirmed.

Judgment affirmed.

TREAT, C. J., dissenting. This action is for the breach of the contract to marry. The seduction of the plaintiff forms another and distinct cause of action. The one grows exclusively out of the contract to marry, the breach of which affects the daughter solely, and she alone can bring the action; the other proceeds from an immoral act, in the commission of which the daughter, in legal contemplation at least, is a partaker equally with the defendant, and the only civil remedy provided by the law in such case, is the action by the father, for the consequent expense and loss of service. They are separate and distinct causes of action, founded on entirely different considerations, and accruing to different persons. In the action by the father, the breach of the contract to marry, cannot be taken into consideration by the jury; nor ought the daughter to recover damages on account of the seduction. If she is allowed to do so, the recovery would be no bar to the action by the father, and consequently, the same might be twice made responsible for the same act. More than this it would be permitting her to recover damages for an immoral act, in the doing of which she equally participated. The parties are *in pari delicto*. If the plaintiff has been debauched, it was the result of her own voluntary consent. It is contrary to the policy of the law to give one guilty party a

remedy against an associate in crime or immorality. On this ground, the ruling of the Circuit Judge was, in my opinion, clearly erroneous, for the real effect of his decision, was to authorize the jury to give the plaintiff damages for the seduction, thereby enabling her to accomplish indirectly, what the law, in no event, would allow her to do directly. There is not a single case to be found in the English Reports, that countenances such a doctrine. But the question must have occurred in that country over and over again, and would have found its way into the books, if the slightest doubt had been entertained on the subjects It is a legitimate inference, from this silence in the English Reports, that the principles of the common law do not sanction such a recovery. The notion seems to have originated in this country, and some of the Courts, as I cannot but think, more influenced by sympathy for the party debauched, or by indigation against the seducer, than by a stern adherence to the well established rules and distinctions of the common law, have seen proper to adopt it. The cases of Burks *v.* Shain, 2 Bibb, 341, and Weaver *v.* Bachert, 2 Bar. 80, lay down and enforce the true doctrine on this subject. The reasoning of the Courts in those cases is, to my mind satisfactory and conclusive.

HIRAM FOSTER, Pltff in Error, *v.* JOSEPH J. JARED, Deft in Error.

ERROR TO WARREN.

If A gives a bond to convey land to B. and receives notes for the purchase money and he should afterwards sell the same land to C, B cannot avoid the payment of the notes, by setting up the fact, that A had parted with his title to the land. The payment of the notes being a condition precedent, A could not be put in default, until after their payment. A payment, or an offer to pay is necessary to a recision of the bond.

The world debt in a judgment, does not necessarily make it a judgment in debt

Joseph J. Jared sued Foster in assumpsit, on a promissory note. Foster plead, 1st, non-assumpsit; 3d, failure of consideration in this: One William Jared, being the owner of the legal title to a certain tract or land, sold the land to Foster, and executed his title bond, as the evidence of the agreement

on his part, by which he bound himself to convey by warrantee deed, the land to Foster, upon the payment of the residue of the purchase money, which was to be made in three annual instalments, of which the note sued on was given to secure the payment of the first. That William Jared, without insisting upon any forfeiture for the non-payment of the note in suit, and without the consent of Foster, conveyed the land to one Joseph J. Jared, a stranger, that the title still remains in Joseph J. Jared, whereby William Jared voluntarily put it out of his power to perform his part of the agreement, and the consideration of the note failed, of which the plaintiff had notice, &c.

To this plea, the plaintiff below demurred; the Court sustained the demurrer.

The issue on the first plea was tried, found in favor of the plaintiff below and judgment rendered that he should recover a certain sum debt, together with his costs.

A jury was waived, and the cause was tried by the Court, Kellogg, Judge, presiding, at April term, 1851, of the Warren Circuit Court.

The errors assigned, were the sustaining of the demurrer to the plea, and the rendition of the judgment in debt.

Manning & Davidson, for Pltff in Error.

The note sued on, and the title bond constituted parts of the same agreement, and the conveyance of the title to the land was the consideration of the note. 4 Scam., 135, 394, 566.

Where a person having agreed to convey real estate at a future day, being then the owner of the title, conveys the title to a stranger before that day, an action by the vendee lies immediately, and without tender of performance on his part. Newcomb *v.* Bracket, 16. Mass., 161; Ford *v.* Tiley, 13 Eng. Com. Law, 188, (6 Barn. & Cres., 325;) 23 Pick., 460;. Reynolds *v.* Smith, 6 Blackford, 200; 7 Vermont, 27; 3 Vermont, 161.

In this case, the payee of the note in suit has elected to rescind the contract by conveying to a third person, and therefore no recovery can be had upon the note in the hands of his assignee with notice. Arbuckele *v.* Hawks, 20 Verm., 538 : 11 Smedes & Marshall, 372, 1 Morris, 344; 7 S. & M., 340; 7 Blackford, 150

The form of action is assumpsit, and judgmeut is rendred for

the recovery of a certain sum, *debt*, which is error. Lyon *v.* Barney, 1 Scam., 387. For similar reasons that it is erroneous to render judgment for damages, when the form of action is debt. 11 Ills. R., 59, 2 Gill., 266, *et pass.*, it is erroneous to render judgment in *debt*, where the form of action is assumpsit. Nor can the proper judgment be rendered in this Court, as the evidence is not before the Court, and there was an issue under which many matters of defence might have been given in evidence. 3 Gil., 434; 1 Chit. Pl., 475—6.

O. PETERS, for Pltff in Error.

The plea alleges that the bond was accepted as the consideration of the note. The facts pleaded show that the consideration of the note was not the bond, but the purchase of land; the contract was not to get a warrant from William Jared, but to get a good title to the land. In a similar case, it has been so settled. Tyler *v.* Young et al., 2 Scam., 447. William Jared, by the contract, has nothing to do, till all the notes are paid; and Foster undertakes to pay the notes as they consecutively become due, and he must do so, to entitle him to a deed, when he shall be ready to pay the last note.

This was the contract of the parties, and the court will let this stand, and not make a new contract for them. Duncan et al. *v.* Charles, 4 Scam., 561; The President, &c., of Bank of Columbia *v.* Hagner, 1 Peters, 454; Coutch *v.* Ingersoll, 2 Pick., 292.

The last error assigned, presents the question, whether the judgment is sufficient in point of form. It would be a good judgment, clearly, but for the insertion of the word "debt" therein.

The judgment is informal; but mere informality will not vitiate. Sears *v.* Sears, 3 Gil., 47.

TREAT, C. J. This was an action of assumpsit, brought by Joseph J. Jared against Hiram Foster The declaration was on a promissory note, dated November 18th, 1848, for $100, payable in twelve months, made by the defendant to William Jared, and assigned by the latter to the plaintiff. The defendant pleaded, first, non-assumpsit; and second, failure of consideration in this: that William Jared, at the date of the note, sold a tract of land to the defendant, for the price of four hundred dollars, one-fourth of which was paid in hand, and the residue was to be paid in

three equal installmennts, to secure the payment of which, the defendant made three promissory notes, the note sued on being for the first installment; that, at the same time, Jared executed a title bond by which he agreed to execute and deliver to the defendant, a good and sufficient warrantee deed for the land, on the payment of the notes at maturity; that the bond provided, that, if the defendant should fail to pay the notes, or either of them, at maturity, or within sixty days thereafter, Jared might declare the contract void, and defendant should forfeit all previous payments; that Jared then had the full legal title to the land, but afterwards, on the 30th of January, 1850, without declaring the contract void, for the consideration of five hundred dollars, by deed of that date, containing no reservation or condition, he conveyed the land to the plaintiff, whereby he voluntarily and willfully put it out of his power to perform the condition of the bond, by reason whereof the consideration of the note had wholly failed, and of all which the plaintiff had notice before the note was assigned. The court sustained a demurrer to this plea, and then heard the issue of fact, and rendered a judgment in favor of the plaintiff, for the amount due on the note.

The notes and title bond are but parts of one entire contract. Bailey *v.* Cromwell, 3 Scam., 71; Duncan *v.* Charles, 4 *ibid*, 561; Davis *v.* McVickers, 11 Illinois, 327. The true consideration of the notes, is the estate agreed to be conveyed. Tyler *v.* Young, 2 Scam, 444; Mason *v.* Wait, 4 *ibid*, 127; Gregory *v.* Scott, *ibid*, 392; Davis *v.* McVicker, *supra*. But the conveyance of the land, and the payment of the note in question, are not concurrent acts. The payment of the note is to precede the conveyance. The vendor is not bound to execute a conveyance until all of the notes are paid. The doctrine, that in the case of dependent covenants, neither party can recover unless he has fully performed or offered to perform, on his part, has, therefore, no application to this case. The defendant cannot put the vendor in default, until he has paid, or offered to pay, the entire purchase money. He undertook to pay the two first installments, before he was to receive a conveyance. He chose, as respects this portion of the consideration, to rely on the covenants of the vendor to compel the execution of a deed. It is no excuse, that the latter has now no existing capacity to make a good title. It will be enough, if he has the title when the defendant has the right

to demand a conveyance. He may acquire a perfect title before he can be called on to convey. In Green *v.* Green, 9 Cowen, 44, where the payment of the purchase money was to precede the conveyance, it was held to be no breach of the covenant to convey, that the vendor never had any title to the land. The cases of Robb *v.* Montgomery, 20 Johnson, 15, and Champion *v.* White, 5 Cowen, 509, assert the same doctrine. And the same principle is recognized in Gregory *v.* Scott, and Duncan *v.* Charles, *supra.* The fact that the vendor had title when the contract was made, and that he has since transferred it to the plaintiff, makes no difference in principle. He may be re-invested with the title before he is put in default by the defendant. If a vendor has title when he is bound to convey, the purchaser has no cause to complain It is a matter of no importance, whether he then requires the title for the first time, or whether he obtains it by a re-conveyance from a party to whom he once transferred it. The case of Sage *v.* Ranney, 2 Wendell, 532, is an authority directly in point The court there held, on a demurrer to the declaration, in an action of covenant for not conveying a lot of land, which the vendor had agreed to convey when the purchaser should pay a certain note, that an offer of payment and a demand of a deed should pay be averred; and that the conveyance of the lot to a third person, formed no excuse for not making the tender and demand The court said: "and though the defendant had divested himself of the title, yet had an offer of payment and demand been made, he might have been re-vested with the title, so as to have fulfilled his contract." The defendant is not now in a position to take advantage of a want of title in the vendor. He must first be ready to perform the contract on his part. By tendering the ballance of the purchase money, he will have the right to insist upon a conveyance, and if the vendor cannot then make a good title, the contract may be rescinded.(*a*)

The facts stated in the plea, do not show a recision of the contract by the vendor. The plea expressly alleges, that the conveyance was made without declaring the contract void. The assignment of the note shows that he did not elect to rescind the contract. He could not put an end to the contract, and at the same time claim any benefit from the notes. The forfeiture provided for in the bond did not extend to the notes. It only related to payments actually made.

(*a*) Willetts vs. Burgess, 34 Ill. R. 499.

It is contended that the judgment is in debt, and must, therefore, be reversed. The record, after stating a hearing of the cause by the court, proceeds: "it is considered by the court, that the said plaintiff have and recover of the said defendant herein, the sum of one hundred and eight dollars and fifty cents debt, together with his costs in this cause, by him expended, and may have execution therefor."(*a*)This is not technically a judgment in debt. The word debt, does not of itself make a judgment in debt without it, the entry would have none of the distinctive features of a judgment in debt, and there would be no pretence for insisting that it was not good judgment in assumpsit. The word must be considered as surplusage, or understood as used for the purpose of distinguishing the amount found due on the note, from the costs of the plaintiff which are embraced in the judgment.

The judgment is affirmed.

Judgment affirmed.

DAVID L. HOUGH, Pltff in Error, *v.* HARVEY LEONARD, Deft in Error.

ERROR TO LA SALLE.

It is error for a Circuit Court to dismiss a suit commenced before a justice of the peace, because the papers do not on their face show his right to jurisdiction.

It is the duty of the Circuit Court to hear the evidence, and if from that, it appears that the justice had jurisdiction of the matter in controversy, then the case should be disposed of on its merits.

Leonard brought an action against Hough, before a justice of the peace. The summons was in the usual form, on which was indorsed, "demand fifty dollars, justice's fee 75, constable's fee 30." A judgment was rendered against Hough, after a trial, for fifty dollars and costs. Hough appealed to the circuit court. At April term, 1850, of the LaSalle Circuit Court, T. L. Dickey, Judge, presiding, Hough entered a motion to dismiss the suit, for want of jurisdiction in the justice of the peace, which was overruled. It appeared at the trial on the circuit, that the bill of particulars, comprizing several items, filed by Leonard before the justice, amounted to $109.80. It appeared also, that after Leonard had proved his bill of particulars before the justice, he rested his case for the time being, not having allowed any cred-

(*a*) Heinrichsen vs. Mudd, 33 Ill. R. 480.

its. Hough then moved for a nonsuit for want of jurisdiction in the magistrate. Leonard then offered to allow credits sufficient to reduce his demand to one hundred dollars, which the magistrate permitted. Leonard also asked leave of the Circuit Court to amend his bill of particulars, by striking out or indorsing specific credits, to reduce his demand to fifty dollars, which was granted. The cause was then submitted to a jury for trial, which resulted in a verdict and judgment in favor of Leonard for $48.55, and costs. A motion was made by Hough for a new trial, which was denied. Whereupon Hough brought the cause to this Court.

M. E. Hollister, for Pltiff in Error.

J. O. Glover and Wm. Chumasero, for Deft in Error.

Caton, J. The question presented by this record we do not consider an open one in this Court. At the last term in this Division, it was decided that the Revised Statutes must receive the same construction as the act of 1839, respecting the jurisdiction of justices of the peace, and that it was error for the Circuit Court to dismiss a suit commenced, for want of jurisdiction appearing on the face of the papers, but that it is the duty of the Court, upon appeal, to hear the evidence, and if from that it appears, that the subject matter of the controversy is within a justice's jurisdiction, then it is the duty of the Court to dispose of the cause upon its merits.(*a*)Ballard *v.* McCarty, 11 Ills., 50. The result of the testimony in this case, showed that a justice had jurisdiction of the amount due from the defendant to the plaintiff, which, as the verdict shows, was less than fifty dollars, the amount indosed on the back of the summons as the extent of the plaintiff's claim.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

(*a*) Clark vs. Whitbeck, 14 Ill. R. 397; Marshall vs. Pope, 29 Ill. R. 441 and cases cited.

Smith *v.* Dysart.

MARIAH L. SMITH, Executrix, &c., Pltff in Error, *v.* ARCHIBALD P. DYSART, Deft in Error.

ERROR TO PUTNAM.

Where a record shows pleas, to which no objection is made, and to which a demurrer was overruled, and upon which a judgment was entered for the defendant, this Court will not disturb the judgment.

This was an action of covenant, brought in the Putman Circuit Court by the plaintiff in error, as executrix of William Smith, against Dysart. The defendant pleaded seven pleas. To the first, second, third and fourth, there was a replication and issue to the county. To the fifth, sixth, and seventh pleas there were demurrers, which were overruled. The fifth plea alleges, that plaintiff is not executrix. The sixth plea declares, that said Mariah L. Smith has not been appointed, and is not, nor ever has been, executrix of the last will and testament of said deceased; nor has she produced, either the last will and testament of said deceased, after having proved the same in any other state or territory of the United States, or a certified copy thereof, with letters testamentary, under the seal of the Court where the same were obtained, and a certified copy, &c., showing that letters were granted, &c. To these pleas, after demurrer was overruled, no replication was filed.

E. S. LELAND, for Pltiff in Error.

O. PETERS, for Deft in Error.

CATON, J. The record shows at least two pleas to which no objection is now made; a demurrer to which was overruled; upon which a judgment was entered in favor of the defendant, which is a perfect bar to the plaintiff's right of action. We shall therefore decline entering upon the investigation of the question which was argued, as to whether the seventh plea was obnoxious to a general demurrer, or whether it should have been demurred to specially. The defendant is certainly entitled to have the judgment affirmed.

Judgment affirmed.

SAMUEL P. BAILEY, *et al.*, Appellants, *v.* J. E. HARDY, Appellee.

APPEAL FROM TAZEWELL.

In an application for a continuance on account of the absence of a witness, if the testimony sought is important only in connection with certain facts, those facts should be set forth or referred to in the affidavit, so that the materiality of the evidence may be apparent to the Court.

This was an action brought by appellee before a justice of the peace, and taken by appeal to the circuit court of Tazewell county. In the circuit court, Bailey applied for a continuance of the cause upon his affidavit; stating that he was not prepared for trial, for want of a witness, by whom he expected to prove, that the note sued on was in the hands and was the property of one Clement Turner, who held the said note by virtue of an assignment of Benjamin Prettyman, who delivered the same to one Thomas McGrew, since deceased, who delivered the same to the said Clement Turner; that no other witness could prove the same fact, &c., &c. This continuance was refused by the court, exceptions were taken to the ruling of the court.

Davis, Judge, at the same term, being September term, 1850, after overruling the motion for a continuance, proceeded to try the cause without the intervention of a jury, and gave judgment for appellee.

MERRIMANS & JOHNSON, for Appellants.

CHAMPLIN & WALLACE, for Appellee, cited 8 Wend., 600; Chitty on Bills, 215, 220; R. S. 385, §8.

TREAT, C. J. The application for a continuance was properly denied. It was not made to appear, that the testimony of the absent witness would be material on the trial. The defendants expected to prove by the witness, that the note sued on was, prior to the commencement of the action, the property of Turner by virtue of an assignment from the payee. This fact of itself would not constitute any defense to the action. The note may once have belonged to Turner, and still have been the property of the plaintiff when this suit was brought. It may have been returned to the payee, and by him transferred

to the plaintiff. If the makers acquired any defense to the note while it was in the hands of Turner, that could be set up in this case, they should have so alleged in the affidavit. Where testimony is important only in connection with certain facts, those facts should be set forth or referred to, so that the materiality of the evidence may be apparent to the court. The court is not to presume that a state of case may arise, that may render the testimony important; but the party himself must affirmatively show, that he cannot safely proceed with the trial without the evidence. (*a*) It is not necessary to inquire whether due diligence was used to procure the attendance of the witness.

The judgment is affirmed.

Judgment affirmed.

JONATHAN WELDEN *et al.*, Appellants, *v.* THOMPSON W. FRANCIS, Appellee.

APPEAL FROM WINNEBAGO.

This Court will not set aside a verdict of a jury, unless it is against the weight of evidence.

This was an action on promises, tried before Hon. Hugh Henderson and a jury, at the December special term, 1850, between the appellee plaintiff, and the appellants defendants, which resulted in a verdict and judgment for the appellee.

The declaration was upon two promissory notes made by the defendants.

First plea. General issue.

Second plea. Plaintiff ought not to maintain his action for the whole amount of the notes, because the consideration for them was a he-ass and she-ass sold and delivered by the plaintiff to Welden at Michigan City, Indiana, 18th December, 1846, for the sum of money expressed in the notes, and a warranty. In consideration of the sale and notes, the plaintiff warranted the he-ass and she-ass to be sound in every way; but he was unsound, whereby he was of no use or value to Welden, and to wit: 12th December, 1848, died of the unsoundness. Whereby Welden, by the loss of the animal, and of the value he would have been of if sound, and of the services he ought to have received from him until the time he died, sustained damages to

(*a*) Updike vs. Henry, 14 Ill. R. 378.

wit, to $200. Prayer, if the plaintiff ought to maintain his action for any part of the moneys due, according to the notes, except that part over and above those damages.

The defendants to prove their part of the issues, read the warranty following;

I, this day, sell to Jonathan Welden, my large jinney and a small jack. I warrant them to be both sound in every way, but do not warrant the jack to be a foal getter, as I have not owned him but a short time.

Michigan City, Dec. 18, 1846. T. W. Francis.

The depositions of James Hopkins and Fisher Ames were read on the trial.

They say the plaintiff sold Jonathan Welden, in the fall of 1846, or January or February, 1847, or thereabouts, a jack-ass. The terms of sale were promissory notes of Jonathan Welden, and Betsey Welden, for $75 dollars. Had known him some five months and was sound when sold to said Jonathan Welden. At the same time, plaintiff sold Jonathan Welden a she-ass, which they knew while suckling, was sound when sold to Welden.

Godfrey Carnes, whose deposition was taken, says: I saw a jack-ass, which I understood to be J. Welden's. Thinks it was some time in December, 1846. He was a grey dun or mouse color. Supposes he was about the common size. He appeared to be lame in his feet and legs. To me he would have been of no value whatever.

The deposition of Joseph Goodrich was taken; says defendant Welden left a jack-ass in my possession, at my residence, in the fore part of January, 1848. His feet were rather out of shape. He was left with me for about eleven months. I think his feet were never sound while in my possession. He died early in December, 1848, thinks with disease. I think the disease in his limbs and feet was of a permanent nature.

The defendants called William A. Miller, who testified that he resides in the county of De Kalb; that Welden came to his house from the east, in the latter part of December, 1846, with a wagon and one horse in it, and a she-ass. He had also a jack-ass which gave out at a river about three quarters of a mile from the house of the witness, and could not go any further. The horse and other ass were in good condition, and not jaded. The he-ass was got to the wisness' house, and was there taken care of by

him, and remained there three or four weeks, sick ; at the end of which time he was so far recovered and recruited, that Welden came and took him away home, as he supposed. He further testified, that he was acquainted with the diseases of such animals, and that the disease could not, in his opinion, be a fresh founder ; that the animal was thin in flesh. He appeared to be tired out ; his feet and legs were sore, and he could not get up, and did not get up for several days without lifting, and when up, had difficulty in voiding water. His hoofs were grown out and contracted. He considered him of no value whatever.

Francis Burnap, for Appellant.

Miller and Miller, for Appellee.

Treat, C. J. The testimony in this case has been carefully considered, and we are not prepared to say that the verdict was against the weight of evidence. Two witnesses, who knew the animal in question at the time of the sale, and for several months previously, stated that he was sound when sold ; while the two other witnesses testified, that he was subsequently unsound and valueless, from a disease that, in their opinion, had its origin anterior to the sale. This is stating the case as favorably for the appellant, as the bill of exceptions will authorize. The Court would not be justified in holding that the jury erred in the conclusion that there was no breach of the warranty.

The judgment is affirmed.

Judgment affirmed.

Orrin Smith *et al.*, Appellants, *v.* Robert S. Harris *et al.*, Appellees.

APPEAL FROM JO DAVIESS.

Upon plea in abatement for non-joinder of a co-defendant, the plaintiff should issue a *sci. fa.*, against the co-defendant, and insert his name in the declaration and non-service of the *sci. fa.*, will not impede the progress of the suit.

The provisions of the fifteenth section of the Act on Abatement, relate to persons who by marriage or death, have become necessary parties to a suit, which was originally properly commenced without them, and they can only be made parties by actual service upon them of a *sci. fa.*, or by their voluntary appearance.

The mere omission of the Court, on overruling a demurrer to the declaration, to

render a formal judgment of *respondeas ouster* cannot prejudice the plaintiff.
The defendant is at liberty to answer over, and, if he does not do so, the Court must dispose of the case for want of a plea.
In a suit, brought on an instrument of writing for the payment of money if no issue is made, the Court may either itself assess the damages against parties in default, or may direct the clerk to do so, but where an issue is made by one defendant, and default entered against others, the Court or jury who tried the issue must assess the damages against the parties in default.
In a judgment for the plaintiff, a general judgment for cost against all the defendants is good, whether all have defended or not.

This was action of assumpsit, brought in the Jo Daviess Circuit Court, by Robert S. and James M. Harris, against Orrin Smith and others, on a promissory note. The note was dated February 1st, 1849, given for $2,000,00, payable four months from date, in the following form, "For value received, the steamboat, Senator, and owners, promise to pay to the order of D. S. Harris," &c. Signed, Orrin Smith, Capt., for boat and owners, and endrosed by D. S. Harris, to R. S. Harris & Co., the plaintiff below. The defendants below, were sued as owners of the steamer Senator. The pleadings are stated in the opinion of the Court. A jury was waived, and Sheldon, Judge, found for the plaintiffs, at May term, 1850. The bill of exceptions shows that the note was given in part consideration of said boat, which was purchased of the payee of the note. Several of the defendants were present when the note was executed.

The declaration averred that Smith executed the note as the agent of the defendants.

R. S. Blackwell, for Appellants.

The proceedings in making Brisbois a party, were irregular in this, viz: the *scire facias* was never served upon him, there was no order making him a party, and no disposition made of the plea in abatement. The true rule of practice, where a plea in abatement is filed, alleging the non-joinder of a party defendant, is, for the plaintiff immediately upon the filing of the plea, to sue out a *scire facias* against the person named in the plea; on the return of the writ to insert his name in the declaration; when service is had, obtain an order from the Court making him a party defendant; then by replication traverse the truth of the plea, and in support thereof exhibit the *scire facias*, amended declaration and order of Court, making him a party; upon which the Court will render a judgment of *respondeas ouster* against the

defendants. R. S., 43, 44, 45, § 3, 4, & 15 ; Heslep *v.* Peters, 4 Illinois, 45.

There ought to have been an interlocutory judgment on overruling the demurrer of Smith, Corwith, & Lodwick. 5 Dane Abr., 221, 224 ; 2 Saund. R. 119, 143, 205.

When plaintiff made Brisbois a party, there was a new cause of action spead upon the record, and the demurrants and the parties defendant, who plead in abatement, had a right to plead *de novo*, and the Court erred in rendering an interlocutory judgment against them without entering technical default.

There was no assessment of damages as to Corwith, Smith, Lodwick, Campbell, and Blakely, which is clearly erroneous. Howell *v.* Barnett, 8 Illinois, 433.

The introduction of the note, on the face of which an answer appeared, it was incumbent on the plaintiff to explain it, this was not satisfactorily done, and, therefore, there was a variance between the declaration and note. Longley *v.* Norvell, 5 Illinois, 389 ; Walter *v.* Short, 10 Illinois, 252.

A general judgment for costs in this case against all of the defendants, who served in their defence, was clearly erroneous.

E. S. Leland, and Doulass & Higgins, for Appellees.

Caton, J. This was an action of assumpsit, originally commenced against Smith, Campbell, Corwith, Lodwick, Blakely, Rice, and Douseman, on a note signed "Orrin Smith, Capt., for boat and owners." Smith, Corwith, and Lodwick, demurred to the declaration ; Campbell and Blakely, filed a plea in abatement, alleging that Brisbois should have been joined as defendant, and Rice pleaded the general issue. An order was entered for a *scire facias*, against Brisbois, which was returned not found, and his name was suggested on the record, as a party defendant. There appears an order, reciting that the plea in abatement having been confessed, and Brisbois having been made a parry by *scire facias*, and the said Balkely and Campbell having failed to answer further, a judgment by default was entered against them. Afterwards the issue of fact made by Rice, was tried by the Court, who found in favor of the plaintiffs, and assessed their damages $2,118.68, upon which a motion for a new trial was made, which

was overruled. And on the same day a judgment was rendered against all of the defendants who had appeared for the amount found due upon the note. The bill of exceptions shows that when the note was offered in evidence, it was objected to because the letters "U. S." before the word senator, had been erased. The plaintiffs offered evidence tending to explain the erasure, and show that it was made at the time of the execution of the note, when the objection was overruled, and the note read in evidence, to which an exception was taken, as well as to the overruling of the motion for a new trial.

Upon this record, nineteen errors have been assigned, all of which have been examined and considered by the Court, and we are of opinion, that none of them can be sustained. We only feel called upon to notice a few of the most prominent errors assigned, and which were most relied upon in the argument.

In relation to the alleged alteration of the note, it is only necessary to remark, that if it required any explanation, the evidence on the subject was before the Court who tried the issue, and we think it was sufficient, to justify the conclusion, that the letters were erased at the time of the execution of the note. Nor can we perceive any weight in the objection, that the plea in abatement was never disposed of. The record recites, that the plea was confessed, and we see that the name of Brisbois was inserted in the declaration, as a defendant and a *scire facias* issued to him. In this, the plaintiffs strictly pursued the course pointed out by the third section of our abatement act. Upon the filing of the plea in abatement, the plaintiffs forthwith sued out a *scire facias* against Brisbois, and inserted his name in the declaration. By doing this, they, in effect, confessed the plea in abatement, and avoided its effect, and it was not necessary to take any further notice of it. The defendant who had not been originally sued, was now made a party to the record, and although the *scire facias* was not served upon him, still that could not impede the progress of the suit. That such should be the effect, is expressly provided in the fourth section.

The provisions of the fifteenth section, which were so confidently relied upon, do not apply to cases of this kind. They only apply to cases, where the suit had originally been commenced properly, but in consequence of subsequent events, as the death or marriage of the party, a change upon the record

has become necessary. Such cases are provided for by section five and those succeeding it, which require an order of the Court to make the new parties, and in these cases the suit cannot proceed till the new parties are served with process, or voluntarily appear to the action. And there is a manifest propriety in this. In the first case, there is already a party before the Court to be proceeded against, and who can not only defend his own rights, but who must necessarily, to the same extent defend the interest of the absent party, who, however, cannot be affected by, or made a party to the judgment rendered, until he is made a party to it by another *scire facias* actually served upon him, and he has an opportunity of making a defence. In the latter case there may be no party in Court to proceed against, and no one to defend the interest which he should represent.

Another objection was, that no formal judgment of *respondeas ouster* was entered, upon the overruling of the demurrer. In the first place, the necessity for this was superceded by the express declaration of the demurrants, entered upon the record, that they would abide by their demurrer. But if this were not so, the objection is fully answered by the decision of this Court, in the case of Bradshaw *v.* Morehouse, 1 Gilman, 395. There, where the same objection was made, this Court said, "The mere omission of the Court to render a formal judgment of *respondeas ouster*, could not prejudice him. He was not denied the right of answering over to the declaration, but was at perfect liberty to do so. Refusing or failing to do it, the Court could only proceed to dispose of the case for want of a plea." How much more so in this case, where the parties had expressly notified the Court that they would not answer over, but would abide by their demurrer.

Another objection is, that the damages were not assessed as against the parties who were in default for the want of a plea. When a suit is brought on an instrument in writing for the payment of money, and no issue is found, but a default is entered, the Court may either direct the clerk to assess the damages, or they may be assessed by the Court, without the intervention of the clerk.

Where an issue is found by one defendant, and a default is entered against others, the Court or jury who tries the issue, must assess the damages against the parties defaulted. In this

a) Bradshaw vs. Hubbard, 1 Gil R. 366 and note.

case, the Court tried the issue, which was found against the defendant, when nothing remained to be done, but to compute the amount due upon the note, which was necessarily the amount of damages, to be assessed against all of the defendants, and for this amount judgment was entered against them. In this, there was neither error nor irregularity.

The last objection which we deem necessary to notice is, that a general judgment for costs was entered against all of the defendants served; whereas each should be held liable for the costs which he had made. It would, no doubt, appear to be unjust, to tax a party who had made no defence, with a large bill of costs, which an obstinate co-defendant had made, without hope of success and against his remonstrance. But this judgment is entered in the form which has, in such cases, been universally adopted in this State, from its first organization, and we do not feel at liberty to change it. With us, a general judgment for costs is entered, without specifying the amount. They are subsequently taxed by the clerk, and if any party is dissatisfied with the taxation, he may replevy the fee bill, as is authorized by the statute, and thus bring the matter before the court, for its decision. We express no opinion, whether the clerk could tax against each defendant, separately, the costs which he had occasioned, and issue a separate fee bill against each for their collections. When that question is brought before us we will examine it more attentively than we have done. It is enough for the present, that this judgment is in the proper form.

The judgment of the circuit court must be affirmed with costs.

Judgment affirmed.

WILLIAM W. LOW, Appellant, *v.* SAMUEL FREEMAN *et al.*, Appellees.

APPEAL FROM STARK.

A contract by which A. agrees to sell eight hundred bushels of corn, more or less, within a specified time, at a stipulated price, does not give the vendee a property in the corn in question. Something remained to be done by the vendor to ascertain the exact amount sold.

The remedy for a failure to perform, was an action for a breach of the contract. Replevin will not lie.

Low *v.* Freeman *et al.*

This was an action of replevin, brought in the Marshall Circuit Court. Low, the plaintiff below, took a change of venue to Stark county. The action was founded upon the contract set out in the opinion of the court. The defendants filed two pleas, first, that they did not wrongfully detain, &c.; second, property in themselves. The cause was tried before Kellogg, Judge, and a jury, at November term, 1850. The jury found for the defendants, and a judgment was entered accordingly. Low moved for a new trial, which was denied, and he thereupon prayed this appeal.

The sheriff who executed the writ, proved on the trial that he replevied two wagon loads of corn in Lacon, and the residue he took at the farms of the defendants. Low proved by another witness that he called upon the defendants for the corn, that they replied that he was too late, that he did not come according to the contract, that this was on the ninth of August. That the Freemans complained that they had not been furnished with sacks.

N. H. PURPLE, for Appellant.

O. PETERS, for Appellee.

TREAT, C. J. The foundation of this suit was the following contract: "We, Samuel Freeman and Elijah Freeman, have this day sold to Wm. W. Low eight hundred bushels of corn, more or less, at twenty cents per pushel, to be delivered at the mouth of Sandy, opposite of Henry, or at Wm. Fenn's warehouse in Lacon; if any thing should happen that Low could not get a boat to take it from opposite of Henry; to be delivered by the first of August next in merchantable good order, at the customary weight per bushel; received on this contract five dollars, and the balance of the money to be paid when all of the corn is delivered. SAMUEL FREEMAN.

"June 2d, 1849. ELIJAH FREEMAN."

The Freemans failed to deliver any corn under the contract. On the ninth of August, 1849, Low sued out a writ of replevin, under which the sheriff seized two hundred and eighty-three bushels of corn; fifty bushels of which were taken from the wagons of the defendants in Lacon, and the residue from the

farm of Elijah Freeman. The plaintiff's right to the property replevied was put in issue by the pleadings. On the trial, the Court instructed the jury in substance, that the contract did not vest the title to the corn in the plaintiff; and that ruling may be considered as presenting the whole merits of the case. We concur in opinion with the Circuit Judge. It is very clear that the written contract, by itself and without reference to the surrounding circumstances, did not show a sale of the property in controversy. The subject matter of the contract was corn generally, and not any particular lot of corn. The contract amounted at most to an undertaking on the part of the defendants, to deliver to the plaintiff eight hundred bushels of corn, at one of two places on the Illinois river, before a certain day, and at a stipulated price. It was in the power of the defendants to comply fully with their engagement, by the delivery within the time limited of that many bushels of corn, although they may have purchased the same after the contract was entered into. They agreed generally to sell, and the plaintiff to purchase, a given quantity of corn. The latter thereby acquired no property in the corn in question. It was insisted on the argument, that the contract should be construed as a sale of all the corn the defendants then had. We think otherwise. If that was the design of the parties, they certainly would have used very different and more definite expressions. The phrase "more or less" indicates no such intention. If any operation is to be given to these words, they must be understood as providing for any trifling variance in the amount of corn delivered. If on the measurement of the corn delivered, it should turn out that there were a few more bushels than the contract called for, the plaintiff might be bound to receive the excess; if on the other hand, a few bushels should be wanting, the mere failure of the defendants to make up the deficiency might not be considered a breach of the contract. Suppose the defendants had on hand at the date of the contract ten thousand bushels of corn, would it be contended that the plaintiff had purchased and was bound to take the whole? And suppose that between the making of the contract and the time fixed for its performance, this large amount had been destroyed by the elements, without the fault of the defendants, would it be contended that the loss should fall on the plaintiff? And these conclusions would inevitably follow, if the construction

insisted on is correct. By this construction, if the defendants were the owners of but one hundred bushels of corn they might by delivering that amount have entirely discharged the contract. If it was proper to construe this contract in the light of the circumstances disclosed by the evidence, the rights of the plaintiff would be precisely the same. It would as clearly appear that he acquired no title to the property in controversy. The corn in the possession of the defendants, when the contract was made, was unthrashed, and not in a condition to be measured. Labor had to be done upon it before it could be delivered.. In such case the title would not pass to the plaintiff. "Although a contract for the sale of goods be complete and binding in other respects, the property in them remains in the vendor, and they are at his risk, if any material acts remain to be done before the delivery, either to distinguish the goods or ascertain the price thereof." (*a*) Chitty on Contracts, 375. In any point of view, we are clearly satisfied that the plaintiff acquired no such interest in the corn in question, as would authorize him to maintain replevin for its recovery. His remedy was an action for the breach of the contract to deliver the corn.

The judgment is affirmed.

Judgment affirmed.

ISAAC WALKER, *et al.*, Appellants, *v.* JOSEPH ELLIS, Appellee.

APPEAL FROM PEORIA.

Where there is a tenancy for a period of more than one year, no notice to the tenant is required, in order to entitle the landlord to possession, upon the expiration of the first term. (*b*)

If a minor contracts to sell real estate, the contract cannot be enforced, if he refuses after his majority to sanction it.

This was an action of forcible detainer, originally commenced before a justice of the peace, of Peoria county, and afterwards brought into the Circuit Court of said county, by appeal; and a trial was had at the September term of said Court, A. D., 1850; which trial resulted in a verdict and judgment against said plaintiffs in error, who were defendants below, for the possession of the property described in the petition.

The petition stated in substance, that on the 8th day of July,

(*a*) Updike vs. Henry, 14 Ill R. 379.
(*a*) Secor vs. Pestana, 37 Ill. R. 525

1845, Ellis leased to A. Van Eps, all that certain piece or parcel of land, lying on Main street, two lots above Mr. Pettingill's new brick building on Main street, being twenty feet front, running back seventy-two feet from front to back part of said lot, for three years, commencing June 1st, 1845, and ending June 1st, 1848, for the consideration or rent of $15 per year; which lot is more particularly described as follows, (setting it out by metes and bounds,) and on which is a tinner's shop.

That about 19th September, 1846, Van Eps died, and James Taylor was appointed administrator, &c.; and afterwards, and before said term expired, said Taylor, as administrator, assigned, sold, and transferred said lease and term to plaintiffs in error; and the plaintiffs in error, on the 14th of December, 1846, entered upon said premises, and held and occupied, have held and occupied, the same; and from thence, hitherto, have held and occupied the same as the tenants of defendant in error, and have acknowledged him as their landlord and, as such, have paid him rent. That on the 1st day of December, 1848, defendant in error, demanded possession of said premises of plaintiffs in error, and notified them to quit, and deliver possession of said premises to defendant in error; which they refused, and still hold possession against the will of defendant in error; and charges forcible detainer, &c.

At September term, 1850, plaintiffs in error moved the Circuit Court to dismiss said petition and suit, on the ground of the insufficiency of the petition; which motion was overruled. At said September term, 1850, said cause was tried before Kellogg, Judge, and a jury. Verdict and judgment for plaintiff. Evidence was, in substance, on the part of the defendant in error, as follows:

Said defendant in error read in evidence a contract, in the words and figures following, to wit: "Peoria, Illinois, July 8, 1845. Articles of agreement, entered into this eighth day of July, 1845, between A. Van Eps on the first part, and J. Ellis, the second part, all of the town of Peoria. The said Ellis lets to A. Van Eps, a certain piece of ground, lying on Main street, two lots above Mr. Pettingill's new brick building, being twenty feet front to back part of lot, for the term of three years, commencing on the first day of June, A. D., 1845, and ending on the same date, 1848; for the consideration of $15 per year, with

the taxes to be paid. Also, A. Van Eps has the privilege of buying said lot within one year, at the price of four hundred dollars, on trial from one to two years. The walk is to be brick, by J. Ellis. Signed, A. Van Eps, Joseph Ellis."

On the back of which, was the assignment of James Taylor, as administrator and guardian of the heirs of A. Van Eps, deceased, to plaintiffs in error, of all the right, title, and interest of the said Van Eps, deceased, to said contract and lot, dated December 9th, 1846.

William Ellis also testified, on the part of the defendant in error, that he was brother of defendant in error; that Van Eps died in September, 1846; that plaintiffs in error went into possession of property in fall of 1846 or winter following, and have continued in possession thereof ever since; that the residence of defendant in error then, was Peoria. That soon after the date of said contract, he went to Indiana, and did not return till June, 1848. Van Eps called on witness in summer of 1846; and enquired where defendant in error was; and said he wished to make first payment on the purchase of the lot; that he had the gold, and wished witness to receive it for defendant in error: that Van Eps frequently made the same request. Witness declined receiving the money, not being authorized to act for him. Van Eps then desired to know where the defendant in error was, as he wished to write to him; but witness could not tell him. After Van Eps' death, about November, 1846, Taylor paid witness, for defendant in error, $15, as the amount due him on said agreement. Witness supposed plaintiffs in error went into possession under an assignment of said contract. Defendant was under age at time contract was made. He was born in 1825. That part of the time defendant in error was gone, from 1845, to June, 1848, his family did not know where he was.

On the part of plaintiffs in error, James Taylor testified, that he was guardian of the heirs and administrator of the estate of Van Eps; that he was called by Ellis and Van Eps, in September 1845, to witness their contract; at which time, at their request, he signed his name as witness to the contract. Van Eps then agreed, at the earnest request of said defendant in error, to buy said property on the terms in said contract, and told defendant in error the money would be ready as it became due. This was agreed to by both. Van Eps was not to pay interest, but

was to pay $15 per year till last payment would become due The lot was then vacant. Van Eps built a house on it, and when witness assigned the contract to plaintiffs in error, he sold also the house, tools, &c., and all rights under the contract, whatever they were ; and at the same time, witness told plaintiffs in error that Van Eps had elected to buy the lot under the contract, and it was agreed to by the defendant in error ; and that the plaintiffs in error went into possession of said property, under said purchase from witness. That witness did recollect telling Mr. Ellis [the first witness] that he should not complete said contract of purchase ; but did not recollect telling him, that he had been told by the probate justice that he could not as administrator fulfill said contract, and did not know that he had the power to do so, but never intimated that he had not the means to do so. That after Van Eps' death, he found $100 in gold, in a package marked J. Ellis among Van Eps' effects.

That soon after defendant in error returned in 1848, plaintiffs in error tendered to defendant in error the amount due for the purchase of the lot and interest ; which he refused to accept, alleging he was a minor when contract was made. A previous tender of $100 was made and refused. Witness then asked him, if he was not of age when contract was witnessed by witness ? and he said he was ; he afterwards said, he was then mistaken as to his age. This was at last tender.

H. O. Merriman, for Appellants.

The lease took effect June 1, 1845, for three years, reserving annual rent ; and the demand of possession was [not] made till December 1, 1848 ; and the petition, dated December 2, 1848, alleges, that "Defendants have hitherto occupied, &c.," as tenants of Ellis. This is an allegation of tenancy or lawful occupancy, after June 1, 1848, and created a new tenancy for a year from that date ; and the petition should have been dismissed.

The proof showed that appellants occupied the premises for the time stated in the petition, by the acquiescence of the appellee ; thereby creating such new tenancy : and the court erred in refusing to give the instruction asked for by appellee. 4 Kent Com., p. 111, 112, 113, 114, 116 ; Jackson *v.* Salmon, 4 Wend. 327 ; Weller *v.* Shearman, 3 Hill, 549 ; Sherwood *v.* Phillips, 13

Wend., 479., 6 B. & C. p. 125, in 13 Eng. Com. L. R., 118; Mashire *v.* Reding, 3 Fairfield, 478 ; Coffin *v.* Lunt, 2 Pick. 70 ; Conway *v.* Starkweather, 1 Denio, 113.

Appellants claimed under contract of purchase, and the relation of landlord and tenant did not exist ; and a new trial should have been granted. Whitaker *v.* Gautier, 3 Gil., 443.

Such holding over is not willful. Hall *v.* Balantine, 7 J. B., 536, and cases there cited ; R. L., p. 256, sec. 1.

E. N. Powell, for Appellee.

The complaint is sufficient. It clearly shows, that the premises in question were demised by the appellee to Van Eps, for three years ; and that appellants came into possession under the administrator of Van Eps, and as the tenant of Ellis, and paid him rent. It also shows that the tenancy had expired, and that demand had been made in writing for the possession ; and that the appellants persisted in holding over.

This is all that can be required. It does not require the same strictness as might be required, were it a proceeding originally brought in the circuit court. See Ballance *v.* Fortier, 3 Gilman, 291 ; Smith *v.* Kellick *et al.*, 5 Gilman, 293.

It is well settled that, in trials by jury, the weight of testimony is a question to be decided by the jury exclusively, and their decision cannot be assigned for error. And in order to warrant a new trial, it must be flagrant to justify a court in disturbing the verdict. Johnson *v.* Maulton, 1 Scam., 532 ; Eldridge *v.* Huntington, 2 ibid, 538 ; Webster *v.* Vickers, 2 ibid, 296 ; Harmon *v.* Thornton, 2 ibid, 354 ; Lowry *v.* Orr, 1 Gil., 70, and authorities cited in the argument.

If a tenant for a year hold over by consent, he then becomes tenant from year to year, (4 Kent, 112,) and becomes entitled to notice to quit. But a tenancy from year to year, cannot be created out of a tenancy for a certain and definite number of years. 4 Kent, 112, 113, 114, 115, 116 and 117 ; Rowan *v.* Lytle, 11 Wend., 616 ; McKay *et al. v.* Mumford, 10 Wend., 351.

Caton, J. The complaint in this case was abundantly sufficient.

On the trial, the plaintiff below introduced and proved a lease

of the premises in question to Van Eps, for three years from the first of June, 1845, in consideration of fifteen dollars per year. The lease concludes with the following provision: "Also, A. Van Eps has the privilege of buying said lot within one year, at the price of four hundred dollars, on time from one to two years." The evidence shows that Ellis, soon after the execution of the lease, left the state and was absent until about the time of the expiration of the term; and that his friends did not know where he was. During the summer of 1846, Van Eps called on a brother of Ellis, and inquired where he was, and said he wished to make a payment of one hundred dollars on the purchase of the lot, and wished the brother to take it; who, however, declined to receive the money, because he had no authority to do so. During the fall of 1846, Van Eps died, and Taylor was appointed administrator of his estate, and guardian to his children, who were all infants. In the fall or winter of 1846, Taylor, as such administrator and guardian, assigned the agreement to Walker & Lightner, who soon after took possession of the premises, which they held till the commencement of this suit. In the summer of 1848, and soon after Ellis returned to Peoria, the defendants tendered to him some gold, which they said was the full amount due for the purchase of the lot; which Ellis refused to accept, alleging that he was a minor at the time the agreement was executed. The evidence shows, that he was about twenty years of age at that time. A demand in writing, for delivery of the possession of the premises, as is required by the statute, was made on the first of December, 1848, and on the same day this suit was commenced. The jury found a verdict for the plaintiff, which the Court refused to set aside; and, we think, properly. No tenancy from year to year had existed in this case, which by the rule of the common law would entitle the tenant to a half-year's notice to terminate the tenancy. Here was a tenancy for a determinate period of more than one year; and no notice was required previous to the termination of that lease, in order to entitle the landlord to the possession of the premises upon the expiration of the first term. (*a*) Had the tenants, after that time, continued in possession for another year, with the consent and approbation of the landlord, then a tenancy from year to year might be presumed; and which, according to the rule as held in England and many of the United States

(*a*) Secor vs. Pestana, 37 Ill. R. 525.

would continue from year to year, until one party should notify the other, six months previous to the end of the year, of an intention to determine it. This doctrine of notice has no application whatever to this case. Had there been evidence showing that the landlord had acquiesced in the holding over of the tenants, then the jury might have inferred a new lease, for a longer or shorter term, not exceeding one year, according to the nature of the evidence; and until the end of that term, this action could not be maintained. But there was no such evidence, and the jury have found no such new tenancy.

The only remaining question is, whether the appellants were entitled to hold as purchasers in possession, under the clause in the lease providing for the sale of the premises. It is clear that Van Eps took possession as tenant under the lease, and not as purchaser; and as the evidence stands in this record, it makes no difference whether he subsequently determined to purchase the premises or not, under the clause professing to give him that right, or whether he did such acts in performance as would entitle him to the benefit of it. At the time of the execution of that agreement to sell, if as such it may be considered, the plaintiff was yet a minor; and this record fails to show a single act done by him, after he attained his majority, which can be construed into an affirmance of the agreement. As before remarked, immediately after he executed the lease, he left the country, and did not return until about the time, or after the term thereby created had expired; and when the defendants, soon after, offered to go on and complete the purchase, he repudiated the agreement to sell, upon the ground that it was not binding upon him, for the reason that he was not of age when he made it. This, of itself, is a sufficient answer to the claim of the defendants to hold the premises as purchasers, laying aside all question of the authority of Taylor to sell and assign to them the agreement.

The judgment of the Circuit Court must be affirmed, with costs.

Judgment affirmed.

HERVEY LOWE, Appellant, *v.* WILLIAM S. MOSS, Appellee.

APPEAL FROM LA SALLE.

The receipt by the owner of a part of a lot of goods *in transitu*, does not discharge a common carrier from liability as to the remainder.

The object of a bill of exceptions, is to place upon the record some fact, or ruling of the Court, which would not appear without it, and if it fairly presents the point sought to be raised, it is sufficient.

If a common carrier is prevented, by ice or low water, from delivering goods, his liability to deliver them within a reasonable time, after the cause of detention is removed, continues.

This was an action on the case for not delivering goods, received by Moss as a common carrier. Plea, general issue, with notice that Moss would prove that he was prevented by the act of God, from delivering the goods.

Lowe proved the ownership of the goods, and their shipment on board of the boat of Moss, in good order and condition. That Moss stored the goods at Hennepin, (they having been shipped for La Salle,) without the consent of Lowe, and collected freight for the whole voyage. It was also in evidence, that 2278 pounds of sugar were destroyed while in store at Hennepin, that Lowe paid for the storage of the goods at Hennepin. Moss proved that he was prevented from reaching La Salle, by ice in the river. That Lowe, prior to the rise of water in the river, which destroyed the sugar at Hennepin, carried away a portion of the goods.

The cause was submitted to T. L. Dickey, Judge, without the intervention of a jury, at April term, 1851, and judgment was given for defendant.

A bill of exceptions was taken, setting forth all the evidence, which concluded as follows: "And the said Circuit Judge, did then and there give his opinion, and decide that a receipt of part of the goods, by the plaintiff, prior to their being damaged, was a release of the defendant's further liability, as a common carrier, and rendered a judgment in favor of the defendant, to which opinion of said judge, the plaintiff excepted, and made motion for a new trial, which was overruled by the said judge, to which decision the plaintiff excepted, and prays that this, his bill of exceptions, may be signed and sealed by the said judge, which is done."

WILLIAM CHUMASERO, for Appellant, cited Angel on Com-

mon Carriers, 282-3, 299 ; 14 Wendell, 217 ; 23 Wendell, 306 ; 4 Blackford, 260.

Glover & Cook, for Appellee, cited 4 N. H. 261.

Trumbull, J. The plaintiff, a merchant of Joliet, shipped a lot of goods at St. Louis for La Salle, on board the steamboat Avalanche, of which the defendant was master, and this action was brought to recover damages, for a failure to transport and safely deliver the goods at the port of destination.

The record shows, that the goods, among which was a quantity of sugar, were shipped late in the fall, and that the Avalanche, in consequence of the ice, was unable to reach La Salle, whereupon the goods were stored at Hennepin, without the knowledge or consent of the plaintiff ; that subsequently, and before any injury to the goods, the plaintiff took part of them away ; that the sugar remained in the warehouse, at Hennepin, till the July following the fall, when they were shipped, and in the mean time were injured by the high waters of the Illinois river, and that the defendant charged and received freight for the transportation of the entire lot of goods to La Salle. Upon this state of facts, the Circuit Court decided, that a receipt of part of the goods by the plaintiff, prior to their being damaged, was a release of the defendant's further liability as common carrier, and gave judgment for the defendant.

This decision of the Court, which was excepted to at the time, is now assigned for error.

A preliminary question has been raised, that the case having been tried by the Court, without the intervention of a jury, no such decision of the Court, has been excepted to, as can be assigned for error.

The object of a bill of exceptions, is to place upon the record some fact, or ruling of the Court, which would not appear without it. The bill of exceptions, in this case, shows the decision of the Court upon which the case turned, and fairly presents the point sought to be raised by the plaintiff.

We are at a loss to perceive upon what principle, the receipt of part of a lot of goods in *transitu*, by the owner should be held to release a common carrier from further liability, in reference to the balance of the goods.

It often happens, that a merchant, traveling upon the same steamboat, upon which he may have a quantity of goods, finds it expedient, in consequence of some detention which may have happened to the boat, from low waters or some other cause, to leave her and take a more rapid conveyance with such light articles of merchandise as he can conveniently take with him, and it was never supposed, that in such a case, the owner of the boat was thereby discharged from his obligation to deliver the remaining goods at the port of destination, or from any liability for their safety, which might properly attach to him as a common carrier.

It may be that the common carrier, in such a case, would be entitled to the full price for the transportation of all the goods notwithstanding the withdrawal of a part by the owner before they reached the end of the voyage, but it is clear that his liability for the goods remaining with him, would continue the same as if none had been taken away.

In this case, the freezing up of the river may have been a sufficient excuse for the non-delivery of the goods at LaSalle, that season, and the defendant may have been justified under the circumstances in storing them at Hennepin, but his obligation to deliver them at LaSalle, within a reasonable time after the resumption of navigation, still continued, unless the plaintiff had agreed to receive them at Hennepin, or in some other way released the defendant from his original undertaking.

The fact, that the plaintiff took from the place where they were stored, part of the goods which would justify hauling by land, released the defendant from all future liability in reference to the goods thus taken away, but it would not of itself relieve him from his obligation to deliver the balance of the goods according to his original contract.

It would be a great hardship, if a merchant who had a stock of goods detained upon one of our rivers, by ice or low water, within a few miles of his place of doing business, could not be permitted, at his own expense, to send for such articles as could be conveniently transported by land, without discharging the common carrier from all responsibility, in reference to the goods left with him.

Judgment reversed, and cause remanded.

Judgment reversed.

THE BOARD OF SUPERVISORS of the County of La Salle, Pltffs in Error *v.* THE TOWN OF SOUTH OTTAWA, Defts in Error.

AGREED CASE FROM LA SALLE.

The board of Supervisors, in such counties as have adopted the township organization, are required to provide for the support of the paupers of the county. There is no foundation for a distinction between county and town paupers.

The town of South Ottawa, brought an action in the LaSalle circuit court, against the board of supervisors of that county, to recover the sum of one hundred dollars, for the support and care of a pauper, from June 1st, 1850, to March 25th, 1851. A jury was waived, and the cause was submitted to the court for trial. T. L. Dickey, Judge, presiding, the finding was for the plaintiffs, damages assessed at fifty-two dollars and fifty cents, and a judgment accordingly. The defendants excepted to the finding of the Court. The following agreement was filed of record: "It is hereby agreed that the only questions of law, arising in this case are as follows: Are the boards of supervisors of those counties organized under the act entitled, "An act to provide for township and county organization, under which every county may organize whenever a majority of voters of such county, at any general election, shall so determine." Approved, February 12th, 1849, required by that law to provide for the support and maintenance of paupers, or are the towns of such counties, required by the same law to support the paupers within their limits? It is agreed also that LaSalle county is organized under said act, and that the town of South Ottawa, is one of the organized towns of said county. It is further agreed that if the Supreme Court decide, that the Board is required by the act aforesaid, to support paupers, the judgment herein shall be affirmed, and if the said court decide that the towns are to support their own paupers, the judgment is to be reversed."

E. S. LELAND, for Pltffs in Error.

CHAMPLIN & WALLACE, for Deft in Error.

Towns are not liable, at common law, for the support of paupers. 14 Mass. R , 399 ; such liability must be created by express statute.

The statute of this State, have created a liability in the county to support paupers. R. S. ch. 80, § 3, 4, 6, 7, 8, 12 & 15. This liability has not been changed by the township law of February 12, 1849. Art. 5, § 2 ; Art. 6, § 2 ; Art. 11, § 1 ; Art. 11, § 5 ; Art. 16, § 3 & 13 ; Township law of February 12, 1849. These are all the provisions of the act of February 12, 1849, in any manner relating to the subject of paupers.

It could not have been the intention of the legislature, that enacted the law of Februay 12, 1849, to change the liabillity of the county, and impose it upon the towns. The act of February 17, 1851, which remodels and repeals the act of February, 1849, contains the same provisions as the act of 1849. Session Laws, 1851, p. 35. That same legislature passed laws requiring the towns of the counties of Lake and Tazewell, on certain conditions, to support the paupers within their limits. Session Laws, 1851, p. 183 & 195 ; Art. 11, § 1 & 5, and Art. 16, § 13, Township Law of 1849, are conflicting, and the latter section must prevail. Dwarris Stat., 658 ; 6 Dane's Digest, 588, § 17, *ibid*, 591, § 8; 1 Kent's Com., 463.

Trumbull, J. This case presents the question, whether the board of supervisors of such counties as have adopted the township organization, are required to provide for the support of the paupers of the county, or whether each town is required to support its own paupers.

At the time the county of La Salle adopted the township organization, and at this time, in all counties where it has not been adopted, the poor are a county charge, for the support of which, the county commissioners' court is required to provide. Unless, therefore, there is somthing in the act, providing for a township organization, which changes the burden of providing for the poor, from the county to the towns, it would seem that the county would still be required to make that provision.

That the act to provide for township and county organization, contains no direct provision, making it the duty of each town to provide for its own paupers, is admitted ; but it is said that such a duty is inferrable from various provisions of that act. If this were so, it would be sufficient answer to all such inferences to say, that the act makes no provision whatever, whereby the towns are to raise the means to support their poor. But the legislature

have not left this question doubtful or uncertain. In the thirteenth section of the sixteenth article of the act to provide for township and county organization, in force April 16, 1849, it is expressly declared whose duty it shall be to provide for the poor. That section is as follows: "It shall be the duty of the board of supervisors to take charge of the poor, and the management of the poor houses in their respective counties, that is given to the county commissioners' court, and the overseers of the poor of the several towns shall be accountable to, and their compensation shall be audited by the board of supervisors, and paid by the county."

It is difficult to conceive how the legislature could more clearly have expressed their intention, that the board of supervisors should take charge of the poor at the expense of the county.

There is no foundation in the act for a distinction between county paupers and town paupers. Such a distinction had never, at that time, been recognized as existing in this State, and the plain, obvious meaning of the act is, that all the poor of the county shall be maintained at the expense of the county.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

TERAH B. FARNSWORTH, impleaded, &c., Pltff in Error, *v.* JOHN STRASLER, *et al.*, administrators, &c., Defts in Error.

ERROR TO JO DAVIESS.

It is no proper province of a court of equity, to remove impediments formed by fraudulent conveyances to the collection of money decreed in chancery as well as of judgments at law. (*a*)

If, by a reasonable and natural construction, the meaning of the Sheriff's return to a writ, is, that service was properly made, it is sufficient.

If a bill is answered, the complainant may require the evidence he has advanced to be preserved in the record; but a defendant, who has allowed the bill to be taken for confessed, has no such right, it lies in the discretion of the Court to hear, if it chooses, corroborative testimony on any or all the allegations of the bill.

If the Circuit Court appoint a special commission to execute its decree, it will be presumed to have done so for good reasons, whether they appear on the record or not.

The right of redemption, does not extend to all sales made under a decree in chancery. (*b*)

This was a bill filled by the administrator and administratrix of the estate of Henry Schneider, deceased, showing that at April

(*a*) Weightman vs. Hath, 17 Ill. R. 281.
(*b*) West vs. Fleming, 18 Ill. R. 248; but as to Mechanic's Lien, Laws 1869.

term, 1849, a decree obtained against Terah B. Farnsworth ordering and adjudging that he should pay them in their representative capacity, $187.50, and costs of suit, for pay and compensation for a building and improvements, put upon lot twenty-two in the town of Galena, by said Schneider, in his life time. That an execution had issued upon said degree, and to which the sheriff returned that he could not find any personal or real property of said Farnsworth, on which to levy, except said lot twenty-two, upon which he made a levy. That on the thirtieth day of May, A. D. 1843, the said Farnsworth, being seized in fee of said lot of land, for the pretended consideration of $5,000.00, executed a deed thereof to his sister. That afterwards, on the 22d of September, 1845, the said sister, being about to marry, the said sister and her intended husband executed a deed of conveyance, purporting to convey said lot to said Terah B. Farnsworth, in trust, for the separate use and benefit of his said sister. That immediately afterwards said sister married. That at all times, since the conveyance, first aforesaid, by Farnsworth to his sister, he had been in the continuous occupation of said lot, receiving, using, and disposing of, as of his own right, the rents and profits thereof.

That said Farnsworth, before and since the said conveyance, first named, was, and still is insolvent. That he has no property out of which debts can be collected by law. That the said conveyances were made to hinder and delay his creditors. And prayed that the said parties answer, waiving answer under oath, and that the said conveyances be set aside, and for such other relief, &c., &c.

The parties were summoned; the returns to the process are stated in the opinion of the court.

The bill was taken for confessed. At May term, 1850, Sheldon, Judge, presiding, the Circuit Court of Jo Daviess, decreed upon bill, exhibits and proofs of record, written and oral, that the said conveyances be set aside, and that the lot of land was subject to the payment of said decree. That said Farnsworth pay the amount of said decree in sixty days, and in default thereof, the sheriff of Jo Daviess, was appointed a special commissioner, to sell the same after giving twenty days notice, and upon making sale to execute a deed, after sale, to pay the

decree and costs, and to hold any excess subject to the order of the court.

The respondants sued out this writ of error, assigning for error. The rendition of the decree. The decreeing the property to be sold, absolutely without any redemption. The appointment of a special commissioner. And that the returns of the service of process were so defective that a decree *pro confesso* should not have been rendered.

R. S. Blackwell, for Pltffs in Error.

The service on Frink and wife defective. R. S. 94, §7 ; Montgomery *v.* Brown, 7 Illinois, 581. There is no specific allegation of fraud on the part of Frink and wife. Elston *v.* Blanchard, 3 Illinois, 420. Hovey *v.* Holcomb, 11 Ill., 660. The bill does not make exhibits of the fraudulent deeds. 1 Daniel's Ch. Prac., 475. Redemption ought to have been allowed. R. S., 302, § 12, 13, 14.

The evidence upon which the court based the decree, is not incorporated in the record. R. S., 95, § 19 ; White *v.* Morrison, 11 Illinois, 361.

The decree ought to have directed a sale by the master, or some excuse should be shown upon the record, why a special commissioner was appointed. R. S. 99, § 51.

V. H. Higgins, for Appellees.

Cited, 3 Scammon, 575, 204 ; 3 Gilman, 523 ; 1 Paige, 304 ; 2 Paige, 54 ; 2 Blackford, 421 ; 1 Littell, 302 ; 9 Wendell,548; 6 Ham., 233 ; 3 Paige, 320 ; 5 Blackford, 396 ; Story's Eq. Pl., §429 ; 6 Monroe, 82 ; 7 ibid, 263 ; 3 Paige, 606 ; 11 Ill., 665. As to term "charges." Cooper's Eq. Pl., 6 Lobe's Eq. Pl., 207 ; 1 Dun., Ch. Prac., 377, and note 2 ; ibid, 411 and notes ; Story's Eq. Pl. § 28. As to necessity of preserving evidence. 4 Gil., 517; 3 Gil., 547. As to right of redemption. R. S., 305, § 24 ; ibid 93, § 44, 45. Party complaining of an error must show that he is prejudiced thereby. 3 Blackford, 331 ; 4 Gil., 516; 3 Gil., 76; 5 Gil., 26. Reference to the deeds on record was sufficient. 1 Duncan's Ch. Prac., 414, and 420.

Farnsworth alone prosecutes this writ of error, does not lie in his mouth to object. 4 Gil., 516 ; 3 Blackford, 331. As to right

of redemption. R. S., p. 305, § 24 ; 1 Gil., 574. The service of process was good. 2 Howard's Miss. R., 683 ; 2 Scam., 18, 457.

Caton, J. It is first objected that this bill is insufficient. This objection is not well taken. The bill alleges that at the April term, 1849, of the Jo Daviess County Court, the complainant obtained a decree against the defendant Farnsworth for the sum of $187.50, upon which an execution was issued which was levied upon the premises described in the bill. The bill further alleges that in May, 1843, Farnsworth conveyed the premises to Harriet Farnsworth, and that in September, 1845, Harriet and the defendant Frink, being about to. intermarry, conveyed the premises to T. B. Farnsworth, in trust, for the separate use of the said Harriet, immediately after which, the said John and Harriet were intermarried. The bill further shows, that at the time of the first conveyance, and ever since, T. B. Farnsworth was, and hath been utterly insolvent, and that all of said conveyances were made to defraud his creditors. The bill prays that the conveyances may be set aside, and that the premises may be sold for the payment of the amount due to the complainants upon their said decree, and for general relief. Here are all of the essential averments of a creditor's bill. Such a bill may as well be filed to aid in the collection of money decreed in chancery, as of a judgment at law. By our statute, an execution may be issued for the collection of one as well as the other. Here were fraudulent conveyances, which were impediments in the way of collection of the amount commanded to be made by the execution, to remove which, is the proper province of a court of equity. The bill was sufficient.

It was next objected, that the summonses were not properly served on the defendant. To the one issued to the sheriff of Jo Daviess county, he returned it with this endorsement, "executed the within, by delivering a certified copy to the within-named Terah B. Farnsworth, this twenty-fifth day of July, A. D. 1849," &c., The service was abundantly sufficient. The whole return taken together shows that the sheriff left a certified copy of the writ with the defendant. That such was the reasonable and proper construction of the return, we have no doubt. Words may be implied in an officer's return, as well as in other written evidence, where such implication is justified, by what is expres-

sed. By the same rule, we find the service to have been sufficient on Frink and wife. The sheriff of Cook county returned the summons which was directed to him with the following endorsement on the back, "executed by reading and delivering two copies to John Frink and Harriet G. Frink, this 29th day," &c., although this return is not quite as full as the first, still it leaves no doubt as to its meaning. We cannot understand that any thing but the writ upon which the return was endorsed was executed. If the writ was not thus executed, the parties could maintain an action for a false return against the officer. All of the defendants were properly in Court, and the bill was regularly taken for confessed, against them.

It was also objected, that the evidence which was heard by the Court, not being preserved in the record, it does not appear that there was enough to warrant the decree. It has been already decided by this Court, in the case of Manchester et al. *v.* McKee, et al., 4 Gilman, 511, that where a bill has been regularly taken for confessed, it cannot be assigned for error, that the averments were not proved. The party cannot be allowed to deny, what he has, in contemplation of law confessed to be true. But it was said that inasmuch as the Court did require proof, it manifested a determination not to proceed upon that confession, and that when proof is required,—when the Court has determined to proceed upon the proofs, then they should appear to have been sufficient. But the right of the Court to act upon the admissions of the parties, is not abandoned because corroborating proof is required. The Court may have desired to have heard proof upon some of the allegations, and not upon others. The amount of corroborating proof to be required, was within the discretion of the Court. The Court might require all the allegations of the bill to be proved, the same as if they had been denied by an answer, but it was certainly not bound to require proof to that extent. It might even listen to evidence not strictly admissible, had an issue been formed, and yet the position of the parties, would preclude them from objecting to it. The whole was within the discretion of the Court. It is true, that in a case where the complainant does produce legitimate evidence, sufficient to maintain his case, had the allegations of his bill been denied by an answer, then that discretion closes, and he is entitled to a decree and it would be error in the Court to refuse it. In such a case, and in

such only, would it be the duty of the Court, on the application of the complainant to preserve the evidence in the record. But the defendant, who has allowed the bill to be taken as confessed, can never require this to be done.

We cannot say that the circuit court erred in appointing a special commissioner or master, to carry the decree into execution, although it was business properly appertaining to the duties of the resident master in that county, yet the court was vested with the authority to appoint the special commissioner, to execute the decree, and we will presume that this change, from the ordinary course, was made for sufficient reasons, and the court was not bound to spread those reasons upon the record. (*a*)

The last objection which was made, is, that no redemption was allowed from the sale which was ordered to be made by the decree, and in support of the objection, our statute, which allows the same redemption from the sales of mortgaged premises, upon the foreclosure of the mortgage, which is allowed from sales made upon executions at law, was cited. This statute only applies to the class of sales mentioned in it, and we are not at liberty to extend it by construction to all sales made in pursuance of a decree of a court of equity. The court having acquired jurisdiction of the matter, was authorized to do complete justice between the parties, by ordering the premises to be sold to satisfy the amount due upon the former decree, and the considerations of clemency, which induced the passage of that statute, do not exist where premises have been covered up for many years by fraudulent conveyances, and kept from the reach of creditors.

The decree of the circuit court must be affirmed, with costs.

Decree affirmed.

THE TRUSTEES of the Illinois and Michigan Canal, Appellants, *v.* DANIEL BRAINARD, Appellee.

APPEAL FROM THE COOK COUNTY COURT OF COMMON PLEAS.

The Canal Trustees have all the powers in relation to laying out towns upon canal lands that was conferred upon the Board of Commissioners.

Purchasers of canal lands, whether by pre-emption or at public sales, can only purchase in lots and legal subdivisions.

The trustees are authorized to sell lands in such legal subdivisions as they ma

(*a*) Grubb vs. Crane, 4 Scam. R. 155 and note.

think best, in quarter, quarter sections, or otherwise, and the right of pre-emption is limited to the lands on which the improvements are made.

The pre-emptor cannot purchase, until the trustees are authorized to sell, and if it is made their duty to subdivide the lands into town lots and cause them to be appraised, the pre-emptor can only purchase such lots as embrace his improvements,

Whether the party claiming a pre-emption entered as a trespasser, or under license, he is equally entitled to the benefit of the law.

The right to pre-emption, is not restricted to the person who was the owner, at the time the improvement was made, but to the person who was the owner, when the land was brougnt into market.

Brainard filed his bill in the Cook County Court, setting forth that in October, 1841, one James H. Scott obtained from the agent of the canal lands a permit or right to occupy the north-west quarter of section twenty-one, in township thirty-nine, north range fourteen, east of the third principal meridian, at which time he executed a bond to the State, in the penalty of one thousand dollars, conditioned as the law directs. That in pursuance of this permit, Scott entered upon the land in 1842, with the intention of making a farm of the whole quarter section, and purchasing it whenever it should be offered for sale that he broke up, fenced, and raised a crop upon about twenty acres of the quarter section, and from that time until the autumn of 1846, Scott was the sole occupant, in his own person, of the quarter section, that in that autumn Scott's house was burnt. That soon after, Scott built another house, which was continued to be occupied by a tenant, the premises being used solely and exclusively for farming purposes. Scott built a barn upon the premises, and dug for two wells, one well was on the east and the other on the west half of the two eighties of the quarter section. This was canal land. The bill refers to the laws of the General Assembly, passed in relation to canal lands, referred to in the opinion. That Scott, in 1846, filed a petition with the Board of Trustees, claiming a pre-emption and the right to purchase the land at the appraisal, and made proof in support of the petition. That in August, 1848, Scott sold and transferred to Brainard. Sets forth the offer to pay $\$7{,}167.61\frac{1}{2}$, being the one-forth part of the appraisal and the interest on the balance, and his three notes of hand, as is required by law for the payment of canal lands. That the tender was waived, and the sale of the land refused by the Canal Trustees.

The prayer of the bill was for an injunction, restraining the Canal Trustees from selling the land to any other person, and that the land should be sold to Brainard at its appraised value.

The answer of the Trustees, states that they have no personal knowledge of the permit to Scott. Denies that any improvements were made by Scott, previous to 1st December, 1842, upon the land, except by ploughing and fencing, and raising a crop upon about twenty acres, on the north-east corner of the quarter section.

That the other improvements, as they are informed, were made subsequent to 1st December, 1842, and will not aid in procuring a pre-emption. That Scott had not resided on the land up to, or in the month of March, 1843. That the land before, and at the time, and ever since, Scott made improvements upon it, was within the limits of the City of Chicago, and that the land is valuable for city lots. That if Brainard is entitled to a pre-emption he is only entitled to the twenty acres first improved. That the quarter section has been laid off into lots under authority of law. That the quarter section was appraised by lots. That they are bound to sell in lots. That they offered to sell lots 57 and 58, at the appraised value to Brainard. That the lots would bring much more at public sale, than they were appraised at.

Proofs were taken, and the cause was heard by Spring, Judge of the Cook County Circuit Court, who entered a decree in favor of Brainard, to complainant, at February term, 1851. The Canal Trustees appealed from this decision.

The proofs taken sustained the allegations of the bill.

I. N. Arnold, for Appellant.

The statute of 21st of February, 1843, and amendments of the 4th of March, 1843, are to be construed together. No rights had accrued under the first, until long after the second had been passed.

Rule of construction: They are to be regarded and construed as public grants (as they virtually are). The rule is, "Public grants should have a construction most favorable to the grantor; for being made by a trustee, for the public, no alienation should be presumed that is not clearly expressed." 5 U. S. Dig., 87, sec. 17; Hagan *v.* Campbell, 8 Porter, 9. This rule ought to be rigidly applied to this fund. The state was its trustee by the government of the United States, and as such should guard it from spoliation.

What is the construction of the act? If one can be found which is fair and just toward settler, and will give him all that in equity and good conscience he is entitled to, will the court torture the language and do violence to the intention of the Legislature, by lending itself to these claimants? The true construction is, to give to the claimant the smallest legal subdivision, or so many of them, as will embrace his entire improvements. Surely this is fair and just. The application of Skinner as trustee, was to purchase s. e. $\frac{1}{4}$ of sec. 21, t. 39, &c. Trustees decided to allow blocks 3 and 16, and refused the remainder

There are two classes of legal subdivisions. 1st, The subdivision into farming land; 2d, Into town and city lots. The lands were transferred to the state by the United States in the subdivision of sections, and had been surveyed in the usual manner of the government surveys. A legal subdivision is such a one as is recognized in the law, and is usual. Under the practice of the land office of the United States, the smallest legal subdivision of farming lands is forty acres. The government sells by this division, and it is a matter of general notoriety that it is regarded as an ordinary legal subdivision. Vide U. S. Statutes. This subdivision requires no additional survey to designate and describe it. But this subdivision has been repeatedly and expressly recognized by the laws of this state. This as early as 1829. See Canal Laws, p. 9, sec. 7.

Commissioners authorized to sell in such divisions. Canal Laws p. 13, sec. 7, 1831: "Such Commissioners may cause such tracts of land as they think proper, to be sold in tracts of forty acres," &c. This does not require them to subdivide, but authorizes to sell; and if it were not so before, makes a forty acre tract a legal subdivision. And yet, in the face of this, the court below gives appellees 160 acres on the ground that that was the smallest legal subdivision. See Canal Laws, p. 28, sec. 1, expressly recognzing 40 acre tracts, by state and United States, as legal subdivisions.

What is the authority of the Canal Trustees, and what was that of the Commissioners, in regard to town lots? Canal Laws, p. 20, sec. 32: "The Commissioners shall examine the whole canal route, and select such places thereon as may be eligible for town sites, and cause the same to be laid off into town lots; and they shall cause the canal lands in and near Chicago to be laid off into town lots." Acts of January 9, 1836.

In pursuance of this act, in January, 1837, the Commissioners laid off the premises in question into town lots, and caused it to be surveyed, subdivided, and marked the same by stones and stakes, and a plat thereof was made, &c. Had Commissioners authority to do this? Clearly they had, by the above act. Did these acts amount to a compliance with the statutes? It was analogous to cases where United States officers were authorized to reserve for military posts, lighthouses, &c. Such reservations never were the subject of pre-emption rights. See Beaubien case; Jackson *v.* Wilcox, 13 Peters; same, 1 Scam., 357. But the law itself amounts to a reservation, and designates that the lands "in and near Chicago should be reserved, and laid off into town lots." Is it not incredible, that individuals should attempt to defeat this by claims to farms of 160 acres, made up of these town lots, so appropriated by law? This section had been appropriated, and Scott knew it at the time he went on to it. He knew it, because this act was a public law. The premises were in the city of Chicago, and so appropriated. City was incorporated as a town in 1835, and as a city in 1837. He knew it in point of fact, as was proved.

See also Canal Laws, p. 25, sec. 7. This was an appropriation by law, whether actually executed by laying off or not. 1 Scam. R., 381. Occupants went on and made improvements subject to this act, and could acquire rights to town lots only.

Board of Trustees have the same powers as the Board of Commissioners. Canal Laws, p. 43, sec. 8. Laws on subject of subdivision; Canal Laws, p. 10, sec. 7; same, p. 13, sec. 7; same, p. 20, sec. 32; same, p. 25–6, sec. 7; same, p. 28, sec. 1. These powers are conferred upon the Trustees. Canal Laws, p. 42, sec. 8.

These lands and lots must be sold in lots and legal subdivisions. The power to subdivide was a continuing power, even if it had not been executed. The person making improvements, does so subject to the power of the Trustees to subdivide. The right to purchase lands suitable for town lots at an appraisal, is subject to this power of subdividing.

What is it the party obtains the right to purchase, at the appraisal? Answer, "The land or lot on which the improvement is situated." If in the country, the right is to purchase the land. If in the city, the right is to purchase the lot. When does this right become absolute? At the time when lands or lots are to be sold. This right, then, is the right to purchase, at the appraisal,

and when lands or lots are offered for sale, the land, or the lot, when offered for sale, on which the improvement is situated. The "owner" shall have the right to purchase—owner when? of course at time of sale; otherwise, complainants' no right to purchase at all. They were not owners until 1848.

They who contend for appellees must hold, that by an improvement on any part of a legal subdivision, when the person making it acquires a right to that whole subdivision; so that, if then it had only been surveyed into townships or sections, the person would have acquired a right to the whole township (by settling on half an acre) or section, as the case may be! Why not as well, as a whole quarter section?

It follows from this position, that the party by settling on half an acre, could nullify and repeal the power to subdivide. The true solution and construction is: the party has a right to purchase the lands or lots, according to subdivision, existing at the time of sale, on which his improvements are situated. This construction avoids the absurdities of the other, and does full and complete justice.

Does any man pretend, that the legislature, when it gave this right of purchase, intended to authorize a party, by settling on half an acre in a city, to take 160 acres, and deprive the Trustees of power of dividing it into city lots? Suppose the law had read: "The owner of such improvements shall be entitled to purchase the lands or lots on which said improvements are situated, at an appraisement, &c. But said Trustees may sell the same in forty-acre tracts, or they may subdivide into smaller quantities and sell the same, as they may think most profitable to the canal fund." Or had it read: "The owner may purchase the lands or lot, &c., at an appraisal. 'But the Trustees shall cause the canal lands in or near Chicago, suitable therefor, to be laid off into town lots.'" Or had it read. The owner, &c., subject to the power in the Trustees "to cause surveys of such town sites as they may select," to be laid out, &c. If these sections had been thus brought into juxtaposition, nobody would ever have denied the right to subdivide into town lots, and the party should take so many as his improvements were situated upon.

But all these provisions are the law, binding upon these parties; and the appellees as settlers, went on subject to them. The Trustees took the lands with the power—nay, the obligation im-

posed upon them—to subdivide into city lots. The settler went on with the knowledge that Trustees must subdivide. He expected to get so many lots as his improvements covered, and no more. If Trustees had failed to subdivide under these laws, and had allowed a man to take 40, 80, or 160 acres in this growing city, they must have deserved severe censure.

Can all these acts be repealed by implication? Can a man, by going on a lot 80 by 100 feet, stop the progress of improvement, and prevent its being laid out into city lots and improved? Lands enhanced within city limits are not subject to pre-emption or purchase for farming purposes; so it has always been held under laws of United States. Land Laws, p. 160, 161, &c. Opinion of Wirt, Attorney General.

The laying out of this quarter section is either legal or illegal. If legal, decree must be reversed; because it would follow, that it must be sold and appraised according to such subdivision. "Lands and lots shall be offered for sale in lots and legal subdivisions." If it be sold in city lots, appellees are clearly entitled only to such of them as their improvements are upon. But they applied to purchase, as a quarter section. Their offer to tender was as such; they ask a decree for it as such. They never applied for the lots, they never offered to tender money for lots, and they do not ask to purchase as such. There has never been any refusal to sell it in lots and blocks. If this plat is legal, Trustees must sell in lots and blocks; and then comes in the law: "The owner of the improvements shall have the right to purchase the lots"—what lots? The lots then about to be sold, "on which they are situated, &c., at an appraisal." This right was granted by Trustees, by allowing a part of the blocks.

Application was made for tender, &c., and prayer of bill is for quarter section. To grant this, requires the plat to be vacated. This could not be done without making the city a party. The fee of the streets has, by recording plats, been vested in the city. Canal Trustees *v.* Haven, 11 Ill. R. If the subdivision is illegal, the appraisal is illegal and void. It has been appraised in separate lots and blocks. If the subdivision is illegal, it must be vacated. Court cannot do this, because it has not the proper parties If vacated, the appraisal is void.

Again. The Court cannot give him the right to purchase a quarter section by virtue of improvements made on two blocks

into which it is divided, and decree it to be sold in lots and blocks. It must be sold as a quarter section. To decree its sale in lots and blocks, and allow him to purchase as a quarter section, would be an inconsistency and an absurdity.

The decree is therefore a *felo de se*. It grants the right to purchase the whole quarter section, and then direct the sale in blocks. The basis of the decree is that the Trustees could not legally subdivide, and then legalizes their subdivision. This part of the decree legalizing the subdivision, is erroneous. Because it is inconsistent with the prayer of the bill, and is a fact not alleged in the bill, and not in issue by the pleadings. 5 Gilman's R., 503. "Relief inconsis tent with the specific relief prayed for, will never be granted under a general prayer." 18 John. R., 562. Complainants must recover, if at all, on the allegations of their bill. 11 Ill. R., 660 ; McKay *v.* Bissett, 5 Gilman, 503 ; 10 Wheaton, 181. Here the allegation was: That the complainants applied to purchase quarter section, and offered to tender, &c., for quarter section. Not to buy as blocks, &c. If complainants were entitled to purchase 160, 80, or 40 acres on the case presented in the bill, then the appraisal is void, and there must be a re-appraisement. Same directs sale, in legal subdivision ; and sale must not be for less than appraisal ; consequently it must be appraised as sold : otherwise you would have to split up arbitrarily the appraisal. If complainants are entitled to purchase, there must be a re-appraisal.

R. S. Blackwell, for the Appellants.

The merits of the controversy in this case depend upon the construction of the proviso to the thirteenth section of the act of February 21st, 1843, which is in these words : "Provided, That in all cases where improvements were made upon the said canal lands or lots, previous to the first day of February, 1843, the owner of such improvements shall be entitled to purchase the said lands or lots, on which said improvements are situated, at an appraisement, to be made as aforesaid, without reference to said improvements ;" and the second section of the act of March 4, 1843, limiting the operation of the said proviso, to improvements made prior to December 1, 1842.

In 1842, Stuart, under whom the appellees claim their rights, entered upon, and improved a part of the E. frac. of the S. E.

frac. qr. sec. 21, T. 39 N., R. 14 E. of the 4th principal meridian. This parcel of land then lay within the corporate limits of the city of Chicago, and was laid out into town lots by the Canal Commissioners, on January 2, 1837. A new survey and plat was made by the present Board of Trustees, August 31, 1848, and duly recorded; by which plat it appears, that out-lots 3 and 16 included within their metes and bounds, all of the improvements made by Stewart prior to December 1, 1842.

The appellees insist that they are entitled to a pre-emption, or right to purchase at the appraised value, the whole frac. qr. upon which these improvements are situated, regardless of the subdivision into lots and blocks.

This construction is at war with the letter and spirit of the canal laws, and against the policy of our entire system of legislation upon this subject. The language of the law is imperative, that the Canal Commissioners shall lay out towns upon all eligible sites, and make addition to such towns as may have been already laid out upon the canal lands. Canal Acts, 10, §7; 13, §7; 14, §12; 20, §33.

And by a special provision, the canal lands, lying in and near the city of Chicago, are directed to be laid out by the Commissioners into town lots. Ibid., 20, §32; 25, §6.

The parcel of land in controversy, is declared by law to be included within the corporate limits of the city. Laws 1836–7, p. 50, §1.

The present Board of Trustees possess the same powers, and are required to perform the same duties conferred and enjoined upon the Canal Commissioners by the act of January 9, 1836, and the acts amendatory thereto. Laws 1842–3, p. 55–6, §8.

The spirit of the law is clearly manifested by these provisions. Canal Acts, 9, §7; 28, §1; 40, §2; 45, §13.

The policy of the laws, as collected from our entire system of legislation upon the subject, is equally clear.

These lands were granted by the U. S. to Illinois, to aid in the completion of the canal, and for no other purpose. Canal Acts, 3 and 4, §1, 3. The canal has ever been regarded as a work of national importance, connecting the Lakes and Gulf of Mexico. The donation was in the nature of a trust for this purpose, with a reversion in the federal government. Therefore, all legislation tending to diminish or destroy this trust fund,

ought to be strictly construed. And the presumption is that the legislature never intended her bounty to actual settlers to be construed into an invitation to speculate in canal lands. No encouragement has ever been given to settlers upon these lands, Canal Act, 21, §34, and numerous laws have been passed from time to time, prohibiting, under severe penalties, trespasses and intrusion of every kind upon the canal lands. Laws 1836–7, p. 44. When permits have been granted, stringent conditions have been annexed to them. Laws 1836–7, p. 45. So of sales upon a credit. Laws 1838–9, p. 177, §2. Sales limited in quantity to 3 town lots, or a ½ section of farming lands. Canal Acts, 36, §14; 37, §20. Canal Commissioners prohibited from selling any two quarter sections adjoining each other. Special Session Laws, 1837, p. 11, §2. Speculation by agents of the State forbidden under severe penalties. Canal Acts, 22, §39; 24, §9. So of combinations to procure canal lands at low prices. Canal Acts, 22, §40.

The legislature have always looked to the increase in the value of canal lands, as a means of meeting the expenses attendant upon the construction of the canal. Canal Acts, 25, §8; 28, §2; 29, §5; 31, §4.

The termini of the canal were always looked to by the legislature with a jealous eye, and speculation guarded against. Canal Acts, 23, §44; Laws 1831, p. 54–6, §1, 10, 11; Laws 1836–7, p. 64, §38.

These various provisions of the canal laws establish the fact conclusively, that the policy of our legislation has ever been to prevent trespasses upon the canal lands, to guard against speculations of all kinds in canal property, and increase the canal fund as much as possible.

When Stewart located upon the parcel of land in controversy, there was no law in force allowing, or even squinting towards a pre-emption, and to say that he entered with a view to the purchase of the whole tract is absurd. He was a trespasser at the time. If he can be regarded as a disseizor of the State, his disseizin must be confined to his actual enclosure and improvements. But there is no such thing as a disseizin of a sovereign State.

This law was designed to give to the *bona fide* settler upon canal lands, the benefit of his improvements, by permitting him

to purchase at the appraised value, without compelling him to run the gauntlet at a public sale. Without this law, his improvements would have become vested in the State, because he made them at his peril, with a full knowledge of the law. A construction which gives to the settler such a legal subdivision of the land, as may be covered by his improvements, is all that he can demand. The general principles of the law warrant this construction. The proviso operates as a grant, and is to be construed most favorably for the State, as in all other public grants.

Again, the State is the beneficial owner of these lands. Canal Acts, 41, preamble and §1 ; 50, §1 ; 46, §14, 16 ; 45, §14 ; 47, §19 ; People *v.* Nichols, 4 Gil., 307. She has conveyed them to the appellants in trust. The great object of this trust, on the part of the State, was to secure the speedy completion of the canal, and on the part of the Trustees, to secure for the bondholders the debt due them by the State. Canal Acts, 41, §1 and preamble. And for the purpose of enabling the Trustees to perform their trusts, the statute provides for the liberal construction of the act in our Courts, and to supply by future legislation all defects in the law. Canal Acts, 47, §20.

Under such circumstances, good faith requires that a latitudinarian construction should not be placed upon this proviso, by which speculation in this trust fund is encouraged, and the fund consequently decreased. The proviso operates as an exception to the grant of the canal lands to the Trustees, and must be construed most favorably to the grantees.

Again, this right of pre-emption was intended as a bounty to settlers upon canal lands. This bounty, it cannot be supposed, was designed to be extended, to the sacrifice of great public interests. Wilcox *v.* Jackson, 13 Peters, 514 ; People *v.* Canal Commissioners, 3 Scam., 160.

Lastly. A literal interpretation is not always to be adhered to, the words of a statute may be enlarged or restained to effect the intent of the legislature. Mason *v.* Rogers, 4 Litt., 375 ; Dwarris, 728. Upon this principle, the attorney general, and Courts of the United States, have by construction, restrained the operation of the pre-emption laws of the U. S., in cases analogous to the one at bar. 2 Land Law U. S., 45, 161, 1023–4 ; Clestard *v.* Pope, 12 Wheat., 586 ; 6 Peters' Cond. R., 654 ; Reynolds *v.* McArthur, 2 Peters, 426 ; Freytag *v.* Powell, 1 Wharton, 536.

The conclusion is inevitable, that the proviso is restrained by the power of the Canal Trustees to lay off the land in controversy, into town lots, that Stuart acquired no rights until this power was exercised in 1848, and then the appellees, claiming under Stuart, became entitled to a pre-emption to out-lots 3 and 16, being all of the tract in controversy covered by their improvements.

Thus far, upon the assumption that the land was never laid out into town lots. We now insist that there was a subdivision and plat of this land, made by the Canal Commissioners, in 1837, which is valid, though not recorded until 1848, by which it was appropriated and set apart as city lots, by the authority of the State. The law requiring a record of the plat was directory only. Taylor *v.* Brown, 2 U. S. Cond. R., 235; 5 Cra., 234; Dwarris' Stat., 715–16. No time was fixed within which the plat should be recorded. The record of it in 1848 is a compliance with the law. Hoge *v.* Currin, 3 Gratt., 201; Williams *v.* Lumenberg, 21 Pick., 82.

If the object of the law was to give notice, then the law is complied with in this case. The proceedings of the Canal Board were required by law to be recorded. To these records Stuart had a right of access and inspection. Canal Acts, 17, §11; 20, §26; 23, §42–3.

Bailey's Map of Chicago was then notorious, on which this Addition to Chicago could be seen. The monuments upon the land were open and visible. They were pointed out to Stuart by Wilder. And the land lay within the limits of Chicago. These facts are sufficient to charge Stuart with notice of the survey and plat.

Again, Stuart was a trespasser, and not entitled to notice. 8 S. & M., 268. Besides this, recording laws are made for the protection of purchasers from the same grantor, and have nothing to do with the extent of a grant between the grantor and grantee. This law is not like the general recording laws of the State, it does not say that recording shall be notice, nor does it declare the plat void against subsequent purchasers unless recorded within a limited time. The rule is that the record is not notice unless declared so by law. Baker *v.* Washington, 5 Stew. & Por., 142; Tatum *v.* Young, 1 Porter, 298.

Again, the survey and plat binds the State, like an unrecorded

deed. Strong *v.* Darling, 9 Ohio, 201. And amounts to a dedication of the streets to the public. Morris *v.* Bowers, Wright, 749. And no subsequent disposition of the property by the State can affect the rights of the public in the streets thus dedicated. 18 Ohio, 250. User of the streets not necessary to render the dedication valid. Rowan *v.* Portland, 8 B. Mon., 250.

The city of Chicago being interested to the extent of her interest in the streets, ought to have been made a party to this suit. Dummer *v.* Deer, 1 Spencer, 86; Watertown *v.* Cowen, 4 Paige, 510.

The pre-emption right in this case is not assignable, it is contrary to the rules of the common law, and against the policy of our statute, which was intended as a bounty for the actual settler.

N. H. PURPLE, for Appellants.

S. A. DOUGLAS and JUDD & WILSON, for Appellees.

TRUMBULL, J. The appellee, who was complainant in the court below, claims the right, as the assignee of the original settler, to purchase at the appraisment, a quarter section of canal land, situate within the corporate limits of the city of Chicago. His right to make the purchase depends upon a proper construction of the legislation of this State, in reference to the Illinois and Michigan Canal, and the lands granted to the State, to aid in its construction. The grant of land equal to one half of five sections in width, on each side of the canal, was made by act of Congress, of March 2, 1827. In 1829, the State of Illinois created "The Board of Commissioners of the Illinois and Michigan Canal," and took steps for the construction of the work, which was prosecuted by the State, at an expense of several millions of dollars, till February 21, 1843, when the work still being in an unfinished condition, an act was passed for the purpose of procuring a fund for its completion, whereby the canal and canal lands were placed in the hands of trustees.

Between the time when the Board of Commissioners of the Illinois and Michigan Canal was established, and 1843, various acts were passed in reference to the canal lands and the sale of the same, some of which it becomes necessary to notice.

The act of January 22, 1829, made it the duty of the Commis-

sioners to give notice, and sell the canal land, in half quarter sections, quarter or fractional sections and also gave them authority to lay off into town lots, such parts of said lands, as they might think proper, and to sell the same.

The seventh section of the act of February 15, 1831, authorized the commissioners to sell canal lands in tracts of forty acres, or to subdivide and sell them in smaller quantities, as they might deem most profitable to the canal fund.

The thirty-second section of the act of January 9, 1836, is as follows: "The commissioners shall examine the whole canal route, and select such places thereon as may be eligible for town sites, and cause the same to be laid off into town lots, and they shall cause the canal lands, in or near Chicago, suitable therefor, to be laid off into town lots. Sections thirty-three and four of the same act authorize the sale of lots, and annexed to the thirty-fourth section is this provision: "Provided, that all persons who may have made improvements upon any of the lots authorized to be sold, shall be permitted to remove such improvement, at any time before the day fixed for the sale of any such improved lots, being responsible for all unnecessary damage done or suffered by said removal."

Section seven, of the act of March 2, 1837, provides for laying out towns, and for certifying and recording town plats.

Section one, of the act of July 21, 1837, authorizes Commissioners to subdivide and sell a portion of the canal lands in tracts of not less than forty nor more than eighty acres.

The act of March 4, 1837, provides for giving permits to all persons residing upon, or cultivating canal lands to remain upon or to continue to cultivate the same, upon certain conditions; one of which is, that the occupant shall surrender the possession of the lands described in the permit, to the agent of the State, together with all improvements thereon, whenever said lands shall be advertised for sale.

The act of February 26, 1839, imposes penalties upon such persons as occupy or cultivate canal lands, except under permits, after receiving notice, which the agents of the State are required to give. This, and the preceeding act, also imposes penalties for trespassers upon canal lands.

The second section of the act of February 1, 1840, requires

the Commissioners, in the sale of timber land, to divide it into small lots, not to exceed forty acres in one lot.

It is manifest from the foregoing acts of the legislature, that the Commissioners of the Illinois and Michigan Canal, were authorized in their discretion, to lay out town lots and make sale of town lots, or to subdivide and sell canal lands in tracts of forty acres or less; and it was made their duty, by the act of 1836, to cause the lands, in or near Chicago, suitable therefor, to be laid off into town lots. Thus the law stood at the time of the passage of the act of February 21, 1843, providing for placing the canal and canal lands in the hands of trustees. The eighth section of that act declares that, "The said Board of Trustees of the Illinois and Michigan Canal, when duly appointed and elected as aforesaid, shall apportion their respective duties among themselves, and so far as is not incompatible with this act, shall possess all the powers and perform all the duties conferred upon the Board of Commissioners of the Illinois and Michigan Canal, by the act entitled, 'An act for the construction of the Illinois and Michigan Canal,' approved January ninth, eighteen hundred and thirty-six, and the acts supplementary and amendatory thereto."

It is provided by the thirtieth section of the same act, that "none of the lots, lands or water powers, so granted to the said Trustees, shall be sold, until three months after the completion of said canal; the said lots, lands and water powers shall then be offered for sale by the said Trustees at public auction, in lots and legal subdivisions once or oftener in each year for the four successive years, said sales to be made for cash, or on a credit in the manner prescribed in the act of the ninth of January, eighteen hundred and thirty-six. The said lands, lots and water power, before they are offered for sale, as aforesaid, shall be appraised by three disinterested persons, to be appointed by the judge of the Circuit Court, in which said lands, lots, and water power are situated, who shall take an oath, faithfully and impartially to discharge the duty of appraisers. Said lands, lots, and water power, when so appraised, shall not be sold for less than the appraisement."

Annexed to said section, is the following proviso: "That in all cases where improvements were made upon the said canal lands, or lots, previous to the first day of February, eighteen hundred and forty-three, the owner of such improvement shall be entitled to pur-

chase the said lands or lots, in which said improvements are situated at an appraisement to be made, as aforesaid, without reference to said improvements." A subsequent act, passed March 4, 1843, limits the foregoing proviso, to improvements made previous to the first day of December, 1842.

The record shows, that one James H. Scott, previous to December, eighteen hundred and forty-two, made an improvement upon the land in controversy, the N. W. qr. sec. 21, T. 39, N. R. 14, E. of third P. M., by enclosing and cultivating some twenty acres, situated in the north-east quarter of said quarter section; that the complainant, at the time of filing his bill, was the owner of said improvement; that the defendants, on the thirty-first day of August, eighteen hundred and forty-eight, caused said quarter section, (the same being canal land, and situate within the corporate limits of the City of Chicago, as the same are defined by the act of March 4, 1837, incorporating said city;) to be subdivided into lots and blocks, and a plat thereof to be made, which was duly certified, acknowledged, and filed for record, on the 31st of August, 1848; that the canal was completed in May, 1848, and that the defendants, after having caused said quarter section to be appraised, according to the subdivision thereof, had advertised the same for sale, when the complainant offered to tender the money, and do all the acts necessary to complete his purchase, to the entire quarter section at the appraisement; which defendant, waiving the tender, would not allow; but admitted his right of pre-emption to that part of the quarter section, designated upon their plat, as blocks fifty-seven and fifty-eight, within which were embraced all the improvements made by Scott, prior to December, 1842.

The Trustees, under the act of February 21, 1843, so far as related to the laying out of towns, possessed all the powers conferred upon the Board of Commissioners of the Illinois and Michigan Canal, by the act of January ninth, eighteen hundred and thirty-six; and the thirty-second section of that act, expressly required the Commissioners to cause the canal lands, in or near Chicago suitable therefor, to be laid off into town lots. The tract of land in question was situate near Chicago at that time, and, as we have already seen, was incorporated into the city, by the act of the fourth of March following. That it was suitable for town lots, there can be no question, and it therefore became

the duty of the Canal Trustees, to lay it out previous to the sale, unless there was something in the act of 1843, to restrain them for so doing. Such the complainant insists was the case; that immediately upon the passage of the law granting the right of pre-emption, Scott became vested with the absolute right to purchase at the appraisement, the entire quarter section, upon which his improvement was situated, and that the Canal Trustees possessed no power after that time, to subdivide it. If the principle contended for be correct, we see no reason for limiting the pre-emption to a quarter section, for with the same propriety it might be extended to a half or even a whole section. It will be observed, that the act allowing the pre-emption, unlike most of the acts of Congress in this respect, does not define its extent. The statute authorizes the owner to purchase the lands upon which his improvements are situated, without determining the number of acres. Literally, therefore, he would be confined to the boundaries of his improvements, but such, doubtless, was not the legislative intention. It could never have been the design, in allowing the owner of improvements to purchase the lands on which they were situated, to change or affect in any manner the general system of rectangular surveys, adopted in the subdivision of the public lands. The Trustees were required by the act to sell in lots and legal subdivisions, and as a vendee can only purchase in the manner which his vendor is authorized to sell, it follows that purchasers of canal lands, whether by virtue of pre-emptions or at public sales, can only purchase in lots and legal subdivisions. What, then, is a legal subdivision, such as the Trustees are authorized to sell? It has been argued that resort must be had to the legislation and practice of the general government, in reference to the public lands, to determine this question. Grant it, and what follows? The acts of Congress provide for the subdivision of the public lands into half quarter, and quarter quarter sections, and expressly authorize sales to be made in subdivisions of forty and eighty acres. Part 1, Public Lands Laws, &c., 323, 493; *ibid*, Part 2, 561. The argument that nothing is a legal subdivision, except what has been run off and marked upon the ground as such, in making the public surveys, proves too much; for if it be sound, then a quarter section is not a legal subdivision, it not being the practice, in surveying the public lands, to run round and mark upon the ground the

boundaries of any subdivisions less than whole sections. McClintock *v.* Rogers, 11 Illinois, 295.

A forty acre tract, or a quarter quarter section, is a subdivision of land recognized by act of Congress, and is, therefore, just as much a legal subdivision as a quarter section, or any other subdivision known to the law. The right of the Trustees to offer the canal lands for sale in quarter quarter, half quarter, or quarter sections, as they shall deem best for the interests of the canal fund is beyond dispute; and the right of pre-emption, as has been already shown, must be limited to the lands on which the improvements are situated, as the trustees are authorized to bring the same into market. If, therefore, the trustees think proper to offer the canal lands for sale, in tracts of forty acres, and one such subdivision, as in this case, embraces all the improvements put upon the land, prior to December, 1842, the owner thereof, would be confined in his right of pre-emption to the quarter quarter section, embracing his improvements, while, if the lands had been offered for sale in tracts of one hundred and sixty acres, his right of pre-emption would have extended to the whole quarter section. The record, in this case, does not show that the trustees were offering or about to sell the whole quarter section together, and unless such were the fact, the complainant would have no right to purchase the entire quarter, at the appraisement.

The main ground, however, upon which we base our decision is this, that the right of the Trustees to subdivide lands, and lay out town lots, was not intended to be abridged, or in any manner affected, by the proviso to the thirteenth section of the act of February 21, 1843. Although the legislature, by that act, provided for surrendering the canal and canal lands to trustees, yet it was for the express purpose of providing a fund for the completion of the canal, and upon certain conditions, one of which was, that the canal, and the lands remaining unsold, should revert to the State, whenever the canal debt should be paid. It was always the policy of the State, in disposing of the canal lands, to adopt such a course as would be most likely to benefit the canal fund. Hence the authority given to the Commissioners, from time to time, to subdivide the lands and lay out towns as they should consider would best promote the interest of that fund.

This power, as we have already seen, unless repealed by the proviso in favor of the owners of improvements, was continued to the Trustees.

Did the legislature intend by that proviso to repeal it? What claim had the owners of these improvements to legislative favor? None certainly. If the improvements were made under permits, then it was with the express understanding that the possession, together with all improvements, should be surrendered to the State, whenever the lands should be advertised for sale, if made by trespassers in violation of the laws of the State, their owner would be entitled to still less favor. In no point of view, had they any just claims upon the legislature, and the bestowal of the right of pre-emption upon such persons was purely a bounty, which they had no right to expect, and for which they paid no consideration whatever.

The object of the law was, to give to the owners the benefit of improvements they had made previous to a certain day. The lands and lots were to be appraised, at what it is to be presumed was their true value, without regard to the improvements, and by taking them at the appraisement, the owner secured the benefit of what he had done upon the land, without being subjected to the competition of a public sale, and this was all that the legislature could have intended to bestow. The granting of this privilege was never designed to deprive the Trustees of the power to lay off the canal lands, within the city of Chicago, into town lots, nor to interfere with the general policy of the State, in reference to the sale of said lands. It is not to be presumed, that the legislature would deprive the canal fund of the benefit to arise from laying off, and selling in town lots, a quarter section of land lying within the city of Chicago, for the purpose of bestowing a gratuity upon one who had no claim to favor, and that too, at the expense of a fund, which it had ever been the policy of the State to guard with peculiar care. To give such a construction to the act of 1843, would be to allow an incidental matter, a mere gratuity, to control, not only the principal thing had in veiw, but also the general policy of the law. The permission to purchase lands and lots at the appraisement, was manifestly intended as a privilege, to be exercised in subordination to the general law in reference to the subdivision of lands and bringing them into market.

Such has always been the construction put upon acts of Congress granting pre-emptions, by the officers of the general government. The attorney general, upon being consulted as to what effect a pre-emption right had upon the surveys of the public lands, replied: "I am of opinion, that the survey should be made in conformity to the general system established by law, and by the instructions of the department, without any reference whatever to the existence of a pre-emption law, or to the fact that rights have been claimed and established under it." Public Land Laws, opinions, &c., part 2, 138. In a letter from the treasury department, upon the same subject, it is said: "If the party does not choose to purchase the tract, because the lines do not suit his convenience, he has not the most distant right to complain, since he knew when he made his settlement, that the land would be surveyed into sections, by north and south, and east and west lines, and that nothing was promised to him. The law has now granted to him what the laws of the United States have granted no where else, viz: a preference to purchase either a quarter, half, or entire section, including his improvement; and the law is represented as impracticable or unjust, because it does not permit the party, to whom that privilege is granted, to select in a particular manner, the land he would prefer, and because it does not set aside, for his sake, the general system of surveying." *Ibid*, 694.

This language is peculiarly applicable to the present case. The State of Illinois, by the act of 1843, granted to the owners of improvements on canal lands, what she had never granted before. When Scott made his improvement, he knew that nothing was promised him, and that the quarter section upon which he made it, was within the city of Chicago, and that the law required it should be laid off into town lots, if suitable therefor. He has not therefore the least right to complain.

It has been urged as a reason, why the Trustees had not the power to subdivide the land in question into town lots; that the existence of such a power would place every pre-emptor at the mercy of the Trustees, as by laying out a town, and dedicating the land upon which his improvements were situated, to some public purpose, they would totally destroy his right to purchase. It is a sufficient answer to this argument, to say that the record presents no such case; and it will be time enough to determine

whether the Trustees can be restrained in the exercise of their powers, when they attempt to abuse them. But the fact that a power may be abused, is no argument to prove its non-existence; if it were, it would not be difficult to prove, that the Trustees have not the power to lay out a town in any instance; for if the power exists, it may be said that it may be abused by dedicating to the public for streets and squares, nine-tenths of all the lands thus laid out, and yet, who ever doubted the power of the Trustees to lay out towns, at suitable points, along the route of the canal.

The act of 1843, did not confer upon Scott a right of pre-emption to a section, a quarter section, or any other definite quantity of land; nor did it give him an immediate right to purchase. He was compelled to wait, till the Canal Trustees should proceed under the law, to have the lands, or such of them as they should think proper, subdivided, appraised, and brought into market.

Keeping in view the fact, that the act of January 9, 1836, requiring the canal lands, in and near Chicago, to be laid off into town lots, if suitable therefor, is as much part of the act of February 21, 1843, as if therein incorporated, and this whole case may be briefly stated thus: The State had undertaken a great public work, and found herself without the immediate means to accomplish it; for the purpose of raising those means and securing an early completion of the work, she surrenders to trustees, a vast amount of lands and other property, upon certain conditions, one of which is, that they will lay off into town lots, the tract of land in question, for it is shown to be in Chicago, and suitable for town lots; another is, that the lands, lots and water powers, surrendered to them, shall, within a certain time, be exposed to public sale, in lots and legal subdivisions; and a third, that the owners of improvements made upon canal lands or lots prior to December 1, 1842, shall have the privilege of purchasing the lands or lots on which they are situated at an appraisement made without reference to such improvements. The term lands and lots, by itself, is indefinite, but when viewed in connection with the other conditions of the trust, its meaning is obvious.

The pre-emptor cannot purchase till the trustees are authorized to sell, and before proceeding to sell, it is made their duty to subdivide the land in question, into town lots, and cause them to

be appraised, then, and not before, the pre-emptor has the privilege of purchasing such lots as embrace his improvements, at the appraisement. He cannot purchase the entire quarter section, as land, because the exercise of such a privilege would be inconsistent with those conditions of the trust which require it to be subdivided and sold in lots, and it is the duty of the Court, if practicable, so to construe the whole law, that all its provisions may have effect.

In our opinion, the subdivision of the land, in controversy, made by the Board of Trustees, on the 31st of August, 1848, was legal, and it follows as a consequence, that the complainant's right of pre-emption extends only to the lots as they have been laid out, which embrace the improvements made by Scott, prior to December, 1842. The record shows that his right to this extent, was admitted by the trustees; possibly, therefore, there may be no absolute necessity for passing upon the other questions presented by the record, but, as they have been fully argued, and the whole matter is now before the Court, it may save future litigation to express an opinion upon some of them, and make a final disposition of the case.

It is made a question in the case, whether Scott entered upon the land in question, under the authority of a permit, or as a trespasser without authority. In our view, it is immaterial in which capacity he entered. The law is sufficiently comprehensive in its terms, to embrace all classes of persons who made improvements previous to the time limited by the act; and it is unreasonable to suppose, that the legislature could have intended to bestow the right of pre-emption upon those who had made improvements in violation of law, and withhold the same privilege from those whose improvements were made under its sanction.

It has also been insisted, that the right to purchase at the appraisement, is a personal privilege, of which the owner of the improvements, at the date of the act, can alone avail himself. The language of the statute is general, and not confined to the owner at any particular time; and for the same reason that the words, "lands and lots," have been construed to mean the lands and lots as subdivided at the time of the sale, the word "owner" must be understood to refer to the owner at that time. The act of March 4, 1843, was not designed to limit the right of pre-emp-

tion to a different class of persons, but simply to abridge the time within which the improvements must have been made. If, as complainant insists, the right of pre-emption to lands and lots, as subdivided at the passage of the act of 1843, became absolutely fixed and vested by that act, it would follow that the right would also be fixed and vested in the then owner, and as the law makes no provision for its transfer, he alone could avail himself of its benefits. We have, however, given a different construction to the laws, and are disposed to hold, that the owner of the improvements, at the time the lands are brought into market, has the right to make the purchase. Some other questions, of minor importance, were raised on the argument, which it is not deemed necessary to notice particularly.

The decree of the Cook County Court of Common Pleas will be set aside, and a decree entered in this Court, allowing the complainant to purchase at the appraisement, all of the lots included in blocks number fifty-seven, and fifty-eight, as the same have been laid off by said trustees, it appearing, from the record, that the improvements made by Scott, previous to December, 1842, extended upon some part of all of said lots; but as it was complainant's own fault, that he did not make the purchase in September, 1848, and as the credit allowed upon sales made at that time, will expire on the first of September next; the complainant will now be required to pay to said Trustees the full amount of appraisement of said lots, on or before the first day of September, 1851, and upon the receipt of the money, the Trustees will be required to execute to the complainant, a conveyance for the same. In case of a failure to pay for said lots within the time limited, the complainant will be for ever afterwards, barred of his right of pre-emption to said lots.

As the record does not show the appellants to have been at all in fault, the appellee will be required to pay the costs both in this Court and the Court below.

Decree reversed.

Caton, J., dissenting. In stating my views of this case, it is only necessary that I should examine the single question, upon which I disagree with the conclusions at which a majority of the Court have arrived. This question involves the right of the Canal Trustees, by laying off the premises in controversy into town lots, to diminish the quantity of land to which the com-

plainant would otherwise be entitled. The rights of both parties are derived under and depend upon, the canal law of February, 1843, and the acts supplemental thereto. Under these laws, the legal title to the canal and canal lands was conveyed to the trustees, in trust, for the purpose of raising money and completing the canal, and for the payment of certain debts due from the State, after which the remaining property is to revert to the State.

I maintain, first, that the Trustees are to be considered purchasers, of this land under the law of 1843, which is to be considered a contract between the State and the Trustees, representing the other *cestui que trusts*. The fact that the State has a residuary interest in the subject of the conveyance, and in the trust fund, in no wise changes the rights of the plaintiffs, or the title which they hold. They are to be treated precisely as if they had purchased the property absolutely, and are entitled to no greater immunities, than as if the State had parted with all of her equitable, as well as her legal title. None of the sovereign prerogatives, or special favors, which the State, as owner of the land, might claim, passed to the Trustees. As a remote *cestui que trust*, the State cannot assert her extraordinary and sovereign privileges, in this legal controversy with parties to whom she has transferred all of her legal, and part of her equitable title. When she mixes up her rights with others, she descends to their level, so far as those rights are concerned, and does not elevate them to hers. This has been repeatedly decided by the Supreme Court of the United States, in the cases of the United States *v.* The Planters' Bank, 9 Wheaton, 904; The Bank of the Commonwealth of Kentucky *v.* Wister, 2 Peters, 318, and Briscoe *v.* The Bank of Commonwealth of Kentuckey, 11 Peters, 324. The Court in the last case, after referring to the former, says: "They show that when a State becomes stockholder in a bank, it imparts none of its attributes of sovereignty to the institution, and that is equally the case, whether it own the whole or a part of the stock of the bank."

Unless expressly exempted by law, this property is subject to all the incidents and liabilities of private property. The Board of Trustees are liable to be sued like other corporations, and it will not be denied, that their corporate property is liable to be siezed and sold for the payment for their debts. If this were nto

so, the right to sue them would be a barren right, without any practical results or benefits. But for the express exemption by law, this property would be liable to taxation the same as private property. This has been substantially decided, by this Court at the present term, in the case of the Canal Trustees *v.* The City of Chicago, where it was held that canal lots were liable to special assessments for opening streets. Had the State continued the owner of the land, it would not have been liable to such assessments, and the decision, as I understand it, is placed expressly upon the ground, that the Trustees are purchasers for a valuable consideration, and as such, their property is liable to public burthens, except where expressly exempted by law. In delivering the unanimous opinion of this Court, in that case, the Chief Justice says: "It is insisted that the canal lands are to be regarded as the property of the State, and therefore exempted from the payment of the assessment. This proposition cannot be maintained. The State, for a valuable consideration, has granted these lands to the Board of Trustees." And again: "The State cannot now be regarded as the owner of the lands." In my judgment, this places the title of the Trustees in its true light and I feel called upon to carry out this doctrine, to its legitimate extent, and to apply it, wherever it is, in my judgment, properly applicable.

This disposes of all of that part of the argument, which relied upon the continuing interest of the State in these lands, and of the sacred character of the fund to be raised from them. This is no more sacred, than it would be if it belonged to the State creditors, or the Trustees alone. For the present then, I may safely lay out of view all idea of State interest in these lands, and treat the Trustees as absolute *bona fide* purchasers, under the law of February, 1843. Under that act, the Trustees acquired their title, and they took it subject to all the liabilities imposed by that act. It enters into and forms a part of their contract of purchase, and they are bound to preform all its obligations, whether to the State or to others. One of those obligations is, that they shall sell to those persons who are entitled to pre-emptions under the proviso to the thirteenth section of the law, the lands and lots, on which their improvements are situated; and that obligation is to be construed the same as if they had, by a separate agreement, after they had received the title, and for a

valuable consideration agreed with the pre-emptors, in person, to make such conveyance That obligation was a part of the consideration of the conveyance, and its sufficiency they cannot be allowed to question. As parties to such a contract for a conveyance, I shall therefore hereafter consider them.

I will now examine, what right the pre-emptor has under the law.

The thirteenth section of that act, specifies many of the duties and obligations of the Trustees, and among other things, provides, that "the said lots, lands and water powers, shall then be offered for sale by said Trustees, at public auction, in lots and legal subdivisions, once or oftener in each year, for four succeeding years." And the section concludes with the following proviso: "*provided*, that in all cases where improvements were made upon the said canal lands or lots, previous to the first day of February, eighteen hundred and forty-three, the owners of such improvements, shall be entitled to purchase the said lands or lots on which said improvements are situated, at an appraisement to be made as aforesaid, without reference to said improvements." In order to understand these provisions properly, we must remember, that before they were granted to the State by the general government, all the canal lands had been surveyed into legal subdivisions, according to the system of surveys of the United States lands, as it existed in 1819, and that previous to the passage of the law in question, many of those lands had been laid out into town lots by the old Board of Canal Commissioners. This explains the meaning of the words, "in lots and legal subdivisions," in the above clause, providing for the sale of the canal lands. In no other quantities or form, could the Trustees offer these lands for sale, either to persons entitled to pre-emptions or others, and it is understood, that so literal have been the Trustees in their construction of this provision, that parties entitled to pre-emptions, have been required to attend the public sales, and when the lands which they were entitled to purchase, were offered at public auction, then to bid the amount of the appraisement ; and this was undoubtedly a very reasonable precaution.

This direction, as to the mode of sale, enables us to determine with unerring certainty, what was meant by the words " said lands or lots"as used in the proviso, as specifying what the pre-

emptor should have the right to purchase. Those words are manifestly used as descriptive of two classes of property. The word lands was intended to describe all that portion of the canal lands, which had not been subdivided into town lots, and by the word lots, was intended, town lots. This is too clear to be doubted, and I shall not stop to prove, what must strike every one as undeniable. This law provides that the owner of the improvement shall have the right to purchase the land on which his improvement is situated. The same section provides that the land shall be sold in legal subdivisions. The law, therefore, expressly inhibits the sale to him, of less than a legal subdivision, and as he has the right to purchase the land, there is no escaping the conclusion, that he has the right to purchase the legal subdivision on which his improvement is situated. This legal subdivision is such as is made by the government surveys. His right to this, is just as clear, as if the proviso had stated in express words, that the owners of improvements should have the right to purchase the legal subdivisions of lands not laid off into town lots, on which their improvements were situated. The language of the act is thus specific in relation to town property, for the word lots is as definite as tracts or legal subdivisions of lands. It means a specified area, defined by known boundaries, previously established, in a legal mode. No language could well have been used to have secured to the owner of the improvement, the right to purchase the entire lot on which he had made the improvements, whether they covered the entire lot or not, and are we to suppose, that the legislature intended to be less specific, less just, or less liberal to the settler upon farming lands, than to the inhabitants of the towns? The truth is, all were intended to be treated alike.

The course of the argument, now leads me to inquire into the nature of the provisions made in favor of the settler, by this act.

That here was a grant of rights, to the owners of these improvements, cannot be denied, for the same legislature in another canal law, passed only eight days after, for the purpose of limiting the operation of the proviso, calls them "pre-emption rights granted by the provisions" of the former law. This right of pre-emption has been declared by this Court, in the case of Delaunay *v.* Burnet, 4 Gilman, 454, to be property, the subject of alienation, and liable to be sold on execution. And in the case

of Lytle *v.* The State of Arkansas, 9 Howard, 335, the Supreme Court of the United States distinctly declared, that the right of pre-emption was a vested right. That Court said: "By the grant to Arkansas, Congress could not have intended to impair vested rights. The grants of the thousand acres, and of the other tracts, must be so construed as not to interfere with the pre-emption of Clayes." Here there was a vested right of property granted to Scott and his assigns, as valid and efficacious, as if they had been mentioned by name in the grant, and it was as binding and meritorious, as if he had paid a consideration in money for it. That it was considered meritorious, is conclusively proved by the fact of the grant to him, and who is at liberty to deny or inquire into the sufficiency of the consideration money to the State, for a grant which she is authorized to make? Even the State herself, with all her sovereign power, is not at liberty to assume that a grant which she has made, was without consideration, and to resume, limit, or abridge it. These plaintiffs, as well as others, are interested in maintaining inviolate, this sacred principle of the fundamental law. If the State herself cannot do this, much less should the Court be asked to assume, that the grant was made upon an inadequate consideration, for the purpose of inducing us to limit or lean against it, when the State herself makes no complaint. All that the State granted, as to her, was passed and perfected. It required no further action on her part, to give it efficacy. As to her, the grant was executed. What remained to be done, to enable the grantee to enjoy the benefit of the grant, the trustees in effect covenanted with the State that they would do. I say covenanted with the State, for such was the nature of the obligation which they assumed, by excepting the transfer to them, under the provisions of this law. This obligation was a part of the consideration of the transfer to them, and they cannot question the consideration which they received for the undertaking. It was this agreement to convey to the owners of the improvements, the lands and lots on which their improvements were situated, which the State granted to them. Such was the nature of this grant. By it the pre-emptors became the obligees of the trustees, who assumed the obligation to sell to them the legal subdivisions, according to the government surveys, of lands, not laid off into town lots, upon which their improvements were situated, and

that they would sell to the owners of improvements upon town lots, the lots on which their improvements were placed. I shall assume throughout, that I have shown, incontrovertibly, that this is the true construction of the words lands and lots, in the proviso. I take it that this obligation is as binding upon the Trustees as if they had, with full authority of law, after they acquired the legal title, entered into a covenant for a full consid eration paid, with the pre-emptors, to convey to them the tracts and lots on which their improvements are situated, specifically describing each. Although in the undertaking which they did assume, neither the names of the persons to whom the conveyance was to be made, nor the lands to be conveyed, are specified, yet the means of ascertaining both are provided, and when thus ascertained, the obligation is precisely the same, as if they had been given. The consideration is as sufficient, and the obligation as strong, in the case before us, as in the one supposed, and should be construed to secure the same right. When the Trustees are called upon to execute their undertaking, and to make effectual the grant made by the State, upon what principle can their counsel contend, that the grant was made without sufficient consideration? that it was a mere boon—a gratuity, without merit, and without claim to favor? I have already shown that the pre-emptors have the merit of a legislative grant, and they are entitled to legal favor, which is nothing more, than the even handed justice of having the charter of their rights construed as favorably for them, as against them. If they claim under a grant from the State, the plaintiffs hold all their rights by virtue of the same law, and there is as much reason for applying the strict rule to the one as to the other. But I hold that it is applicable to neither, and that a just and reasonable construction should be given to the rights of both, such as is always applied in controversies between individuals. Whether this grant was a mere boon, or made in pursuance of the most sacred obligation, is not for the party to urge, or for the court to consider. The rights of the parties before us should be construed, the same as if arising out of the same contract between individuals. Suppose the legislature had sold these lands absolutely to the plaintiffs, who had then on their part entered into an agreement with one who had made improvements, both upon farming lands and town lots, that they would convey to him, the legal subdivisions

of land and the town lots upon which his improvements were situated. In the construction of such a contract, would any one contend, that they would have the right to subdivide the tracts of lands and lots, and then say to the purchaser, you shall not have the legal subdivision or town lot, as it existed at the time we made the contract, but you shall be content to take such portions as we choose to assign you, embracing your improvements? The bare suggestion of such a proposition would be startling to all our notions of justice. It was not the improvements alone, or the lands covered by them, which was contracted for, but it was the tracts of lands and lots upon which they were situated, the entire tracts and lots. I cannot appreciate the propriety or the justice of thus allowing one party, to circumscribe or fritter away the rights of the other. To me it is an anomaly in the construction of obligations. It could never have been the intention of the legislature, to leave it to the plaintiffs to say, how much or how little, the purchaser should take under the right which was granted him, and which they were bound to execute. That would be in effect to make them the arbitrary and sole judges of there own liability, and a law which makes a man a judge of his own case, is abhorrent to the first principles of natural justice, and no approach to it, can ever be imputed to the legislature.

It was insisted at the bar, that the right of the trustees to reduce the quantity of land which they were bound to convey to the owners of improvements, might be inferred from the authority which they have to lay out into town lots, lands suitable therefor. By the canal law of 1836, the Canal Commissioners were authorized and required to lay off into town lots, all lands suitable for that purpose, and by the eighth section of the act of February, 1843, it is provided, that the Board of Trustees "so far as is not inconsistent with this act, shall possess all the powers and perform all the duties conferred upon the Board of Commissioners of the Illinois and Michigan Canal, by the act entitled 'An act for the construction of the Illinois and Michigan Canal,' approved January the ninth, eighteen hundred and thirty-six, and the acts supplementary and amendatory thereto." One of those powers and duties, undoubtedly was to lay off towns, but without that provision, they would have been authorized, under the general statute, to have done the same thing, and as faithful

trustees, it would have been their duty to have done so, whenever the interest of the trust fund required it. That statute conferred no new authority, nor did it impose any new duty, and its existence does not alter the case in any point of view. How can it, if the law is the same without it as with it? And I shall not stop to prove so plain a proposition, until it is denied. But, even admitting that they could only exercise the right of laying off towns under this old statute, thus adopted, still the adopting clause only authorizes its exercise, when that can be done consistently with the provisions of the last act. Whenever its exercise, would in any way infringe upon or impair the rights granted by this act, it would not be compatible with it; and then the exercise of such rights, is not only not conferred, but is actually restrained. Whatever authority was conferred upon the Trustees by the act, should not, if it can be avoided, be construed as subversive of the rights granted to others. There certainly could have been no rights conferred upon the Trustees inconsistent with a plain duty imposed upon them. If we were right when we decided that the Trustees are to be considered as purchasers of this land for a valuable consideration, and I am right in my conclusion, that their right to lay off town lots, is the same and no more than that of other purchasers who hold in trust, with authority to sell, then they are restrained from the exercise of that right, whenever its exercise would diminish their liabilities to others, or infringe upon the vested rights of third parties, the same as other proprietors of land would be. Could an individual, by the exercise of his general authority to subdivide his lands, reduce the tract which he had agreed to sell, and also his own liability to convey? Suppose I have improvements upon surveyed land and town lots, belonging to another, and he agrees to convey to me the lands in legal subdivisions, and the town lots, on which my improvements are situated, could he subdivide the lands and lots, so as to diminish the tracts or parcels to which I would otherwise be entitled? In an individual it would be considered a subterfuge, which would meet with little countenance in a court of equity. He would, at once, be required to convey the property in the legal subdivisions and town lots, as they existed at the time the agreement was made. My rights would be enforced as they existed at the time I acquired them. Who would tell me, that at the time I made the

agreement, I knew that the law authorized him to subdivide the lands into town lots, and that I, therefore, took it subject to that right? If any did, I should answer with confidence, that by making the agreement, he had parted with that right.

One of the counsel, with the view of enforcing his argument, based upon the authority of the Trustees to subdivide, read the provision of the law of 1836, which conferred that authority upon the Canal Commissioners, in immediate connection with, and as if introduced into the proviso, which grants these pre-emption rights, but in doing so, he took, as I think, the unwarrantable liberty of introducing it in such a way as to make the right to the settler, subservient to the right of the trustees to subdivide. So far from this being authorized by the law of 1843, the reverse is required by the very terms of the eighth section, which revives, in the Trustees, the powers conferred on the old Commissioners. I think the counsel would have got much nearer the intention of the legislature, had he introduced the limitation clause contained in the eighth section of the law of 1843, in connection with both, so that all might have been understood together. If he had done so, the whole provision would have read thus: "Provided, that in all cases where improvements were made upon the said canal lands or lots, previous to the first day of February, eighteen hundred and forty-three, the owners of such improvements, shall be entitled to purchase the said lands or lots, on which said improvements are situated, at an appraisement to be made as aforesaid, without reference to said improvements;" and "so far as not inconsistent with this act," the said Trustees "shall examine the whole canal route, and select such places thereon as may be eligible for town sites, and cause the same to be laid off into town lots, and they shall cause the canal lands, in or near Chicago, suitable therefor, to be laid off into town lots." This transposition, as I conceive, gives the true meaning of the several provisions on the subject, and when so read, it is very clear to my mind, that there was no power conferred on the Trustees, to subdivide the lands, so as to limit the right conferred on the pre-emptor, as it existed at the time of the grant. When thus exercised, it would be inconsistent with the provisions of the act which made the grant.

Let us view this right granted in another light. Suppose that in consideration of money paid into the state treasury, or the

surrender of canal bonds at the time the act was passed, this proviso had required the Trustees to convey to the owners of the improvements, the legal subdivisions of lands or town lots on which their improvements were situated, without any further compensation; would the Trustees have had the right to diminish the extent of the claim, by a subdivision of the lands? The fact that a further consideration is to be paid to the Trustees, in nowise changes the character of the right granted by the state, or the liability imposed upon the Trustees. Indeed, the argument, that by subdividing the land, and thus diminishing the extent of the claim, they might increase the trust fund, if a just one, would be more forcible then than now; for then, there would be a real saving; while now, the pre-emptor pays the full value of every foot of land which he gets. But in my judgment, the argument itself is illegitimate. Here was a right granted, into the consideration of which we have no right to inquire; and it was as fixed and determinate as if the act had granted to Scott, by name, and his assigns, the tract or legal subdivision of land on which his improvements were situate; and when ascertained, required the Governor or Trustees to make him a conveyance therefor. It was never intended by the legislature, that these rights should be subject to the control of the Trustees; any more than that the rights of the Trustees should be subject to the control of the pre-emptors. To the Trustees they granted certain rights, which we should never allow to be invaded; and to the settlers, whether they were considered as objects of bounty or of justice, they granted certain other rights, which should be equally protected.

If it is determined that the Trustees have the right to subdivide the lands, and make the pre-emptors take up with a part, then they must have the same right to cut up the town lots. But this can never be. It is the lots upon which the improvements were situated, and not other lots, the right to purchase which was granted, subsequently to be carved out. It seems to me, that the Trustees have obligated themselves to convey the lots as they were then situated, in as plain terms, as if each lot had been described by its number or boundary. That is certain which can be rendered certain. It was not even contended on the argument, that there was any more authority for subdividing one description of property than the other. I see no way of es-

caping the conclusion, that the decision in this case will determine that the lot does not mean the lot upon which the improvement was then situated, but another lot which the Trustees might subsequently lay off, embracing the improvement. If so, the word the was applied to a very indefinite subject.

But admitting all that was said on the argument, going to show that the great object of the legislature was to secure to the occupant the improvement which he had made, and not to allow him to speculate out of the canal fund, and still it does not prove that it was their design to confine him to the ground actually covered by his improvement. The grant is of the right to purchase the lands and lots on which their improvements are situated, and not that portion covered by their improvements. The idea that they should be confined to the latter, is not only rebutted by the express words of the act, but also by the fact that they are required to pay the full value of the land, exclusive of the improvement. If the purchaser pays the full value of all the land he gets, then the trust fund is not injured by his being allowed to purchase the entire lot or subdivision. While it would be a convenience to the settler, to allow him to get sufficient land to make a suitable plantation, it would be no detriment to the turst fund. It would be accomplishing the policy of the law, which is to dispose of the lands at their full value, as soon as possible; to have them improved, and add to the general wealth of the state; to make them subject to taxation, and increase her revenues. And it was never the intention of the law, that the Trustees should turn speculators, and withhold the lands from sale, in the hope of an uncertain advance. Every precaution was taken, that the lands should not be sold for less than their real value; and in this whole record, there is not an intimation that the land in controversy was not appraised at its full value; but all the evidence shows the reverse. The controversy seems to be, who shall have the benefit of the appreciation since? It is a new doctrine, if this belongs to the seller after he is bound to convey.

It is well known, that the settlers in a new country first make small improvements, increasing them as their means and time enable them; and it takes many years before they reduce to cultivation all that they design, or all that is convenient for a farm. To deprive them of the means of extending their improvements

beyond their first garden, would be to deprive them of all the real value of their first improvements. The legislature well knew this, and acted in veiw of it. These rights were granted in 1843 ; and it was known that the lands would not be brought into market for some years, during which time it must have been foreseen that the settlers, both in town and county, would desire to extend their improvements ; and it was manifestly the design of the legislature, to enable them to know how much they would be entitled to purchase, that they might improve accordingly. And now, shall we establish a rule which will enable the Trustees to deprive them of all the improvements made since the passage of the law? If the right claimed for the Trustees be legal, then they may, as was done in this very case, run streets and alleys through a man's enclosed field, which existed at the time of the passage of the law, and thus distroy his improvement for the very purpose for which he desires it. In this very case, the Trustees have donated to the city of Chicago, as streets, the very land, confessedly, which they were bound by the law and their contract to convey to the pre-emptor. Is not this a violation of their express contract, and an outrage upon the vested rights of Scott and his assigns ? He is not allowed to take the whole, even of his original improvement, in existence at the time of the passage of the law ; for a part has been conveyed in fee to the city, while, in order to get the remnant, he is obliged to pay the Trustees for the part of which he is thus deprived ; for the evidence shows, that that was included in the appraisement which he has to pay to get the pittance allowed him. Surely this was a new kind of vested rights, which Scott acquired. If such is the true construction of the law and the contract, then indeed they "hold the word of promise to the ear, but break it to the hope."

The decision which is made supercedes the necessity of determining what constitutes a legal subdivision. As I agree with the majority of the court, as to who are entitled to pre-emptions, that the rights are assignable, and in fact, I believe, all of the questions determined except this one, further allusion to them is unnecessary, although I have arrived at those conclusions for different reasons in some respects. This expression of opinion on the great question examined, will be deemed sufficient, without reiterating my dissent in other cases involving the same

question ; and my silent acquiescence will not indicate a change in my convictions. Should such change take place, I shall embrace the earliest opportunity to testify my reformation.

I dissent from the decree which is rendered.

THE TRUSTEES of the Illinois and Michigan Canal, Appellants, *v.* THOMAS DYER et al., Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

This was a bill in chancery, filed by Dyer and others, to secure the pre-emption right to the south-east fractional quarter of section twenty-one, in township thirty-nine, range fourteen, east of the third principal meridian, being canal land. The points of discussion in this case, were precisely the same as those raised in the preceding case of the Canal Trustees *v.* Brainard.

I. N. ARNOLD, N. H. PURPLE and R. S. BLACKWELL, for Appellants.

S. A. DOUGLAS and J. H. COLLINS, for Appellees.

TRUMBULL, J. The questions involved in this case have all been settled by the decision in the case of the Board of Trustees of Illinois and Michigan Canal *v.* Brainard, decided at the present term, ante, page 487, and a decree will be entered in this court, conformably to the principles settled in that case, allowing appellees to purchase at the appraisement, out-lots numbered three and sixteen, as designated upon the plat and subdivision of the premises in question, made and filed for record, by the said trustees, on the thirty-first day of August, eighteen hundred and forty-eight, said out-lots three and sixteen, embracing all the improvements made upon the land in controversy, prior to December 2, 1848.

Decree reversed and modified, decree entered in this court.

Decree reversed.

The following opinion of Judge Drummond, of the United States Circuit and District Courts for the District of Illinois, was delivered at the December term, 1850, of those Courts. The merit of the opinion was such, that at the request of a large number of the members of the bar, he prepared it for publication, and at the request of the same parties it is published.

THE UNITED STATES
v.
E. C. DUNCAN, *et al.*

Circuit Court of United States for Illinois—December Term, 1850.

The judgments at law and decree in chancery of the Circuit Court of the United States for the district of Illinois constitute a lien throughout the State, on the real estate of the party against whom they are rendered. This doctrine treated as the law of the Court, until the Supreme Court shall establish a different rule. (*a*)

A person, who, at a judicial sale, purchases a tract of land, as the property of the party against whom the judgment is obtained, and pays the purchase money to the plaintiff cannot, as a general thing, call on him for repayment.

A sale of real estate of D., had taken place under a decree of this Court, O. became the purchaser of a piece of land, and paid the purchase money to the plaintiffs, but discovering that D. had no title to the land, made application to the Court to have the purchase money reimbursed out of moneys of the plaintiff's in Court; held, in the absence of fraud and unfair dealing, that this could not be done, but that being a judicial sale, O. must take the consequences of a defect or failure of title; and that the remedy was in equity against D. or his legal representatives.

If one partner withdraws funds from the partnership, and pays the taxes on his private estate, the creditors of the partnership do not, in general, thereby acquire a lien on the land. The estate of the partner is still his own private property, and, in case of his death passes to his heirs or devisees subject to that debt as to others; and if his executors make a similar appropriation of the partnership funds the rule is the same.

Where it was alleged that A. and B. were partners, and after A's death, his executors appropriated partnership property to the payment of taxes on his estate, and in expenses of administration, he being, at the time of his death, insolvent and indebted to the United States in judgment and otherwise, which judgments were a lien on the real estate of A., the lien of the United States and their priority of payment were not thereby affected, but they could enforce their judgments notwithstanding the acts of the executors.

When the partnership property is not sufficient to pay the debts of the firm, the priority of the United States does not reach the undivided interest of one of the partners in the partnership effects; if he is indebted to the United States, but when it has become his separate, individual property, the rule would be different. The true test is, whether the property belongs to the partnership or the individual.

The creditors of a partnership applied to the State Court by bill, to declare the

(*a*) Jones vs. Guthrie, 33 Ill. R. 425; Davidson vs. Walkron, 31 Ill. R. 136; Masingill vs. Downs, 7 How. U. S. R. 769.

partnership, and decree the payment of the partnership debt, out of assets in the hands of the administrator of one of the partners who had died insolvent, indebted to the United States. The administrator denied the partnership and took an objection based on the debts of the United States and their priority. The State Court decreed in accordance with the prayer of the bill.

The U. S. were not parties, and did not appear in the State Court. Held that the proceedings in the State Court did not impair the rights of the United States, and that they were not bound by them, but that notwithstanding the decree in the State Court, the priority of the government attached, and that whenever the proceeds of any real estate, or any personal estate, came into the hands of the administrator, he became a trustee for the United States, and they must first be paid.

The acts of Congress, giving the United States a priority of payment, supersede all State laws upon the subject of the distribution of those estates that come within their provisions. The law makes no exception in favor of a particular class of creditors, and the priority of the United States does not yield to the claims of any creditors, however high may be the dignity of their debts.

In June, 1841, the United States recovered judgments in the Circuit Court of the United States against D. Subsequently, in 1841 and 1842, other creditors obtained judgments in a State Court against him. These last judgments were liens only on the real estate of D. situate in the county where the judgments were recovered. In 1846, the U. S. obtained a decree in the Circuit Court of the United States, directing all of D's real property in the State, to be sold to pay an indebtedness to the United States, independent of the judgments of 1841. D. died in 1844, his whole property not being sufficient to pay the debts due the government. Under the decree of 1846, various sales took place of real estate, out of the County in which the other creditors had their judgment, and there was a fund in Court arising from these sales, sufficient to pay the judgments of the other creditors. The United States having sued out executions on the judgments of 1841, and levied them on lands situate in the county where the other creditors held their judgments, these creditors made application to this Court to compel the United States to go upon lands out of that county, to satisfy their judgments, or for the proceeds of the land sold out of that county. Held, that however it might be in the case of private individuals, the United States, having an older lien made perfect by a levy, were entitled to retain it and sell the property to satisfy the judgments of 1841, and that the other creditors had no claim upon the proceeds in Court.

It is a rule well recognized and understood, that when a party has a lien for a debt in two funds, and another party has a lien on one of the funds only, a court of equity will oblige the party who has the double funds, to resort, in the first instance, for payment, to that fund upon which the other party has no lien. But this is never done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund.

The case of Schuyler *v.* Teller, 9 Paige, 173, examined and distinguished from this. But this rule does not affect, under the circumstances of this case, the priority of the United States, neither is that priority affected by the rule settled in New York, that lands consisting of different parcels, subject to a general incumbrance, are in equity to be charged in the inverse order of the alienation of the several parcels.

It has been uniformly held in all the cases, that the priority of the United States does not disturb any specific lien, nor the perfected lien for a judgment, that is, it does not supersede a mortgage on land, nor a judgment made perfect by the issue of an execution and a levy on real estate. But in the case of a general lien it is not so clear.

The laws of the United States, giving a priority to the government, are of general application in the cases therein stated, and if a debtor is to be excepted out of the general rule, it devolves upon the party alleging the exception, to show it.

Opinion, Delivered December 27th, 1850.

In the year 1835, Josepb Duncan, whose representatives are the defendants in this case, became one of the sureties of William Linn, receiver of public moneys at Vandalia, in this State

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The principal having failed to comply with the duties imposed on him by law, the sureties became liable on the bond given to the United States.

At the June term, 1841, of this Court, the United States recovered three several judgments at law against the sureties, Duncan among others, for the aggregate sum of $29,191.05. At the time these judgments were obtained, none of the sureties except Duncan, had any available property, and Linn, the principal, was insolvent. On the 22d of December, 1843, the United States realized on these judgments, the sum of $23,532.65.

In January, 1844, Joseph Duncan died, disposing, by will, of his real and personal estate, but making no provision, other than the usual one for the payment of his debts, for the amount due the United States. At the time of his death, he was seized of a great many tracts of land lying in different counties of this State and in Morgan county, his place of residence.

The judgments of 1841, in this Court, not covering the defalcation of Linn, the plaintiffs instituted suit at law, to the December term of this Court, 1844, against William Thomas, as administrator, &c , of Joseph Duncan, the executors having resigned or ceased to act, and at that term, recovered judgment against the administrator, *de bonis testatoris*, for the sum of $48,151.61.

In February, 1846, the United States filed a bill in this Court setting forth most of the facts detailed above, and asking for a discovery of the title papers and estate of Duncan, insisting upon the priority of the plaintiffs, and praying for an account of the money due the United States, of the personal estate of Duncan, and of the value, rents and profits of the real estate, and that, if the personal estate was not sufficient, the real estate might be sold to pay the debt due the plaintiffs. To this bill the widow, heirs, executors, devisees, &c., of Duncan were made parties. During the progress of the cause, the value of the widow's dower was agreed upon and amicably settled, and she relinquished. Answers were put in by the defendants, and at the June term, 1846, a decree was rendered in favor of the United States, for the sum of $49,156 15, [that being all that was due, except what had not been collected under the judgments of 1841,) and ordering the real estate of Duncan to be sold, and the proceeds to be paid to the United States, first paying prior liens, if any."

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Under this decree, various sales of real estate out of Morgan county have taken place, under the direction of a commisioner, from which very considerable sums have been realized, part of which have been paid over to the United States, but there remains the sum of $4,052.00 subject to the order of the court.

Personal property, to the amount of $300.00, was sold under the judgment of 1844.

There were two judgments recovered against Duncan in his life time, in the Circuit Court of Morgan county, of this State, one by McConnel et al., for $333.76, in November, 1841, and the other by Matthews for $497.35, in March, 1842. On the 10th of November, 1845, Doremus, Suydam & Nixon, filed a bill in the same court against William Thomas, administrator, &c., of Duncan's estate, alleging that certain personal property which the executors of Duncan had sold, and the proceeds of which, amounting to $960.60, it seems they had applied to the payment of taxes on real estate and expenses of administration, belonged to a firm of which one James M. Duncan and Joseph Duncan, in his life time were partners, and that the plaintiffs were creditors of that firm, and claiming that they (Doremus, Suydam & Nixon) should be repaid the sum so used by the executors, and that they should be substituted in their place; insisting it was a favored claim. James M. Duncan, also one of the sureties of Linn, was party to this bill, but he was insolvent. The administrator, in his answer, denied the partnership, and referred to the claim of the United States, and their priority, and to the proceedings in this court, which he set forth at length, but the circuit court of Morgan county, by a decree rendered on the 17th of November, 1847, found that the partnership did exist, as stated in the bill; that at the death of Duncan, the goods and chattels referred to, and the proceeds of which had gone into the hands of the executors, were liable for the partnership debts, wherever traced, and ordered that the plaintiffs should be paid out of the estate of Duncan. To Doremus & Nixon $766.48; to William A. Ransom & Co., $194.12. The latter had been made parties and Suydam had died pending the suit. The Court further adjudged, that inasmuch as it did not appear the administrator had any assets in his hands, he should pay the above sums out of assets thereafter to come into his hands, or which might remain in his hands after the settlement of his accounts as administrator. It

is proper to add, that an objection was made in the answer of Thomas, because the United States were not parties, but the Court decided it was not necessary to make them parties.

It was conceded that the judgments of 1841, rendered in this Court, were a lien on all the real estate of Duncan, within the State, that the decree of June term, 1846, operated to the same extent, upon the real estate in the hands of the heirs, devisees executors, &c., of Duncan ;* and that the judgments of the Morgan Circuit Court, operated only upon real estate within the county of Morgan. The judgments and decree entered in the circuit court of Morgan county, are yet in force, not being paid or satisfied, except some partial payments hereafter mentioned.

The judgments at law, of this court, recovered in 1841, being paid only in part, the United States in 1847, issued alias executions on those judgments, and the marshal levied them on lands lying in Morgan county of which Duncan died seized, and they were sold by the plaintiffs.

Joseph Duncan, at the time of his death, did not possess sufficient property, including real and personal, to discharge the debt he owed the United States, the lands out of Morgan county, not being of value enough to satisfy the decree of June term, 1846. And it does not appear that there was more than sufficient property in Morgan county, to meet the balance due on the judgments of 1841, of this court,

In this condition stood the cause, when, on the 15th of June, 1847, McConnel *et al.*, and Matthews filed their petitions in this court.

The petition of McConnel *et al.*, alleges that under the decree of 1846, sales of lands, without the county of Morgan, had taken place, upon which had been made $3,555.20, which, it insists ought to be, as to the lien, of their judgment, a credit on the judgments at law, of the United States of June 1841 ; that there are

* The opinion of the profession in Illinois, is so general in favor of the doctrine that the lien or judgments of the United States Court, is co-extensive with its jurisdiction, as stated in the text, it was not controverted on the argument. See the question discussed in a report which was confirmed by the Circuit Court of the U. S. for the Eastern District of Pennsylvania, contained in the case of Bayard *v.* Lombard *et al.*, 9 Howard's Reports, 530. The Supreme Court of the United States, held that the decision of the Circuit Court was final and conclusive under the circumstances and could not be reviewed, consequently, no opinion was given as to the lien of judgments obtained in the Circuit Court of the United States. Wallace Jr. R., 196, S. C.

lands out of the county of Morgan, more than sufficient to satisfy those judgments, and that the United States are proceeding to sell real estate in Morgan county. The petition calls for the interposition of the court to arrest the sale ; to marshal the securities so as to give them the benefit of this lien, by throwing the judgments of the U. S. of 1841, upon lands out of Morgan county, and that the sum made $3,555.20, be applied upon these judgments.

The petition of Matthews is, in all respects similar to that of McConnel *et al.*

A *fi. fa.* had issued on the judgment of McConnel, and $60.00 had been obtained on it. A *fi. fa.* had also issued on the judgment of Matthews, and real estate had been levied on and $393 made by the sale of it. The executions were issued in each case within a year after the judgments were obtained respectively.

On the 23rd of December, 1847, Doremus & Nixon, and A. Ransom & Co. likewise filed a petition setting forth most of the facts heretofore mentioned, and alleging that this court had taken full administration of the estate of Duncan ; that their decree of the Morgan Court of November, 1847, had been rendered useless ; that there was no priority of payment to the U. S. till the estate was ready to be disbursed ; that taxes and costs of administration were to be first paid ; that under the circumstances they stood as the State and individuals, and were elected with their rights ; that there was more real estate to be sold, and their partnership fund had incresed the amount to be disbursed in this cause, and asking that their decree be paid out of moneys received from the sale of real and personal estate, or, if that be not proper, that the commissioner of this court be ordered to sell land enough to satisfy the sum named in their decree, and pay it over to them.

Various supplemental petitions were filed by all the parties, from time to time, bringing before the court the proceedings that have since taken place in this cause, and particularly stating, that other lands out of Morgan county had been sold under the decree of June, 1846, and the money received, and that the sum of $3,789.56, was made by sale of land in Morgan county under the judgments of 1841.

The petition of O'Donoghue, which was filed on the 10th of January, 1849, states that he had purchased a lot of land at a

sale made by the commissioner in this cause, which lot was sold as a part of the estate of Duncan; that he paid the commissioner for it, and that Duncan had no title to it, having before his death by deed duly recorded, conveyed it to Illinois College. And he seeks to have the sale by the commissioner to him annulled, and to have the money paid by him reimbursed out of the fund in court.

When these petitions were presented this court, without determining the question sought to be raised by them, ordered that a sufficient fund should be reserved to satisfy their claims, which was to be paid to the petitioners, provided the court should be of opinion upon the final disposition of the cause, that the parties were entitled to receive the amounts they sought. And there is now a fund of more than four thousand dollars awaiting the decision of the questions presented by these petitioners.

These are material facts.

The applications were once heard before the former Judge of this court, but no decision was given or order entered. They have, therefore, been fully argued before me, and it now becomes my duty to announce my opinions upon the different questions presented.

The counsel of the United States not denying the allegations contained in the petitions, insists that the petitioners are not entitled to the releif they seek, nor to any relief.

As the petition of O'Donaghue stands upon a footing entirely different from the others, it may be convenient to consider that first.

The sale, under which he purchased the lot, was made by the order of this court, and it is well settled that in all judicial sales there is no warranty, but that the rule of *caveat emptor* applies. Owing *v.* Thompson, 3 Scam., 502. If there be fraud or concealment, or any unfair dealing, that may be a ground for an application to a court of equity; otherwise the purchaser must look to the soundness of his title. This is the established rule in England, and throughout the United States, and it should be peculiarly applicable here, where it is so easy to trace the title to real estate, the sources, in nearly all cases, being the public records of the country. It is true, where a plaintiff, in an execution, purchases a tract of land belonging, apparently, or which he supposes to belong to the defendant, and there is in fact, no title,

a court will interpose and place the parties in their former condition. But that is because it is a matter between themselves, the purchaser having neither benefitted nor injured any third person; and it has been decided, that where there is no fraud, and a stranger to the execution purchased a piece of land as the property of defendant, when he had no title, a court of equity would compel the judgment debtor to refund the amount to the purchaser, on the ground that his purchase had paid the debt. But no case has been shown, in which, under such circumstances, the purchaser could call upon the plaintiff in the execution to refund the amount. Indeed, the case just mentioned, is conclusive that he could not, for it is because the sale must so far stand as to enable the plaintiff to retain the money paid, that the defendant is liable. It could make no difference, that the money, instead of being in the hands of the party, was held by the officer, or paid into court. In either case, it would seem, the right of the party to the fruits of his judgment, could not be contested. But conceding that, this last position may be questionable, still, after the money has actually been paid to the party, it is beyond the reach of the purchaser. Here the moneys paid by the petitioner has been received by the plaintiffs, and he seeks to make another fund, now in court, arising from the sale of other property belonging to the estate of Duncan, liable to his claim.

On the part of the petitioner, the court was referred to Lansing *v.* Quackenbush, 5 Cowen, 38; a case where the defendant had represented he was the owner of lots, which the party purchased, and it turned out he was not. On application to the court, they said there was a remedy, but that it was in equity. Here was a false statement, and if the plaintiff were not a party to it, the remedy would be against the defendant. Adams *v.* Smith, 5 Cowen, 280, was also referred to. In this case, the sheriff had sold personal property which did not belong to the defendant, and the real owner sued the sheriff and plaintiff jointly and recovered. The court allowed the amount made on the sale, and endorsed on the execution, to be stricken out, and an execution to issue for the amount of the original judgment. In this case, it was personal property, and the owner resorted to the remedy which the law gave him, the property remaining with the purchaser. Both cases are very shortly reported and clearly distinguishable from the present. But the Supreme Court of Illinois

have held under somewhat similar circumstances, there was no remedy against the plaintiff in the execution. A party purchased some property under an execution. A stranger sued for and recovered the property from the purchaser. The latter then brought suit against the plaintiff in the execution, to recover back the purchase money. The court decided that the plaintiff was not liable. England *v.* Clark, 4 Scam., 486. There were cases of personal property, but in a sale of real estate under execution no action is brought, because if the property of A. is sold on an execution against B. the title to the property is unchanged, and A. ordinarily suffers no wrong.

In a very recent case, however, Dunn *v.* Frazier, 8 Blackford, 432, this question was directly decided. That was a much stronger case than this. A judgment had been obtained, and an execution was issued and returned *nulla bona*, and afterwards the judgment creditor filed a petition, alleging that the judgment debtor was the owner of certain real estate in fee simple. On the application of the petitioner, the court ordered the real estate to be sold on execution. It was sold accordingly, and Frazier became the purchaser. One of the administrators of the judgment debtor was present at the sale, and solicited Frazier to buy, assuring him that the title was good. Various proceedings took place, during which Dunn, the judgment creditor, transferred the judgment to one Adams, and Frazier refused to pay the purchase money. Another execution was issued which was enjoined. Finally, Frazier paid part of the money to Adams, and the remainder into court,(to the clerk.) The judgment debtor had no title to the property. These facts being made to appear to the court below, by bill in chancery, it ordered the money to be paid back to Frazier, but the Superior Court of Indiana, reversed the decree, on the distinct ground, that a purchaser who buys lands and pays the money, the judgment creditor receiving it, cannot recover it back from the creditor, either at law or in equity, merely because the judgment debtor had no title to the land. The proper course in such a case, was to proceed against the judgment debtor, or his estate, by bill in equity. And even in relation to the money in court, it depended altogether upon the fact, whether there was any thing due on the judgment, or it was an overplus, in which last event it might be paid over to the purchaser. And see Warner *v.* Helm, 1 Gilman, 220.

It will be seen, therefore, from these principles and authorities, the petitioner, while he has no claim upon the fund now in court, has a remedy against the estate of Duncan. That it may be unavailing is his misfortune. If the petitioner obtain the money he has paid, it must be by the voluntary act of the plaintiffs, and not by the order of this court.

Let us now proceed to consider the petition of Doremus & Nixon, and A. Ransom & Co. They insist that, inasmuch as there was a partnership between James M. and Joseph Duncan, and the executor of Joseph Duncan, had used the partnership goods to pay the taxes on his real estate, and the expenses of administration, they, as creditors of the partnership, have a right to be repaid out of the fund in court.

There can be no doubt that the partnership effects are primarily liable for the partnership debts, and that those effects ought not to be appropriated to the payment of the separate liabilities of one of the partners. And if the executors knowingly diverted them, in the manner charged in the bill filed in the Circuit Court of the State, they acted illegally. But conceding this, it does not follow that the partnership creditors thereby obtained a lien upon the separate property of Duncan. No authority has been referred to which shows that if one partner withdraws funds from the partnership, and pays the taxes on his private estate, the creditors of the firm thereby acquire a lien on the land, unless, indeed, the decree on which the application now under consideration is founded, may be so regarded. All that can be said is, that the estate of the partner becomes liable to the creditor of the firm. The estate of the partner is still his own private property, and in case of his death, passes to his heirs or devisees, subject, if he had used the partnership funds for the purpose mentioned to that debt as to others. Story on Part., §97, 326, 358, 359, 360 & 361. Neither could the use of the partnership funds, by the executors, in the expenses of administration, create any lien upon the estate. It would still be a debt due from the estate. And, if the creditor of the firm was placed in the condition of those individuals to whom those expenses had been paid, it is doubtful, whether that circumstance, for reasons presently to be given, would affect the question.

It has been decided that the priority of the United States does not reach the property of a partner in partnership effects,

so as to pay the separate debt of one of the partners, (he being the debtor of the United States,) where the partnership property is not sufficient to pay the debts of the firm. U. S. *v.* Hack, 8 Peters, 271. But that proceeds upon the presumption that they are partnership effects. It is plain, if they had ceased to be such, and had become the separate property of the one indebted to the United States, the doctrine would be different. The true test would seem to be, whether the property belonged to the firm or the individual.

Now it is to be remarked, that these petitioners did not ask the Court of Morgan county to do more than to declare the partnership, and to decree the payment of the partnership debt, out of assets which were at that time, or thereafter to be, in the hands of the administrator. They claimed at most, not a lien on the estate, but a priority of payment out of the estate. And the Court, though it expresses the opinion, that the proceeds of the partnership effects were liable to the debts of the petitioners, wherever they could be traced, decides they were to be paid out of the estate of the testator. Accordingly, in whatever light we may regard this decree of the Circuit Court of Morgan county, it is clear it intended that payment of the debts was to be made out of Duncan's estate, when there should be sufficient assets for that purpose in the hands of the administrator. The Court does not even decree that the petitioners shall be first paid ; but there is an alternative, that they may be paid when the administrator, upon the settlement of his accounts as such, shall have money then remaining in his hands. The decree did not create any lien, specific or general, upon any fund, nor upon the real estate of the testator, as it probably could not ; and it does not vary essentially from the usual judgment against an administrator, for the debt of a deceased party.

Though an objection was taken to the proceedings in Morgan county, because the United States were not made parties, it is said that the decree is binding on them in this Court, in this application on the part of the petitioners. Let us now examine this position, and endeavor to ascertain whether this is so.

At the time of Joseph Duncan's death, his indebtedness to the United States, except the balance due on the judgments at law of this Court of 1841, did not constitute a lien upon his real or personal estate. The plaintiffs had only a right to a

priority of payment. And it may be admitted, for the purpose of this argument, that their priority did not extend, in point of law, so as to operate upon the real estate of which Duncan died seized, in the hands of heirs or devisees. But at the time the petitioners filed their bill in the Circuit Court of Morgan county, there was a judgment of this Court against William Thomas as the administrator, with the will annexed, &c., of Duncan; and at the time the final decree was rendered in the Circuit Court of Morgan county, there was, and had been, for more than a year, a decree standing in this Court, which took effect upon all the real estate of Duncan within the state, and directed it all to be sold for the payment of the debts of the United States, first paying prior liens. When this decree was rendered, in June, 1846, the claims of the petitioners were certainly not a prior lien, binding the estate. If, then, we give effect to the decree in the State Court, we are not the less bound to give full effect to the judgments and decree in this Court; and we will now proceed to show, that it must be considered subject to those of this Court; that under the law and by virtue of the proceedings here the decree of the Circuit Court of Morgan county could not become operative until the claims in this Court were satisfied.

The petitioners have not sought to enforce their decree in the State Court; indeed, so long as there is nothing in the hands of the administrator, it could not, by its terms, be enforced. They come into this Court, and request its action upon their claims.

By the fifth section of the act of 3d of March, 1797, it is provided that when any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise, or shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied. 1 Statutes at Large, 515. This applies to two classes of debtors—those who are insolvent, and those whose estates, in the hands of executors or administrators, are not sufficient to discharge all the debts due from the estate. It was intended to reach the property of the debtor, whether living or dead. It has been decided that this section is applicable to all debtors of the United States. Joseph Duncan's estate was the estate of a deceased debtor of the United States; and when it came within the other requisition of the act—that is,

whenever it came into the hands of executors or administrators—then the operation of the law was complete. The doctrine of the Supreme Court of the United States, as founded on this law, and on a similar one, (act of March 2d, 1799, sec. 65,) as it respects this point is, that the party, whether assignee, executor or administrator, into whose hands the estate of the two classes of debtors mentioned passes, becomes a trustee for the United States, and from the fund in his hands, they must first be paid. Blaston *v.* The Farmers' Bank of Delaware, 12 Peters, 102; Brent *v.* Bank of Washington, 10 Peters, 596. If it be admitted that the priority of the United States did not extend to the real estate of Duncan, in the hands of heirs or devisees, as already stated, because it does not attach as against them, still when the real estate or the proceeds thereof passed to or vested by law in the hands of the executors or administrators, the priority did attach. United States *v.* Crookshank, 1 Edwards' Chancery R., 233. Consequently, whenever the proceeds of any real estate, or any personal estate, came into the hands of Thomas as the administrator, he, having notice of the debt due the government, became a trustee for the United States, and was obliged to pay them first, independent of the judgment of December term, 1844, and the decree of June term, 1846, of this Court. These merely determined the amount of the debt, but in no degree changed his duty in the premises.

It is to be observed, that this law of Congress supersedes all state laws upon the subject of the distribution of those estates that come within its provisions. The language of the Supreme Court of the United States, in Thellason *v.* Smith, 2 Wheaton, 296, is that there is no exception made by the law, in favor of a particular class of creditors. And the same Court, in Conrad *v.* Atlantic Insurance Company, 1 Peters, 444, says, that the priority of the United States does not yield to any class of creditors, however high may be the dignity of their debts. It follows, then, if these principles are correct, that the claims of the petitioners cannot bind any funds in the hands of the administrator, nor any lands sold under the judgments at law, nor the decree in chancery of this Court nor the proceeds of the same, notwithstanding the decree of the Circuit Court, of Morgan county; for whatever may be the effect of this last decree, it cannot operate, under the circumstances, so as to impair the

rights of the United States. Field *v.* United States, 9 Peters, 183.

The remaining question is as to the effect of the judgments at law of the Circuit Court of Morgan county. As the rights of the petitioners, whose claims we are now to consider, depend upon the same principle, we will examine them together. This, then, was the position of the parties. The United States had judgments, binding all the lands of Duncan throughout the State, prior, in point of time, to the judgment of McConnel *et al.*, and that of Matthews, which last two judgments, were binding only on lands in Morgan county ; and the United States had a decree subsequent and subordinate to both, but which, in extent, had the advantage of operating, like the judgments of June, 1841, throughout the State. The petitioners insist they have a right to throw the judgments of 1841, upon land without the county of Morgan They assert that at the time their judgments became liens upon the real estate in Morgan county, the United States, having also judgments which were liens upon that land, and which were, besides, liens upon lands out of Morgan county, are compelled to go upon these last mentioned lands, upon the principle well recognized and understood, that where a party has a lien for a debt on two funds, and another party has a lien on one of the funds only a court of equity will oblige the party who has the double fund, to resort in the first instance, for payment to that fund upon which the other party has no lien. And it is contended that the circumstance of the United States procuring a decree, binding the lands out of Morgan county, before the application is made here, can make no difference. Another principle is also invoked, which may be considered settled law in New York at least; that where there is a general incumbrance upon distinct parcels of land, and the owner aliens them at different times to different persons, the parcel last sold is to be first charged to its full value to pay the general incumbrance, and so on backwards. The argument is this: if Duncan had mortgaged all his lands in the State, to the United States, for the payment of thirty thousand dollars, and then had mortgaged his lands in Morgan county to these petitioners for the amount of their judgments, and afterwards all his lands out of Morgan county to the United States for forty-nine thousand dollars, these lands out of Morgan, being the last aliened, are, according

to the doctrine above mentioned, to be first charged with the payment of the sum first named. And it can make no difference, it is said, if instead of mortgaging the lands out of Morgan, he had mortgaged all of his lands in the State over again ; because, it will be seen, in order to adapt it to this case, we must include all of the land, the decree of 1846 of this court binding the lands in Morgan county as well as elsewhere. It is urged that these being judgments, the principal is the same.

This is stating the proposition fully, and carrying the analogy to as great an extent in favor of the petitioners, as was contended for by their counsel on the argument.

The doctrine that where a man owns different parcels of land, and transfers some of them, himself also retaining some, all the parcels being subject, before the transfer, to a general incumbrance made by him, the part which he still retains shall be applied to the payment or discharge of that general incumbrance, rather than that which he has transferred, is founded on the plainest principles of equity. It would be manifestly unjust that those persons to whom he had made transfers, should be compelled to pay off the incumbrance, when he held land which would satisfy it. Accordingly, it has been held, under such circumstances, that the property transferred is only liable, in the event of the part remaining in the owner not being sufficient to discharge the incumbrance. On the other hand, the doctrine already mentioned, as settled in New York, that land consisting of different parcels, subject to a general incumbrance, is in equity to be charged in the inverse order of the alienation of the several parcels, has been sometimes questioned, and Judge Story thinks it is not maintainable upon principle ; and inclines to the opinion that there should be contribution, in such cases, according to the relative value of the estates. Story's Equity Juriss., §§634 *a*, 1233 *a*.

The New York doctrine was pressed very far in the case of Schryver v. Teller, 9 Paige, 173, and as that was cited in the argument by the counsel of the petitioners, and considered conclusively settling the principles which should govern this case, it may not be improper to give it a particular examination.

In that case, the owner of the parcels of land—one at Coxsakie, the other at Redhook—having encumbered both by judgments and each by mortgages, on the 28th of May, 1840, mort-

gaged the Coxsackie property, and on the 7th of July following mortgaged it again to another person. On the 9th of June, of the same year, he mortgaged the Redhook property, and again on the 12th of the same month, this last being given to the same person that held the mortgage of the 7th of July on the Coxsackie property. On the 3rd of June, 1840, a judgment was docketed, which was a lien on both. The parties who held the mortgage of the 7th of July on the Coxsackie property, and those who held the mortgage of the 9th of June, on the Redhook property, at different times and in different courts, filed bills for foreclosure, and at different dates obtained the usual decrees for sale of the property, the master having reported as to the priority of the several liens. On the 2nd of March, 1841, the Redhood property was sold for an amount sufficient to satisfy all the liens on it prior in point of time to the mortgage of the 28th of May, 1840, on the Coxsackie property. On the 23rd of March, 1841, this last property was sold for an amount not sufficient to pay the costs of foreclosure and the mortgage of 28th of May, if the previous judgments, as well as the prior specific liens on that property, were paid out of such sale. Under such circumstances, the holder of the mortgage of the 28th of May made application to the court for a modification of the original decree so as to throw the judgments on the surplus proceeds of the Redhook property, after satisfying all liens thereon prior to his mortgage. The court allowed the application, on the ground that as the Redhook property was more than sufficient to pay all liens on it prior to the date of the applicant's mortgage, in case the judgment creditors, who held liens at that time, sought to enforce them on the Redhook property, if the applicant paid them, he would have a right in equity to insist on an assignment of them, so that he might have a repayment out of the surplus proceeds, in preference to those who had liens on that property accruing after the date of his mortgage. For instance, the judgment creditors had liens on both properties, when his mortgage was taken on one. [Coxsackie] If, in enforcing those liens, it would prejudice his mortgage, he would have a right in equity to compel them to go upon the Redhook property, because, certainly, he could be in no better position by taking an assignment of the judgments, than those who held them. Let us suppose the case put, had actually happened ; that the applicant had pur-

chased the judgments ; then he would be the holder of judgments binding on both properties, and of a mortgage on one. The doctrine of the court is, that in this condition, he could go upon the Redhook property to satisfy his judgments, in preference to one who had a lien on that property accruing after his mortgage. The court illustrated it by saying, if there had been a mortgage on both properties, and it had been foreclosed, the decree would require the property to be sold separately, and the proceeds so to be marshalled as to pay general liens on the whole out of that part of the fund arising from the sale of the Redhook property, thus far giving the applicant the benefit of his priority on the Coxsackie property, over a subsequent incumbrancer of the Redhook property.

In the case just cited, there was a general incumbrance, binding oth parcels, also specific incumbrances binding each, and a transfer made of one, and then the other ; and it seems to proceed upon the principle that, inasmuch as at the time when the transfer was made of one of the parcels, the party would have the right to compel the general iucumbrancer to go upon that parcel not affected by the transfer, no subsequent act of the owner in relation to that other parcel, could change his rights. Whether it would make any difference, if the general incumbrance and the transfer of the second parcel were held by the same person, does not appear ; but it is certain, he would, in one sense, come within the qualification for limitation of the rule laid down by Judge Story. He says, that though the rule, that is, if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien, is so general, it is never applied, except when it can be done without injustice to the person who has the double fund, as well as the debtor. It is never done when it trenches upon the rights, or operates to the prejudice of the party entitled to the double fund. Equity Jurisprudence, §558, 559, 560, 633. The object is to satisfy both creditors. It is apparent, however, whenever the double fund is insufficient to pay all the claims against it, and the same person has a right to proceed against both, and against one alone, it does affect the right of the party entitled to the double fund. For example, in this case, the United States have a general lien on different parcels of land ; creditors, the petitioners, have also a general lien on some of the parcels ; and the United States have a lien which

may well be considered specific upon all the parcels. Now it is plain, if the creditors turn the general lien of the United States over to the lands not bound by the lien of the creditors, under the facts of this case, it diminishes, by so much, the fund which is to satisfy the decree of 1846. In other words, whatever is paid to the petitioners is an absolute loss to the plaintiffs. Notwithstanding such would be the effect, in this case, upon the party entitled to the double fund, it may be questionable whether the circumstance of taking a subsequent lien, would or ought to place them in a better position ; certainly not, if the true reason be given for the rule, in the case in Paige. To apply the argument of that case to this ; if these petitioners had paid off the balance due on the judgments of the plaintiffs of 1841, they would have the right in equity, to insist upon an assignment thereof.

The case of Schryver v. Teller, if we admit that it was rightly ruled, must be regarded as deciding that a general lien will be thrown upon a particular parcel of land so as to give a party having a mortgage the benefit of his priority over subsequent incumbrances, either of the whole or a part ; that is, where the question is dependent upon priority of time alone. But it does not follow that this would be the rule where there is a priority of right, that is in a case where the parties, as such, do not stand upon an equality of right.

Let us therefore examine how far the character of the parties in this case, affects the question. The plaintiffs consti tute the sovereign power of the country, and, according to the jurisprudence of most States, under certain circumstances, are entitled, as a creditor, to peculiar privileges. It was so under the Roman law ; is so under the law of England, and under our own.

We must bear in mind, that the statutes giving the government a priority, are presumed to have for their object the public good, and are, therefore, to be liberally construed. United States *v.* State Bank of North Carolina, 6 Peter's, 29 ; Beaston v. Farmers' Bank of Delaware, 12 Peter's, 134.

The application was presented in this case, after a levy had been made by the United States, upon lands in Morgan county, under executions issued on the judgments of 1841. The lands were sold and the moneys appropriated upon those judgments, subsequent to the filing of the original petitions, as appears by the supplemental petitions. This court did not interfere with the pro-

ceedings under the executions, but suffered them to continue, and directed that there should be reserved a sufficient fund to meet the claim of the petitioners, from what might be made by the sale of lands in this case. The rights of the petitioners ought, perhaps, for that reason, to be considered the same as if the money arising from the sale of the Morgan lands had been paid into court, subject to its order herein. And, apparently, it should be governed by the same principles as if the petitioners, instead of pursuing the course they have, had applied to a court of equity to restrain the proceedings on the executions, waiving for the purpose of the supposed case, all objections on account of sovereignty, and the United States had come and given, in answer, the decree of 1846; the indebtedness of Duncan's estate; in fines stating all the facts and claiming a priority of payment under the law.

It would seem upon principle, as well as by the authority of adjudged cases, if we throw out of view the decree of 1846, and the question of sovereignty, there could be no doubt of the right of the judgment creditors to compel the plaintiffs to look to lands out of Morgan county, not bound by their lien, for the satisfaction of the balance due the United States, upon the judgments of 1841, for in that case, there would be property sufficient to pay both. It is true, technically speaking, the petitioners, if they paid the judgments of 1841, could not compel the plaintiffs to assign those judgments to them, because they could not strictly reach the United States. Hill *v.* United States, 9 Howard, 386. But if this difficulty were avoided, the question is whether the decree of 1846, which operated specifically upon lands not affected by the judgments of the petitioners, changes the principle.

It must be conceded the question is not free from embarrassment, in consequence of the difficulty of extracting from the various cases which have been decided, the true rule of interpretation of the acts of Congress, laid down by the Supreme Court.

The petitioners had taken out executions on their judgments, within a year after they were rendered; on one some real estate, not in question here, had been sold; on the other, a small payment had been made; as to the balances due on them respectively, the judgments became general liens.

It has been uniformly held, in all the cases, that the priority of the United States, does not disturb any specific lien, nor the perfected lien of a judgment; that is, it does not supersede a

mortgage on land, nor a judgment made perfect by the issue of an execution and a levy on land. Thelluson *v.* Smith, 2 Wheat., 396 ; Conard *v.* Atlantic Insurance Company, 1 Peters, 386.

But in the case of a general lien it is not so clear. The case of Thelluson *v.* Smith, if it is not considered, as in some respects, overruled by the case of Conard *v.* The Atlantic Ins. Co., certainly establishes the doctrine that the priority of the United States does not yield to a judgment which is a general lien upon real estate. The facts were, that Thelluson and others, recovered a judgment against Crammond, which, it was admitted by the Court, was a lien upon his lands on the 20th of May, 1805. Afterwards he made an assignment of all his estate, being insolvent, and in debt to the United States, so as to bring him within the operation of the acts of Congress. The United States subsequently brought suit against him, had judgment, sued out execution, levied on and sold an estate, called Sedgely, admitted to be bound by the judgment of May 20, 1805. The Marshal having received the proceeds, Thelluson *et al.*, brought suit against him. They had not issued execution, nor levied on the estate by virtue of their judgment. One of the questions made in the case was, whether the United States were entitled to be paid in preference to the judgment creditor? This the Supreme Court decided in the affirmative, concluding by saying: "a judgment gives the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the act of Congress defeats this preference." This was under the act of 1799, but we have already seen, that in this respect, it is like the act of 1797.

This case was particularly examined and reviewed in Conard *v.* The Atlantic Insurance Company. It is there said, that Thelluson *v.* Smith was a case where a judgment creditor sought to recover the proceeds of a sale of land made under an adverse execution, on the ground that he had a general lien by judgment on the land ; and in such circumstances the action was not maintainable. The real ground of the decision, the court says, was, that the judgment creditor had never made his lien specific ; that he had no title to the proceeds as his property ; and if they were to be deemed general funds of the debtor, the priority of the United States attached ; that a mere lien on land did not convey the legal title to the proceeds of a sale, made under an

adverse execution; the case did not establish the principle, that a specific lien could be displaced by the priority of the United States; because that priority was not, of itself, equivalent to a lien. Judge Johnson, in his separate opinion, says, that he never acknowledged the authority of the case of Thelluson *v.* Smith, on the point supposed to be decided by it—the precedence of the debt of the United States, as to a previous judgment, in the case of a general assignment; and that he concurred in it, only because of the want of priority betwenn the parties. He thought the sale of the Sedgely estate under the execution was a nullity, because the assignment of Crammond divested all his interest, so as to place it beyond the reach of the execution issued on the judgment of the United States. Suppose, however, the assignees in whom the estate had vested—admitting it had vested—had sold it notwithstanding the lien; then, according to my understanding of the case of Thelluson v. Smith, even as corrected and explained in Conard v. The Atlantic Insurance Company, the proceeds of the sale in the hands of the assignees, would have been subject to the priority of the United States. As, in this case, if the lands in Morgan County had been sold by the executors or administrator, under the authority of the will or of the law, the proceeds would have been liable, not to the judgment creditors, (the petitioners,) but to the United States; it being understood in all such cases, that the executor or administrator in whose hands the proceeds were, had notice of the debt due the government.

In Conard v. The Atlantic Insurance Company, the court are careful to say, the priority of the United States does no t effect any specific lien; but in the case of Brent v. The Bank of Washington, 10 Peters, 596, the court state, that it has never been decided that the priority of the United States affects any lien, general or specific, existing when the event happened which gave them priority.

Suppose, then, the case of Thelluson v. Smith may be considered as shaken, and, indeed, overruled—about which some doubt may be entertained—so far as it gives a preference to the United States over the general lien of a judgment creditor; it would follow that the judgment of these petitioners would not be affected by the mere force of the statute of 1797; and, possibly, we might go farther, and say they would not be affected by any

mere judgment or decree in favor of the United States, on the indebtedness of Duncan's estate, rendered after the date of the judgments of the petitioners. But this court is asked to go even farther; to say that the United States shall forego their lien of 1841, superior to that of the petitioners, as to the lands in Morgan county, and release a part of the lands bound by their decree of 1846, out of that county; so that the petitioners may be paid in preference to the plaintiffs. This, it seems to me, cannot be done. The United States are entitled to all their legal rights; and, in the case supposed of an application to a court of Equity, to say to the judgment creditors: We will enforce our lien of older date than yours, made specific by a levy before you applied to the court; we will retain our lien under the decree of 1846 upon the lands out of Morgan county; we are not to be regarded as ordinary individual creditors of the estate; your rights must yield to ours. The same answer to the application of the petitioners, must be given in this court. If they have a lien, so have the United States; and to decide that under the circumstances of this case, the latter could not enforce their judgments of 1841; would be to say, in effect, they had no priority of payment at all; but that they must stand upon an equal footing with all other creditors; to prevent which was the very object of that portion of the statutes of 1797 and 1799, already referred to.

We have been told their lien cannot be displaced by that which is not a lien—the priority of the plaintiffs. It is not. There is not only a priority, but that priority has been perfected into specific liens. If it be said, that, discarding the decree of 1846, the United States might be regarded as individuals, and thrown on the lands out of Morgan county for the satisfaction of their judgments of 1841 and they ought consequently to be treated in the same manner, notwithstanding that decree: if the first could be done, the other would not necessarily follow; and the reason is—in the former case the United States would be paid in the latter, not; and the law is imperative they shall be first paid, when the estate of any deceased debtor, in the hands of administrators or executors, is insufficient to pay all the debts due from the deceased. And certainly, the lands of the deceased debtor, when these petitioners made their application to this court, were as strongly bound by the priority of the claim of

the United States, as the proceeds of them would have been, in the hands of executors or administrators.

The laws of the United States giving a priority to the government, are of general application in the cases therein stated ; and if a debtor is to be excepted out of the general rule, it devolves upon the party alleging the exception, to show it. I think these petitioners have not satisfactorily established their right to be withdrawn from the ordinary predicament of creditors, when they come in competition with the claims of the government. In all such cases, it is manifest Congress intended to give priority of payment to the United States, over all other creditors. Beaston *v.* The Farmer's Bank of Delaware, 12 Peter's, 134.

Admitting that the questson is not free from, difficulty, yet I have not been able to arrive at any other conclusion than that which is here announced. It is sometimes a hard rule, undoubtedly, upon individual creditors and upon families, that a man's whole estate should be swept away, to pay a debt due to the government ; but Courts of justice can only expound and apply the law ; and if upon a fair and impartial examination of the subject, they can ascertain its intent and meaning, their duty is simply to administer it, as it becomes applicable in the various relations of life, to the rights and interests of the parties before them.

Archibald Williams, District Attorney, for the Pltffs.

D. A. Smith & Wm. Brown, for the Petitioners.

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ACTIONS.

1. In an action, the gist of which is carelessness, negligence, or imprudence on the part of a defendant, it is proper to admit any testimony, which tends to prove that a prudent man would have acted in the same manner. *Burkett* v. *Bond*, 87.
2. In trover, if the plaintiff recover, he is entitled to a verdict for the full value of the property converted, at the time of the conversion. *Keaggy* v. *Hite*, 99.
3. In an action of account under our statute, the Court is not authorized to enter judgment on the declaration for the amount claimed therein, or for any amount; nor is the plaintiff limited in his recovery by the amount stated in it. The judgment upon the declaration is interlocutory, that the defendant account, and the final judgment is upon the report of the auditors. *Lee* v. *Abrams*, 111.
4. In pleading in this action the better rule is to require the defendant to file before the court in the first instance, every defence which shows that he is not then liable to account. *Ib.* 111.
5. The Circuit Court has the right to approve or disapprove of the report of the auditors, and to re-commit the case to them. *Ib.* 111.
6. After the interlocutory judgment to account is rendered, a party cannot discharge himself from accounting, by proof that he has before fully accounted, or that he is not indebted; but he may show by his account that the plaintiff has been paid, or that he owes him nothing; but he cannot allege a fact and thereby avoid rendering an account. *Ib.* 111.
7. To sustain the plea of *plene computavit*, the pleader must show an actual accounting, and a balance struck, no matter which way, between the parties. To sustain the issue of nothing in arrear, the party must show by an exhibition of the accounts that nothing is due the plaintiff. *Ib.* 111.
8. By omitting to file the plea of *plene computavit*, the defendant looses the benefit of a settlement which may have been made, and must account anew before the auditors. The auditors are not bound by any previous accounting of the parties, though it parties had agreed upon particular items, or if rests had been made in a running account and balances struck but no final accounting had taken place, the auditors would be concluded by the balances as struck by the parties, and to carry unpaid balances into the future account. *Ib.* 111.

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1. An appearance and cross examination of witnesses is a waiver of objection to the sufficiency of notice. *Greene County* v. *Bledsoe*, 267.
2. In depositions, it is not indispensible that the officer taking them should literally follow the requiremints of the statute, if the substance of the law is complied with. *Ib.* 267.

EASEMENT.

1. A dedication may be made by grant, or written instrument; it may be evidenced by acts and declarations without writing; no particular form being required to estabilsh its validity, it being purely a question of intention. *Godfrey* v. *City of Alton*, 29.
2. A dedication must be understood and construed, with reference to the objects and purposes for which it was made. *Ib.* 29.
3. All accessions to a public landing must necessarily attach to and form a part of it. *Ib.* 29.
4. When an easement is granted to the public, upon the margin of a navigable stream, the right to use and treat it as a landing is undoubted. *Ib.* 29.
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See PUBLIC LANDS, 3.

EJECTMENT.

1. In an action of ejectment, the plaintiff is bound by his allegations in his declaration, and must recover according to the case made by it. *Ballance* v. *Rankin*, 420.
2. He cannot recover a different estate than that claimed by his declaration. *Ib.* 420.
3. But if he declares for the whole premises, he may recover a distinct part; or he may, if he declares for an undivided share, recover that share in any part of the premises. *Ib.* 420.
4. If he declares for the whole of certain premises, he cannot recover an undivided interest therein. *Ib.* 420.

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ENDORSEMENT.

1. An endorsement upon a note is, like a receipt, subject to explanation; and where wholly uncertain, unless explained must be rejected as a nullity. *Kilpatrick* v. *Foster*, 355.
2. A party wishing to raise an issue on the assignment of a note before a justice of the peace, must file an affidavit. *Hudson* v. *Dickinson*, 407.
3. If a note and assignment are made in this state, the rights and liabilities of the parties must be governed by the laws of the state. *Schuttler* v. *Piatt*, 417.
4. An assignor of a note is liable, if the assignee uses due diligence in prosecuting the maker to insolvency, or if the institution of a suit against him would have been unavailing, and if the maker of the note had absconded or left the state when the note falls due. *Ib.* 417.
5. If the maker of a note is beyond the limits of the state when the note matures, so that he cannot be subjected to our jurisdiction, the liability of the assignor becomes fixed. *Ib.* 417.
6. The assignee of a note is not bound to pursue a debtor into a foreign jurisdiction; but he may at once resort to his assignor for payment. The fact that the maker of the note resided in another state when he gave the note, though known to the assignee, does not vary the liability. *Ib.* 417.

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4. It is the duty of the Circuit Court to hear the evidence, and if from that, it appears that the justice had jurisdiction of the matter in controversy, then the case should be disposed of on its merits. *Ib.* 456.

JURY.

1. When the record discloses a case in which the jury have manifestly found against the evidence, the verdict will be set aside. *Keaggy* v. *Hite*, 99.
2. If the Court can see that the jury in the Court below were warranted by the evidence, in inferring a state of case that would sustain the action, it is bound to uphold the judgment, even though there should seem to be a slight preponderance of evidence to the contrary, and the successful party is entitled to all the inferences legitimately arising from such finding. *Bloomer* v. *Denman*, 240.
3. A plaintiff has no right to a non-suit after a case has been submitted to a jury. *Ross* v. *City of Chicago*, 356.
4. This Court will not set aside a verdict of a jury, unless it is against the weight of evidence. *Welden* v. *Francis*, 460.

JUSTICES OF THE PEACE.

1. An affidavit made by an agent of the creditor, is sufficient to authorize the issuing of a warrant by a justice of the peace to hold a debtor to bail. *Wilcox* v. *Nettleton*, 61.
2. A probate justice of the peace when acting in that capacity, must affix the seal of that court to the process issued by him; when acting as an ordinary justice, he is governed by the rules applicable to proceedings before such officer. *Williams* v. *Blankinship*, 122.
3. Justices of the peace, in actions by or against executors or administrators, have only jurisdiction to the amount of twenty dollars. Consent cannot confer jurisdiction. *Ib.* 122.
4. A party wishing to raise an issue on the assignment of a note, in a trial before a justice of the peace, must file an affidavit. *Hudson* v. *Dickinson*, 407.

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LANDLORD AND TENANT.

Where there is a tenancy for a period of more than one year, no notice to the tenant is required, in order to entitle the landlord to possession, upon the expiration of the first term. *Walker* v. *Ellis*, 470.

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See ENDORSEMENT.

LICENSE.

1. The act of 1839, empowering the president and trustees of incorporated towns to grant licenses, and requiring them to pay all moneys derived from this source into the county treasury, does not repeal special laws previously passed empowering particular corporations to grant licenses, and to retain moneys so obtained for their own use. *Trustees of Ottawa* v. *County of La Salle*, 339.
2. These two acts are seemingly repugnant. They should if possible, be so construed, that the latest one shall not operate as a repeal by implication, of one previously passed. *Ib.* 339.

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1. Public rights are not barred by our statute of limitations, which requires certain real actions to be brought within seven years after possession taken by a defendant. *City of Alton* v. *Illinois Transportation Company*, 38.
2. Where the items of an account are read to a party, and he admits the correctness of each item and of the whole account, but as to certain items, stated

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in default, until after their payment. A payment, or an offer to pay is necessary to a rescision of the bond. *Ib.* 451.

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PRIVILEGE.

1. It is a familiar principle, that when a person exercises or enjoys a peculiar privilege productive of benefit to him alone, the law requires that he shall exercise extraordinary care to so use or enjoy such special privilege, that no injury whatever shall result through such use or enjoyment, to other parties. *Nelson* v. *Godfrey*, 20.
2. A plea of privilege, that a party was a suitor and an attorney attending Court, is a dilatory plea, and must be interposed at the first opportunity. *Wilson* v. *Nettleton*, 61.

See APPROPRIATION.

PUBLIC LANDS.

1. A settler upon the public lands, cannot overflow other public lands by dams, or otherwise obstructing a stream, running through lands he may eventually purchase; he does not acquire this right by a subsequent purchase of the land, such a privilege not having been contemplated in making the grant. *Wilcoxon* v. *McGhee*, 381.
2. The subject matter of the grant is the *land*; having a fixed and definite description, nothing passes as parcel of the granted premises, beyond what is included within the boundaries expressed in the patent, or such as is necessarily and naturally annexed to the land. *Ib.* 381.
3. The right to overflow adjoining lands, is not an appurtenance agreeing in nature or quality with land itself; but such an easement more properly appertains to something that has been put upon the land. *Ib* 381.
4. Where a mill and its appurtenances are conveyed, the mill being the subject matter of the grant, the right to continue to overflow the lands of the grantor will continue to the same extent, as when the grant was made. But this rule does not apply to grants of land from the government. *Ib.* 381.

PUBLIC RIGHTS.

1. Public rights are not barred by our statute of limitations, which requires certain real actions to be brought within seven years after possession taken by a defendant. *City of Alton* v. *Illinois Transportation Company*, 38.

RECOGNIZANCE.

The death of the principal in any recognizance, after forfeiture thereof, but before judgment rendered upon the *Scire Facias* issued thereon may be pleaded by the securities, in discharge of such recognizance. *Mather* v. *People*, 9.

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The only mode by which the final decision of a case in the Supreme Court can be reversed or set aside, at a subsequent term, is by petition for a rehearing. *Hollowbush* v. *McConnel*, 203.

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RIGHT OF PROPERTY.

1. It is a familiar principle that when a person exercises or enjoys a peculiar privilege productive of benefit to himself alone, the law requires that he shall exercise extraordinary care to so use or enjoy such special privilege, that no injury whatever shall result through such use or enjoyment, to other parties. *Nelson* v. *Godfrey*, 20.
2. A person claiming the property attached, should interplead, when a jury will enquire into the right of property, and if the finding shall be for the claimant, it will furnish a good excuse for not surrendering the property. *Purcell* v. *Steele*, 93.

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SALE.

1. A commissioner in chancery, appointed to sell, cannot become a purchaser at his own sale, either in his own name or in the name of a third person; if he should do so the sale will be set aside at the instance of the person whose rights have been sold, if the application for that purpose is made within reasonable time. *McConnel* v. *Gibson*, 128.
2. A fiduciary cannot be both seller and buyer at the same time, and a sale under such circumstances may be avoided, but not by the fiduciary. *Ib.* 128.
3. A sale fraudulently made, on a day different from that named in the notice of sale, would furnish ground for setting aside the sale. *Ib.* 128.
4. A bill which seeks to set aside a sale, and an order confirming such sale, upon the ground of fraud, if filed within a reasonable time after the fraud is discovered, is not obnoxious to a demurrer. *Ib.* 128.
5. If an agent rescind a sale by him made, the principal becomes liable to refund any money which has been paid upon it. *Bloomer* v. *Denman*, 240.
6. A party cannot rescind a contract of sale and at the same time retain the consideration he has received. If he rescinds, he must return the property purchased, in as good condition as when he received it, unless it is entirely worthless. *Buckenau* v. *Horney*, 336.
7. A contract of sale cannot be affirmed as to part and rescinded as to the residue. *Ib.* 336.
8. A vendor, if a sale is to be rescinded, must be put in as good a condition as he was before the sale, by a return of the property. *Ib.* 336.

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SATISFACTION OF JUDGMENT.

1. If A. recovers judgment in his name for the use of B., the former cannot receive satisfaction of the judgment, although the legal interest is in his name, and if suit is brought on that judgment, it must be brought in his name. *Triplett* v. *Scott*, 137.
2. A payment to a nominal plaintiff, is not a satisfaction of the debt. *Ib.* 137.

SCHOOL LANDS.

1. In equity, a defendant cannot avail himself of the statute of frauds, or limitations, unless he relies thereon in some proper pleading; and a defence of a kindred character, arising from length of time, will be subject to the same rule. *Trustees of Schools* v. *Wright*, 432.
2. If a commissioner has sold school land the law requiring him to take a mortgage, as security for the purchase money, which he omits to do, the lien upon the land is not lost, and may be enforced against subsequent purchasers, with notice, if proceedings for that purpose are instituted within a reasonable time. *Trustees of Schools* v. *Wright*, 432.

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5. In an action of debt, brought under the 1st Sect. of the 104 ch. of the R. S. for cutting, felling, &c., trees, it is necessary to allege in the declaration that the trees were felled without having first obtained permission so to do from the owner of the land, and the want of such an averment is fatal even after verdict. In order to make a party liable under this statute, all the facts upon which the statute creates the penalty must be alleged. It is not, however, necessary to allege in the declaration that the acts complained of, were done contrary to the form of the statute, provided that it clearly appears from the declaration that the action is founded on the statute. *Whitecraft* v. *Venderver*, 235.
6. In order to subject a party to the penalties of this statute, he must have committed the acts knowingly and wilfully. *Ib.* 235.
7. The declaration should also set out and distinguish the different classes to which the trees felled belong, there being different penalties annexed to the felling of different trees. *Ib.* 235.

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See ILLINOIS AND MICHIGAN CANAL.

TWO MILL TAX.

1. It is the duty of the Auditor to apportion the proceeds of the two mill tax collected under the provisions of the 15th article of the Constitution, upon such State indebtedness, as shall be exhibited to him for the purpose, and draw his warrant on the treasury. *Skinner* v. *The Auditor*, 307.
2. This provision of the Constitution is complete, and can be executed without legislative aid. *Ib.* 307.
3. The proceeds of this tax shall be apportioned annually, on the first day of January, to the payment of the principal of such of the indebtedness provided for, as shall be presented for that purpose. *Ib.* 307.
4. Neither the surplus revenue deposited with the State, by act of Congress of 23d June 1836, nor interest bonds, are indebtedness within the appropriation of this tax. *Ib.* 307.
5. It is not competent for the legislature to direct that any portion of this tax shall be reserved for the benefit of such creditors as may fail to present their demand on the day named by the Constitution. *Ib.* 307.
6. So much of the act of the 12th February, 1849, as requires, that the surplus revenue deposited with the State, shall share in the proceeds of this tax, is unconstitutional. *Ib.* 307.

VERDICT.

1. After verdict found upon several pleas, one may be withdrawn. the defendant being entitled to a judgment, if the verdict can be sustained on any one of the pleas. *Godfrey* v. *City of Alton*, 29.
2. An erroneous verdict as to one plea does not vitiate the finding upon the others. *Ib.* 29.
3. Where the verdict and judgment are too general, the judgment will be reversed. *Knox* v. *Breed*, 61.
4. Verdict if manifestly against evidence will be set aside. *Keaggy* v. *Hite*, 99.
5. In trover, if the plaintiff recover, he is entitled to a verdict, for the full value of the property converted, at the time of the conversion. *Ib.* 99.

See JURY.

WARRANT OF ATTORNEY.

1. A warrant of Attorney to confess a judgment is no part of the record, nor is an affidavit, showing the death of one of the makers of it; to make them such, they should be embodied in a bill of exceptions. *Magher* v. *Howe*, 379.

WITNESS.

1. A partner who is not joined as a defendant, may be called as a witness by the plaintiff, to prove the cause of action against the partner sued. *Crook* v. *Taylor*, 353.

2. In an action of assumpsit, brought to recover wages due for sailing a vessel by a captain, it was held that the defendants in such an action, for the purpose of mitigating damages, might introduce the testimony of a harbor master, although he was not skilled as a navigator, to show any fact within his knowledge respecting the management of the vessel, and to give his opinion whether such management was skillful or unskillful. *Ward* v. *Salisbury*, 369.
3. A witness will not be excused from testifying to a fact material to the issue, because his testimony might subject him to disgrace or reproach. *Weldon* v. *Burch*, 374.
4. When an offence, as against a witness who was an accomplice, is barred by the statute of limitations he is bound to testify. *Weldon* v. *Burch*, 374.

WRITTEN INSTRUMENTS.

1. On demurrer to a declaration reciting a written contract and the circumstances under which it was made, the writing must be construed in the light presented by the declaration. The defendant cannot demur, and then suggest that other circumstances may exist, which, if true, would show that the parties intended to express a different meaning. *Stout* v. *Whitney*, 218.
2. In the construction to be given to written instruments, the intention of the parties must govern; and each part of the instrument must be viewed in the light of the other parts, in order to arrive at that intention. *Id.* 218.
3. In a suit, brought on an instrument of writing for the payment of money, if no issue is made, the Court may either itself assess the damages against parties in default, or may direct the clerk to do so, but where an issue is made by one defendant, and default entered against others, the Court or jury who tried the issue, must assess the damages against the parties in default. *Smith* v. *Harris*, 426.

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